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FISCAL RESPONSIBILITY AND CRIMINAL SENTENCING IN ILLINOIS: THE TIME FOR CHANGE IS NOW[†]

DAVID H. NORRIS* & THOMAS PETERS**

INTRODUCTION

On December 28, 1977, Governor James Thompson signed into law Public Act 80-1099 which transformed Illinois' criminal sentencing and corrections scheme from indeterminate to determinate sentencing.¹ With its mandatory terms of imprisonment, determinate sentences, abolition of parole and longer penitentiary sentences, the determinate sentencing system, otherwise known as Class X legislation, implemented a "tough on crime" mandate. The law has now been in effect for sixteen years, causing a substantial and ever increasing burden on Illinois' fiscal resources.² The heaviest burden of determinate sentencing has been the dramatic explosion in Illinois' prison population and its accompanying financial and social costs.

In 1989, Illinois had the fastest growing prison population in the nation.³ Now, Illinois prisons confine over 32,000 adults.⁴ This

† This is the second of two articles concerning some of the major forces affecting Illinois' prison overcrowding problem. This article addresses fiscal responsibility and criminal sentencing. The first article addressed inmate release decisions and policy.

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1. Marvin E. Aspen, *New Class X Sentencing Law: An Analysis*, 66 ILL. B.J. 344, 347 (1978).

2. See generally James R. Thompson, *Illinois' Response to the Problem of Prison Overcrowding*, 1984 U. ILL. L. REV. 203 (discussing the problems of increased prison overcrowding on budgets and law enforcement).

3. ILLINOIS DEP'T OF CORRECTIONS, TRANSITION PAPER 1 (1990) (stating that in fiscal year 1989, "Illinois' prison population grew by 20.9%") [hereinafter TRANSITION PAPER].

4. Rick Pearson, *State Prisons are Approaching Their Capacity Lawmakers Warned*, CHI. TRIB., Feb. 26, 1993, § 2, at 2. The Illinois Department of Corrections ("I.D.O.C.") Director, Howard Peters, III, told the General Assembly that the adult prison population totaled 32,038 as of Feb. 25, 1993. *Id.* See also ILLINOIS COMPTROLLER'S OFFICE, STATE OF ILL., COMPTROLLER'S MONTHLY FISCAL REPORT 27 (Oct./Nov. 1992) [hereinafter COMPTROLLER'S MONTHLY FISCAL REPORT]; BUREAU OF JUST., U.S. DEP'T OF JUST., BULL. 2 (1990); Dan Culloton, *Prison Chief Says State Must Revamp Sentencing*, CHI. TRIB., May 16, 1991, § 2, at 2.

figure is three times the number of inmates present in Illinois prisons in 1977, when the legislature enacted determinate sentencing. Although Illinois has the most ambitious prison building program in the country its facilities still house 11,000 inmates over their rated capacity.⁵ This situation has worsened to such a degree that the Illinois Department of Corrections ("I.D.O.C.") recently concluded that "Illinois cannot build its way out of the . . . prison overcrowding [problem]."⁶

Crime cannot be eliminated. The question is one of efficient use of scarce resources. Punishment can take many forms: fines, probation, imprisonment or electronic monitoring. Which punishment is appropriate and to what extent it should be imposed are often difficult questions to answer. But whatever the answer, there are costs imposed on society as well as on the accused. The legislature must pay more attention to the cost consequences of Illinois' sentencing policies.

For more than a decade, the mandate has been to incarcerate an ever increasing number of convicted persons. This "tough on crime" approach, although politically popular, has continued to take a bigger bite out of Illinois' finite fiscal resources at the expense of other important social needs. In fiscal 1992, the I.D.O.C. was the fifth largest spender of money from the General Revenue Fund. It is easy to say "throw them all in jail" but, at some point, the bills must be paid. The issue then changes to whether we are willing to sacrifice monies for education, road construction, economic development and other State needs in the name of short-term political goals.

This article examines Illinois' sentencing system, asks a few relevant questions and proposes some potential solutions. With particular emphasis on penitentiary sentences, this article begins with a brief description of the types of criminal sentences. It then continues to trace the history of Illinois' cyclical criminal sentencing policy. This section notes the somewhat inconsistent legislative use of penological theories in the State's transformation from an inde-

5. See Pearson, *supra* note 4, at 2 (I.D.O.C. Director stating that 32,038 adult inmates currently reside in adult correctional facilities which have a rated capacity of 20,877); see also COMPTROLLER'S MONTHLY FISCAL REPORT, *supra* note 4, at 27 (stating that Illinois has built 14 new prisons since 1975).

6. COMPTROLLER'S MONTHLY FISCAL REPORT, *supra* note 4, at 27; see ILLINOIS DEP'T OF CORRECTIONS, STATE OF ILL., STATISTICAL PRESENTATION 1991 i (Apr. 1992) [hereinafter STATISTICAL PRESENTATION 1991]. See also Don Hayner, *Are Jails the Answer?*, CHI. SUN TIMES, Oct. 13, 1991, at 1. I.D.O.C. Director Howard A. Peters, III, discusses his views on Illinois' prison population problems; Harold Henderson, *Another Mess Big Jim Left Behind*, THE READER, June 21, 1991, § 1, at 52 (I.D.O.C. Director Howard A. Peters, III says that the state cannot build its way out of the prison overcrowding problem; stating further that the cost would be \$1.4 billion to build the new prisons and \$442 million to operate).

terminate to determinate sentencing system. Part IV examines the penological theories which underlie most sentencing systems: retribution, deterrence, incapacitation and rehabilitation, and applies them to analyze the current Illinois sentencing model. Next, Part V chronicles the recent explosion in Illinois' inmate population and the corresponding prison overcrowding problem, attributing the explosion to the implementation of determinate and mandatory prison sentences. This Part also examines the cost of incarceration and contrasts incarceration with more cost efficient alternatives. Finally, Part VI proposes some minimal statutory changes which would, if implemented, save Illinois hundreds of millions of dollars and diminish Illinois' prison overcrowding problem.

Any prison overcrowding equation is a product of two major variables.⁷ The first article of this series⁸ dealt with the "back end" variable, releases, and offered a modest proposal to assist the Department of Corrections in coping with the immediate, or emergency problem of prison crowding. This article addresses the "front end" variable, admissions, and proposes a solution which hopefully, will alleviate the protracted prison overcrowding problem. The authors then return to the "back end" variable to cite additional ways by which the State could reduce the prison population and save millions of dollars in the process. In conclusion, the article examines the interaction of these two proposals, their political ramifications and the accompanying fiscal savings.

I. INDETERMINATE, DETERMINATE AND MANDATORY SENTENCES

Illinois has employed determinate, indeterminate and mandatory sentencing throughout most of its history.⁹ In order to understand Illinois' present determinate sentencing scheme, it is helpful to define these terms.

Indeterminate sentences are terms of imprisonment expressed in a range of years, for example, 10 to 20 years.¹⁰ The sentencing judge sets the minimum and maximum terms of incarceration. The corrections authorities, usually the parole board, then release the inmate once he has been "rehabilitated" or upon the completion of

7. Another important variable is, of course, prison capacity. Moreover, the rated capacity for a particular institution is often an ever changing number due, in part, to political concerns. See generally Jeff Bleich, *The Politics of Prison Crowding*, 77 CAL. L. REV. 1125 (1989).

8. Thomas Peters & David H. Norris, *Reconsidering Parole Release Decisions in Illinois: Facts Myths and the Need for Policy Changes*, 24 J. MARSHALL L. REV. 815 (1991).

9. See *infra* notes 10-105 and accompanying text for a discussion of Illinois' sentencing system; see generally Aspen, *supra* note 1, at 344-45.

10. See Peters & Norris, *supra* note 8, at 819.

his maximum term.¹¹ Indeterminate sentencing is based on the theory that a prisoner need only be incarcerated until he is rehabilitated.¹² As the sentencing judge is not in a position to calculate rehabilitation at sentencing, the parole board, now called the Prisoner Review Board, makes this determination after the prisoner has served a portion of his indeterminate sentence.¹³

Determinate sentences, on the other hand, are terms of imprisonment expressed as a precise number of years, for example, ten years. The sentencing judge imposes the sentence within the statutory range of years for a particular offense.¹⁴ The corrections authorities release the inmate upon the completion of this sentence.¹⁵ Under Illinois law, which provides day-for-day good time, a ten year sentence is served in five years.

Mandatory sentences are terms of imprisonment, either indeterminate or determinate, which are required by law. The mandatory sentence is a legislative creation in which the legislature "mandates" a compulsory prison sentence for a particular crime. The sentencing judge has no discretion; the accused must be sent to prison even if the judge thinks probation is the better sentence. Although sentencing schemes are usually either indeterminate or determinate, mandatory prison sentences may be part of either system.

II. THE ILLINOIS EXPERIENCE

A. *The Early Years*

Illinois' sentencing policy has followed a circuitous route marked by legislative inconsistency. "Today's exciting new reform has been yesterday's discarded policy and [may well be] tomorrow's failure."¹⁶ From the early nineteenth century through the early twentieth century, Illinois and most other states had determinate

11. In some jurisdictions, "good-time" credits may reduce the minimum terms served. See, e.g., 730 ILL. COMP. STAT. 5/3-6-3 (1992) (ILL. REV. STAT. ch. 38, para. 1003-6-3 (1991)) (asserting that prisoners may be released early based on good conduct).

12. LAWRENCE FRIEDMAN, *A HISTORY OF AMERICAN LAW* 597 (2d ed. 1985).

13. *Id.* Since the inmate was only incarcerated as long as he was "unfit to be free," the indeterminate sentenced inmate was the "arbiter of his own fate" and carried "the key of his prison in his own pocket." *Id.*

14. Cf. Aspen, *supra* note 1, at 344 n.6 (asserting that determinate "sentencing is for a fixed amount of time within the appropriate statutory sentencing range for the particular offense").

15. See 730 ILL. COMP. STAT. 5/3-6-3 (1992) (ILL. REV. STAT. ch. 38, para. 1003-6-3 (1991)) (asserting that prisoners may be released early based on good conduct).

16. Jonathan D. Casper, *Determinate Sentencing and Prison Crowding in Illinois*, 1984 U. ILL. L. REV. 231, 233.

sentencing.¹⁷ Determinate sentencing was based on the theories of retribution¹⁸ and deterrence.¹⁹ That is, a convicted person should be sentenced relative to the crime committed, irrespective of his individual situation.²⁰ Since parole and other forms of early release were generally not available, once the judge imposed sentence, the individual served the entire term.²¹ This system remained intact throughout most of the nineteenth century.²²

By the end of the century, new penological theories began to take hold throughout the country. These theories were premised on the belief that some criminal behavior was caused by social conditions and thus could be "treated." Accordingly, convicted persons should have received treatment or "rehabilitation," instead of mere punishment.²³ Since some individuals could not be rehabilitated, the legislature developed new sentencing techniques to distinguish between these two groups and determine those who could be "cured."²⁴ These new techniques included probation, parole and indeterminate sentencing. By 1900, Illinois had instituted these techniques and others.²⁵ The use of probation, parole and indeter-

17. *Id.*

18. *Id.* at 233-34; Gray Cavender & Michael C. Musheno, *The Adoption and Implementation of Determinate-Based Sanctioning Policies: A Critical Perspective*, 17 GA. L. REV. 425, 430-32 (1983); see *infra* notes 160-184 and accompanying text for a discussion of the theory of retribution in relation to determinate sentencing.

19. Casper, *supra* note 16, at 234; Cavender & Mushino, *supra* note 18, at 432-34; see *infra* notes 185-205 and accompanying text for a discussion of the theory of deterrence in relation to determinate sentencing.

20. FRIEDMAN, *supra* note 12, at 601.

21. *Id.* at 597.

22. See A. Keith Bottomley, *Parole in Transition: A Comparative Study of Origins, Developments, and Prospects for the 1990's*, 12 CRIME AND JUSTICE: A REVIEW OF RESEARCH 319 (Michael Tonry & Norval Morris eds., 1990) (discussing the origins of parole in the United States, Canada and England and proposing some options for the future of parole in the 1990's); see generally DAVID DRESSLER, *PRACTICE AND THEORY OF PROBATION AND PAROLE* (2d ed. 1969).

23. See generally DAVID J. ROTHMAN, *CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA* (1980).

24. FRIEDMAN, *supra* note 12, at 595-96. A byproduct of the theory of rehabilitation was the shift of power to those persons charged with determining whether rehabilitation had or could occur. *Id.* at 597. Parole and probation officers, as well as prison officials and the parole board, now determine the fates of many prisoners. Professor Lawrence Friedman argues that this trend continued the "professionalization" of the criminal justice and corrections system. *Id.* at 597-98.

25. *Id.* at 595-600. An 1899 Illinois statute instructed prison officials on determining rehabilitation. The statute "directed the warden to pay attention to 'early social influences' that affected the prisoner's 'constitutional and acquired defects and tendencies . . .'" *Id.* at 597. Illinois also used the techniques of suspended sentence and juvenile probation. *Id.* at 595-99. Cook County, Illinois created the first juvenile court in 1899. *Id.* at 599. The idea became so popular that within 20 years, almost every state had instituted some type of juvenile court. *Id.*

minate sentencing was the precursor to individualized sentencing in Illinois.

Through the first half of the twentieth century, Illinois had a dual sentencing policy. Individuals received either determinate or indeterminate sentences depending on the crime.²⁶ At first, courts imposed all indeterminate sentences equally: all persons convicted of the same crime received the same maximum and minimum sentence, as determined by statute.²⁷ By 1943, this policy changed and courts imposed individualized sentences within the maximum and minimum permitted by statute.²⁸ During this time courts also imposed determinate sentences where mandated by statute.²⁹

By the 1950's, the legislature diversified Illinois' sentencing policy. Both judge and jury could impose either determinate or indeterminate sentences depending on a variety of factors.³⁰ The judge imposed sentences in criminal bench trials, in felony jury trials (with the exception of murder, voluntary manslaughter, treason, rape and kidnapping), and in misdemeanor trials where the statute mandated penitentiary incarceration.³¹ The jury imposed sentences in all other convictions as part of its verdict.³²

The type of statute determined the type of sentence.³³ Determinate sentences were imposed for murder, voluntary manslaughter, treason, rape and kidnapping, where the person was to receive penitentiary incarceration.³⁴ Indeterminate sentences were imposed for all other felonies and misdemeanors.³⁵ Both determinate and indeterminate sentences permitted the imposition of a life sentence.³⁶ Diversified sentencing, where the judge or jury could impose either determinate or indeterminate sentences, ended when the legislature enacted the Criminal Code of 1961.

B. *The 1961 Code*

The Criminal Code of 1961 ("1961 Code") was the first of three recent major revisions in Illinois' sentencing law. The enactment of the 1961 Code began the process of instituting uniformity to Illinois sentencing procedures. Under the 1961 Code, the judge sentenced

26. Aspen, *supra* note 1, at 345.

27. *Id.* at 344 (citing ILL. REV. STAT. ch. 38, para. 498 (1895)).

28. *Id.* at 345; ILL. REV. STAT. ch. 38, para. 802 (1943) (repealed 1969).

29. Aspen, *supra* note 1, at 344 n.6.

30. *Id.*

31. *Id.* at 344.

32. *Id.* at 344-45.

33. *Id.* at 345.

34. Aspen, *supra* note 1, at 345. *See also* ILL. REV. STAT. ch. 38, para. 801 (1959) (repealed 1964).

35. Aspen, *supra* note 1, at 345.

36. *Id.* at 345 & n.10.

all convicted persons.³⁷ Where the person received a penitentiary sentence, that is a sentence one year or greater, the term was indeterminate.³⁸ If the judge sent the person to jail 365 days or less, the term was determinate.³⁹ The 1961 Code also abolished the sentence of "life."⁴⁰ Although the 1961 Code limited who would impose sentence and which type of sentence an individual would receive, it left intact the statutory sentencing scheme. Thus, each statute still had its own penalty section containing a range of possible sentences. The legislature addressed this problem in the Unified Code of Corrections.

C. The Unified Code of 1973

The Unified Code of Corrections ("Unified Code") became effective on January 1, 1973. The Unified Code's three major goals were "classification, clarification and consolidation."⁴¹ The new code classified all offenses into categories, standardized adult sentencing by categories, created new sentencing alternatives, modified juvenile adjudication and consolidated the administration and procedures of both the Department of Corrections and the Parole and Pardon Board.⁴² Although there were some substantive changes, most of the modifications were an attempt to simplify the sentencing and corrections system.⁴³

The Unified Code created eight categories of offenses: five felonies (murder; class 1 through class 4); and three misdemeanors (class A through class C).⁴⁴ The code assigned every offense to a severity category and each category had a sentence range, stated in

37. *Id.* at 345; ILL. REV. STAT. ch. 38, para. 1-7(b) (1961), *repealed by* ILL. REV. STAT. ch. 38, para. 1008-5-1 (1973), *replaced and amended by* ILL. REV. STAT. ch. 38, para. 1005-5-3(a) (1973).

38. Aspen, *supra* note 1, at 345; ILL. REV. STAT. ch. 38, para. 1-7(e) (1961), *repealed by* ILL. REV. STAT. ch. 38, para. 1008-5-1 (1973), *replaced and amended by* ILL. REV. STAT. ch. 38, paras. 1005-8-1, 1005-8-2 (1973).

39. Aspen, *supra* note 1, at 345; ILL. REV. STAT. ch. 38, para. 1-7(f) (1961), *repealed by* ILL. REV. STAT. ch. 38, para. 1008-5-1 (1973), *replaced and amended by* ILL. REV. STAT. ch. 38, para. 1005-8-3 (1973).

40. Aspen, *supra* note 1, at 345; ILL. REV. STAT. ch. 38, para. 1-7(d) (1961), *repealed by* ILL. REV. STAT. ch. 38, para. 1008-5-1 (1973), *replaced and amended by* ILL. REV. STAT. ch. 38, para. 1005-5-3(d)-(e) (1973).

41. Lawrence X. Pusateri & Robert K. Scott, *Illinois' New Unified Code of Corrections*, 61 ILL. B.J. 62 (1972).

42. *Id.* at 62-63.

43. *Id.* at 63.

44. *Id.* at 62, 69; ILL. REV. STAT. ch. 38, para. 1005-5-1 (1973) (amended 1978). The legislature omitted the new categories of "petty offense" and "business offense" from the sentencing scheme. These new categories of offenses continued to contain their own penalty provision within the statute. Aspen, *supra* note 1, at 346 (asserting that both were punishable by fine). This is understandable, since the possible punishments for these violations did not include imprisonment. *Id.*

a minimum and maximum number of years.⁴⁵ The Unified Code retained the 1961 Code's substantive dichotomy of indeterminate penitentiary sentences and determinate jail sentences. It did, however, seek to standardize penalties among the ten categories of offenses.⁴⁶

In addition, alternatives to incarceration were available for most offenses.⁴⁷ The new Code urged application of the full range of sentencing alternatives for non-dangerous offenders, such as periodic imprisonment, probation and conditional discharge. The Code also clarified their nature and availability.⁴⁸ The intended result of the expanded use of non-penitentiary alternatives for non-dangerous offenders was to achieve fiscal responsibility while protecting the public and encouraging rehabilitation.⁴⁹

In enacting the Unified Code, the Illinois General Assembly did not increase the sentence range for substantive offenses. Offenses

45. ILL. REV. STAT. ch. 38, para. 1005-5-1 (1973) (amended 1978). The following chart demonstrates the ranges of the new categories:

OFFENSE	MINIMUM TERM	MAXIMUM TERM
FELONIES		
MURDER	14 years	unlimited
CLASS 1	4 years	unlimited
CLASS 2*	no minimum	20 years
CLASS 3*	no minimum	10 years
CLASS 4	no minimum	3 years
MISDEMEANORS		
CLASS A	no minimum	364 days
CLASS B	no minimum	6 months
CLASS C	no minimum	30 days
BUSINESS OFFENSE**	—	—
PETTY OFFENSE***	—	—

* minimum sentence may not be greater than one third of maximum sentence

** (unclassified offense) imprisonment may not be imposed; maximum fine greater than \$500

*** (unclassified offense) imprisonment may not be imposed; maximum fine less than \$500

See ILL. REV. STAT. ch. 38, para. 1005-5-1 (1973) (amended 1978); e.g., ILL. REV. STAT. ch. 38, para. 1005-8-1 (1973) (amended 1974).

46. Pusateri & Scott, *supra* note 41, at 69. In enacting the Unified Code of Corrections ("U.C."), the General Assembly followed the American Bar Association's *Standards Relating to Sentencing Alternatives and Procedures*. *Id.* at 62 & n.1. The dual purpose of the A.B.A. Model Sentencing Act was (1) to assist the legislature by classifying offenses by severity; and (2) to simplify a judge's sentencing choices. *Id.* at 69. The intended result of the offense category was to eliminate disparity in sentences imposed. *Id.*

47. See Aspen, *supra* note 1, at 345 n.21 (asserting that sentencing alternatives existed in most offenses, "with the exception of murder, rape, armed robbery and certain narcotics violations").

48. Pusateri & Scott, *supra* note 41, at 62, 69; see ILL. REV. STAT. ch. 38, para. 1005-5-1 (1973) (amended 1978) (classifying offenses into felonies and misdemeanors); ILL. REV. STAT. ch. 38, para. 1005-6-3 (1973) (amended 1974) (discussing sentencing alternatives). See also Aspen, *supra* note 1, at 345 n.21.

49. Pusateri & Scott, *supra* note 41, at 62, 70.

in which the trial judge had no discretion at sentencing, such as murder, rape, armed robbery and certain narcotics violations, remained the same.⁵⁰ Except for these serious felonies the available sentence for lesser offenses was generally reduced.⁵¹ Additionally, the Unified Code also maintained the parole system and expanded the community services available for releasees.⁵²

The underlying theory for Illinois sentencing and corrections at this time was apparent through its techniques. Judges were the most appropriate group to impose sentences, and received great discretion in doing so. The legislature limited this power by a handful of mandatory sentences and through prescribing the statutory range for each class of offense.⁵³ Judges imposed indeterminate sentences based on the rehabilitation model. Accordingly, a convicted person needed to be incarcerated only until he served his minimum sentence and was rehabilitated. Since the judge was not in a good position to determine when rehabilitation occurred, a special administrative body, the Parole and Pardon Board, was given this responsibility.⁵⁴ In addition, judges were encouraged to consider alternatives to imprisonment or shorter sentences for persons who were not dangerous to the community or convicted of lesser offenses. Therefore, the least restrictive sanction theory was in place: provide society with protection in a cost efficient manner;⁵⁵

50. Aspen, *supra* note 1, at 345 n.21. See also ILL. REV. STAT. ch. 38, para. 1005-5-1 (1972).

51. Pusateri & Scott, *supra* note 41, at 62.

52. *Id.* at 67-68. See 730 ILL. COMP. STAT. 5/3-14-3 (1992) (ILL. REV. STAT. ch. 38, para. 1003-14-3 (1973) (amended 1986) (setting forth the services the Department provides such as counseling and educational assistance). Under the Illinois parole system, an inmate's parole eligibility was determined by the minimum sentence expressed in the indeterminate sentence. ILL. REV. STAT. ch. 38, para. 1003-3-3 (1973) (amended 1974). An inmate earned good time credits based on time served and meritorious behavior. *Id.* The inmate was eligible for parole once he had served the minimum sentence, which was determined by adding time actually served to earned good time credits. *Id.* Inmates with minimum sentences in excess of 20 years received parole hearings after serving 11 years and three months. *Id.* Theodore P. Fields, *Illinois Parole and Pardon Board Adult Parole Decisions*, 62 ILL. B.J. 20, 22 (1973) (describing the Illinois parole system). Once an inmate became eligible for parole, he had parole release hearings at least once every year. ILL. REV. STAT. ch. 38, para. 1003-3-5 (1973) (amended 1974); see, e.g., Tiller v. Klinck, 138 Ill. 2d 1, 6, 561 N.E.2d 576, 578 (1990). See generally Peters & Norris, *supra* note 8, at 819-21; see also Frank S. Merritt, *Due Process in Parole Granting: A Current Assessment*, 10 J. MARSHALL J. PRAC. & PROC. 93-95 (1978) (describing the parole system).

53. See *supra* notes 44-45 and accompanying text for the mandatory sentences and the statutory ranges for various offenses.

54. Until the legislature enacted the Unified Code, it was unclear exactly which body had responsibility and control over parolees, the Department of Corrections or the Parole and Pardon Board. Pusateri & Scott, *supra* note 41, at 67-68. The Code expressly placed the supervisory power of parolees in the hands of the Illinois Department of Corrections. *Id.* at 68.

55. See NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* 58-84 (1974).

incarcerate only when necessary to adequately protect the public; keep these persons imprisoned only as long as necessary for the protection of the public, that is, until rehabilitation. Rehabilitation and fiscal responsibility walked hand in hand.

Under this system, discretion controlled the size of the prison population. On the "front end," admissions, judges sentenced convicted persons armed with the availability of non-prison alternatives. On the "back end," releases, the Parole and Pardon Board decided which inmates would be paroled and the Department of Corrections determined good time credits. This system worked well in controlling not only the size of the prison population but the prisoners themselves.⁵⁶ There was, however, much criticism that this judicial and correctional discretion was too broad, and arbitrarily applied. Within four years, this system was discarded and replaced with a relic of Illinois' past.

D. The Class "X" Sentencing Reform of 1977

In 1977, Illinois dramatically changed its criminal sentencing and corrections system.⁵⁷ The legislature replaced the rehabilitative model with a model based on the punitive theories of incapacitation and deterrence.⁵⁸ Determinate sentencing supplanted indeterminate sentencing and thus, shelved the parole system.⁵⁹ The new system limited judicial discretion in sentencing and release.⁶⁰ To fully understand this drastic return to a nineteenth cen-

56. Casper, *supra* note 16, at 247-48.

57. Since the Illinois system was based on a "just deserts" theory, determinate sentencing sought to limit judicial discretion in sentencing convicted individuals in the hopes of imposing stricter and longer sentences. James J. Bagley, *Sentencing: The Substantive Law 1-1, 1-9 in Sentencing* § 1 (ILL. INST. FOR CLE, 1982) (note: The pagination of this article consists of the section number and numerical page number, for each page. For example § 1-12 designates page 12, and does not refer to a series of pages one through twelve.) [hereinafter Bagley, *Sentencing*]. Norval Morris used the term "just deserts" to describe the underlying theory for his sentencing and correction model. Some authors assert that "just deserts" is merely a positive synonym for the traditional theories of incapacitation and retribution. Compare, Leonard Orland, *Is Determinate Sentencing an Illusory Reform?*, 62 JUDICATURE 381, 384 (1979) with MORRIS, *supra* note 55, at 60 (using the term "deserts" as one of three "principles guiding the decision to imprison" and hopefully rehabilitate the inmate while refusing to compromise society's interest in punishment).

58. Compare ILL. REV. STAT. ch. 38, para. 1005-8-1 (1977) (amended 1979) (stating that "imprisonment for a felony shall be an indeterminate sentence" with maximum terms depending on the seriousness of the crime) with ILL. REV. STAT. ch. 38, para. 1005-8-1 (1979) (amended 1980) (substituting "determinate" in the place of "indeterminate," adding a Class X felony, and increasing the minimum and maximum duration of imprisonment for each felony classification).

59. Bagley, *Sentencing*, *supra* note 57, at 1-9.

60. *Id.*

ture model, it is helpful to look at the forces and theories behind this change.

The transition from indeterminate to determinate sentencing brought about much debate from both sides of the political spectrum.⁶¹ On the one hand, liberals criticized the indeterminate system for its unbridled discretion.⁶² Since judges could impose any sentence within a broad category range, many commentators argued that persons received disparate sentences for similar offenses.⁶³ Similarly, the Parole and Pardon Board exercised unlimited and unpublicized discretion in determining release via parole, once the judge sentenced the person.⁶⁴ This uncontrolled discretion permitted a parole board to make arbitrary decisions, with the potential for biased and capricious rulings in determining the actual time served by a convicted person.⁶⁵

Critics also attacked the underlying theory of indeterminate

61. *See generally id.* (providing an in-depth legislative history of the passage of H.B. 1500). Although nearly all legislators wanted a tougher crime bill, it took an extra congressional session and some compromise to pass the new bill. *Id.* at 1-9.

62. Casper, *supra* note 16, at 235-36; MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 88-89 (1963). One comprehensive critique of Illinois' system states that the legislature's primary motivation for instituting the determinate system was to curb the discretionary sentencing policies of prosecutors and correctional officers, as well as judges and parole boards. *See* Robert P. Schuwerk, *Illinois' Experience with Determinate Sentencing: A Critical Reappraisal Part 1: Efforts to Structure the Exercise of Discretion in Bargaining for, Imposing, and Serving Criminal Sentences*, 33 DEPAUL L. REV. 631, 636 (1984) (providing a review of Illinois' transition from indeterminate to determinate sentencing) [hereinafter Schuwerk 1]. Professor Schuwerk played an important role in drafting the determinate sentencing legislation. Professor Schuwerk provides an insightful view of the entire transition from indeterminate to determinate sentencing in his two part series describing the transition and its aftermath. *See also* Robert P. Schuwerk, *Illinois' Experience with Determinate Sentencing: A Critical Reappraisal Part 2: Efforts to Impose Substantive Limitations on the Exercise of Judicial Sentencing Discretion*, 34 DEPAUL L. REV. 241 (1985) (describing the subsequent judicial and legislative decision which hindered the goals of H.B. 1500) [hereinafter Schuwerk 2].

63. *E.g.*, FRANKEL, *supra* note 62, at 21-25. Judge Marvin Frankel, a noted law professor and federal judge, advocated rejecting the "individual distinctions — discriminations, that is — unless they can be justified by relevant tests . . ." *Id.* at 11. Judge Frankel also remarked that, "the almost wholly unchecked and sweeping powers we give to judges in the fashioning of [indeterminate] sentences are terrifying and intolerable for a society that professes a devotion to the rule of law." *Id.* at 5.

64. *See* Schuwerk 1, *supra* note 62, at 715-16 (discussing the abolition of parole and the limitations placed on the discretion of Illinois' correctional officials); *see also* Casper, *supra* note 16, at 235 (noting the closed parole hearings in Illinois prisons).

65. *See* FRANKEL, *supra* note 62, at 21 (criticizing judges with varying personalities and biases who innocently contributed to the disparate sentencing system); *see also* Schuwerk 1, *supra* note 62, at 636 (highlighting the need to control the judiciary to insure fairness in sentencing).

sentencing.⁶⁶ They argued that the uncertainty of release, premised on rehabilitation, caused inmates anxiety, and possibly increased prison violence.⁶⁷ Moreover, several studies indicated that rehabilitation was unlikely to take place in a forced environment, such as a penitentiary, and had little effect on recidivism.⁶⁸ These criticisms led liberals to reject indeterminate sentencing premised on the rehabilitation model, and to replace it with determinate sentencing premised on the theory of "just desert."⁶⁹

Conservatives and law enforcement agencies also attacked in-

66. See, e.g., David F. Fogel, *Justice, Not Therapy: A New Mission For Corrections*, 62 JUDICATURE 372, 372-73 (1979) (providing a satirical illustration of Illinois sentencing).

67. Casper, *supra* note 16, at 236; cf. Schuwerk 1, *supra* note 62, at 637 n.30 (noting that the proposed reform would serve as a release valve for "widely perceived frustration and anger engendered by the traditional parole release process").

68. Casper, *supra* note 16, at 236; Fogel, *supra* note 66, at 374-75; see MORRIS, *supra* note 55, at 69-70 (discussing the ability of the courts and corrections officers to predict the dangerousness of released prisoners).

69. See generally Fogel, *supra* note 66, at 374-75 (mentioning the variables which discredited the rehabilitative model). Drafters of the new Illinois law relied, in large part, on David Fogel's work, WE ARE THE LIVING PROOF: THE JUSTICE MODEL FOR CORRECTIONS (1975). See Bagley, *Sentencing*, *supra* note 57, at 1-4 (discussing Mr. Fogel's contribution to H.B. 1500). Mr. Fogel criticized sentencing and corrections in this country based on the rehabilitative model, and proposed the "justice model," premised on the theory of "just deserts." Fogel, *supra* note 66, at 376 (noting, however, that he was not in complete disagreement with the rehabilitative model).

In 1974, Governor Dan Walker appointed Mr. Fogel to the position of Director of the Illinois Law Enforcement Commission. While there, he drafted proposed legislation based on the justice model. Bagley, *Sentencing*, *supra* note 57, at 1-4. The goal of this model was to reduce disparity in sentencing. Cf. *id.* (discussing Mr. Fogel's "flat-time" sentencing proposal which "aroused interest in sentencing reform"). The suggested techniques to implement this goal were (a) the "fixed sentence" (determinate sentence within a narrow range) *id.* at 1-6; (b) the elimination of parole cf. *id.* at 1-5 (criticizing the "discretionary capriciousness" of the Parole and Pardon Board); and (c) the end of statutory good time credits. *Id.* at 1-6. Although the Illinois General Assembly rejected this legislation, the Adult Corrections Subcommittee, a special House Judiciary subcommittee, later applied principles underlying this legislation to draft House Bill 1500. Bagley, *Sentencing*, *supra* note 57, at 1-4, 1-12.

Various other authors criticized the rehabilitative model and suggested systems based on the theory of "just deserts." See, e.g., AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE 20-47 (1971) (focusing on the rehabilitative aspect of California's correctional system); FRANKEL, *supra* note 62, at 89-93 (stating that the rehabilitative model is premised on a "baseless assumption" that criminals are treatable); MORRIS, *supra* note 55, at 89-102 (calling the theory "genetically flawed and malformed"); PIERCE O'CONNELL ET AL., TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM 27 (1977) (discussing findings which were the "final blow to the old 'magic moment theory of parole'"); ANDREW VON HIRSH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS 66-76 (1976) (attacking the discretion of a judge and the potential depreciation of a sentence); JAMES Q. WILSON, THINKING ABOUT CRIME 170-72 (1975) (noting the difficulty of rehabilitation in a prison atmosphere).

determinate sentencing, although for different reasons.⁷⁰ These groups criticized the rehabilitative aspect of indeterminate sentencing.⁷¹ They claimed that the Parole and Pardon Board were ineffective as demonstrated by the recidivism rates.⁷² Law enforcement supporters argued alternatively, that a determinate sentencing scheme, with shorter, more certain penitentiary sentences, would encourage judges to impose prison terms more often.⁷³ They claimed more prison sentences would lead to a higher commitment rate, which would expand the deterrence and incapacitation theories of sentencing and corrections.⁷⁴ Moreover, determinate sentencing would curb judicial discretion by preventing judges from sentencing felons moderately.⁷⁵ Therefore, conservatives also supported the imposition of determinate sentencing. In the end, unlikely bedfellows joined together to overhaul the system.

The legislation that would ultimately change Illinois' sentencing and correction policy was a child born of compromise. On March 31, 1977, the House of Representatives introduced House Bill 1500 ("H.B. 1500") to the Illinois House of the General Assembly. The bill proposed: (1) a change from indeterminate to determinate sentencing for all felonies; (2) abolition of parole; (3) guidelines for judicial discretion in sentencing;⁷⁶ (4) retention of current felony categories with slightly higher sentences; (5) maintenance of the current number of mandatory sentences; and, (6) controls on corrections' discretionary decision making.⁷⁷ The theoretical basis for the proposed bill was to minimize reliance on rehabilitation, which

70. For an insightful analysis of this development see Casper, *supra* note 16, at 235-37.

71. *Id.*

72. *Id.* at 236; James L. Bagley, *Why Illinois Adopted Determinate Sentencing*, 62 JUDICATURE 390, 391-92 (1979) [hereinafter Bagley, *Determinate*].

73. Casper, *supra* note 16, at 236. Professor Casper states that law enforcement advocates believed that judges were hesitant to send "marginal defendants" to prison terms because the minimum range was so high. *Id.* Marginal defendants were those defendants who were "'on the margin' between a long jail time and a prison term." *Id.* at 236 n.13.

74. *Id.* at 236.

75. Aspen, *supra* note 1, at 347.

76. Much of the criticism of judicial and correctional discretion arose from the fact that judges and officials did not have to give the reasons supporting their sentencing decisions. See Bagley, *Sentencing*, *supra* note 57, at 1-16 (commenting that the legislature wanted to limit judicial discretion by making judges more accountable through a recording requirement). H.B. 1500 sought to remedy this problem by mandating a statement from the sentencing judge, on the record, as to the factors in mitigation and aggravation he considered in imposing sentence. See *id.* at 1-6 (noting that one of the first goals of the original draft was to require such a statement in order to promote more consistent sentencing); see generally Bagley, *Determinate*, *supra* note 72 (describing the goals of the original draft).

77. H.R. 1500, 80th Illinois General Assembly (1977); Bagley, *Determinate*, *supra* note 72, at 391-93.

was seen as ineffective, and promote the theories of retribution, incapacitation and reformation in the criminal justice system.⁷⁸ Supporters believed that this new policy would not contribute significantly to prison crowding.⁷⁹ Thus, if rehabilitation was an unreachable or improbable goal and if recidivism could not be reduced, the system could at least be "just and fair."⁸⁰

Just one week later, the Senate proposed its own sentencing plan. On April 8, 1977, the new "Class X" legislation was introduced to the Senate of the Illinois General Assembly. With the support of Governor James Thompson, the Senate presented this eight bill package⁸¹ as a "get-tough-on-crime" plan to alter the present sentencing and corrections system.⁸² Although there were some common features between H.B. 1500 and the Class X legislation, the theoretical thrust of the Senate legislation was punitive: treat convicted felons more harshly.⁸³ The Senate package proposed: (1) the creation of a new felony category, Class X, which had a non-probationable mandatory penitentiary sentence; (2) expansion of the number of felonies where penitentiary time was mandated; (3) longer sentences for all felony categories; and, (4) a requirement that prosecutors file a statement with the court when reducing a charge punishable by a mandatory sentence, as well as other "tough on crime" modifications.⁸⁴ Although both H.B. 1500 and the Class X legislation passed their respective bodies, neither program could muster enough support for passage by the Illinois General Assembly. After much debate and media coverage, often centering on which bill was "tougher" on crime, the General Assembly agreed to a compromise bill.⁸⁵ Governor Thompson signed the new law, Public Act 80-1099, on December 28, 1977.⁸⁶

78. Cf. Bagley, *Determinate*, *supra* note 72, at 396 (labelling rehabilitation as ineffective and noting the bill's tougher stance on crime).

79. Cf. Bagley, *Sentencing*, *supra* note 57, at 1-11 (noting no significant increase in then-projected prison populations).

80. Bagley, *Determinate*, *supra* note 72, at 397.

81. S.B. 1272 through S.B. 1279, 80th Illinois General Assembly (1977).

82. Bagley, *Determinate*, *supra* note 72, at 392-93; see Thompson, *supra* note 2, at 204 (commenting on the public demand for a tougher stance on crime in Illinois).

83. Aspen, *supra* note 1, at 347-49.

84. Bagley, *Determinate*, *supra* note 72, at 392. The eight Senate bills also proposed: (1) the establishment of a Criminal Sentencing Commission; (2) consideration of certain mandatory factors when setting bail; (3) restrictions on granting continuances prior to trial; (4) giving the state the right to substitute judges; (5) a hearing procedure for pre-trial motions; (6) a statewide public defender service; and (7) a statewide grand jury system. *Id.*

85. Aspen, *supra* note 1, at 347; Bagley, *Determinate*, *supra* note 72, at 393 n.9.

86. Aspen, *supra* note 1, at 347; Bagley, *Determinate*, *supra* note 72, at 393 n.9.

E. The New "Tough on Crime" Law: P.A. 80-1099

The new "tough-on-crime" law was a mixture of the House and Senate proposals. Public Act 80-1099 contained most of the structural changes advanced in H.B. 1500, including (1) determinate sentencing for all felonies;⁸⁷ (2) abolition of early release parole;⁸⁸ (3) day-for-day good time credits;⁸⁹ (4) controls on judicial discretion at sentencing;⁹⁰ and, (5) controls on corrections' discretion in determining release.⁹¹ It also included some Class X proposals advanced by the Senate, such as: (1) the creation of a new category, Class X, and its mandatory penitentiary sentence; (2) an increase in the number of felonies with a mandatory penitentiary sentence; (3) the implementation of longer sentences for most felonies;⁹² and, (4) the imposition of various other techniques aimed at increasing penitentiary sentences. The new law joined not only two legislative bills but also two penal theories. The resulting legislation sent more

87. ILL. REV. STAT. ch. 38, para. 1005-8-1 (1979) (amended 1980) (requiring a determinate sentence).

88. Compare ILL. REV. STAT. ch. 38, para. 1003-3-2(a) (1977) (amended 1978) (providing the powers and duties of the Parole and Pardon Board) with ILL. REV. STAT. ch. 38, para. 1003-3-2(a)(1979) (amended 1982) (calling for non-discretionary, supervised release at the end of a sentence which may be reduced only by good time credits). Ridding Corrections of parole release discretion was a crucial part of determinate sentencing reform. Casper, *supra* note 16, at 248.

89. ILL. REV. STAT. ch. 38, para. 1003-6-3(a)(2) (1979) (amended 1982).

90. ILL. REV. STAT. ch. 38, para. 1005-8-1 (1979) (amended 1980); ILL. REV. STAT. ch. 38, para. 1005-8-4 (1979) (amended 1982).

91. Bagley, *Determinate*, *supra* note 72, at 394-95.

92. Compare ILL. REV. STAT. ch. 38, para. 1005-8-1 (1977) (amended 1978) (calling for a 14 year minimum sentence for murder) with ILL. REV. STAT. ch. 38, para. 1005-8-1 (1979) (amended 1980) (calling for a mandatory 20 year sentence for murder).

The following chart demonstrates the category ranges for Illinois' new determinate sentences:

OFFENSE	MINIMUM TERM	MAXIMUM TERM
FELONIES		
MURDER	20 years	life
CLASS X*	6 years	30 years
CLASS 1	4 years	15 years
CLASS 2	3 years	7 years
CLASS 3	2 years	5 years
CLASS 4	1 year	3 years
MISDEMEANORS		
CLASS A	6 months	364 days
CLASS B	30 days	6 months
CLASS C	no minimum	30 days
BUSINESS OFFENSE**	—	—
PETTY OFFENSE**	—	—

* mandatory sentence; probation not permitted

** unclassified offenses

730 ILL. COMP. STAT. 5/5-5-2 (1992) (ILL. REV. STAT. ch. 38, para. 1005-5-2 (1978)); ILL. REV. STAT. ch. 38, para. 1005-8-1 (1978) (amended 1980); ILL. REV. STAT. ch. 38, para. 1005-8-4 (1978) (amended 1982).

people to prison for longer terms with no discretionary method for releasing them. The new law's effect on the prison population was inevitable.⁹³ Illinois has been building, and filling, new prisons ever since, and now has one of the fastest growing prison populations in the country.

Since the enactment of the new sentencing law in 1978, Illinois' sentencing system has undergone judicial and legislative alterations. The new law's structural controls on judicial and prosecutorial discretion are now gone, having largely been negated by judicial decisions.⁹⁴ The structural controls on the discretionary decision making by the Department of Corrections, although not specifically overruled, have proved ineffective.⁹⁵ While the structural controls which were intended to help implement the theory of "just deserts" continue to deteriorate, the legislature increased the punitive aspect of sentencing. For example, in 1979, there were eleven Class X felonies.⁹⁶ Now there are twenty-six Class X felonies where a penitentiary sentence is mandatory.⁹⁷ Furthermore,

93. Casper, *supra* note 16, at 238-49; Schuwerk 1, *supra* note 62, at 734-38.

94. *People v. Hicks*, 101 Ill. 2d 366, 374-75, 462 N.E.2d 473, 477 (1984) (holding that a judicial statement of reasons for the imposition of a sentence of consecutive sentences "is permissive rather than mandatory" despite the mandatory language of the statute which "may be the better practice"); *People v. Davis*, 93 Ill. 2d 155, 162-63, 442 N.E.2d 855, 858 (1982) (holding that the statute directing judicial statement of the reasons for imposing a sentence would be an unconstitutional invasion of the power of the judiciary if the court interpreted the legislation as a mandatory requirement); *People v. Cox*, 82 Ill. 2d 268, 279, 412 N.E.2d 541, 547 (1980) (limiting the power of appellate courts to review sentences because "the trial judge is normally in a better position"); see also Schuwerk 1, *supra* note 62, at 734 (providing a look into the judicial and legislative changes since 1978).

95. Schuwerk 1, *supra* note 62, at 734.

96. These class X felonies included: ILL. REV. STAT. ch. 38, para. 8-4 (1979) (attempted murder); ILL. REV. STAT. ch. 38, para. 10-2 (1979) (aggravated kidnapping for ransom); ILL. REV. STAT. ch. 38, para. 11-1 (1979) (rape); ILL. REV. STAT. ch. 38, para. 11-3 (1979) (deviate sexual assault); ILL. REV. STAT. ch. 38, para. 12-4.1 (1979) (heinous battery); ILL. REV. STAT. ch. 38, para. 18-2 (1979) (armed robbery); ILL. REV. STAT. ch. 38, para. 20-1.1 (1979) (aggravated arson); ILL. REV. STAT. ch. 38, para. 30-1 (1979) (treason); ILL. REV. STAT. ch. 38, para. 1401 (1979) (manufacture and delivery of controlled substances); ILL. REV. STAT. ch. 38, para. 1405 (1979) (calculated criminal drug conspiracy).

The foregoing new Class X crimes were all Class 1 offenses under prior law, with the exception of the new offense of heinous battery. Aspen, *supra* note 1, at 347 n.39.

97. Today's Class X felonies include: 625 ILL. COMP. STAT. 5/4-103.3 (1992) (organized vehicle theft conspiracy); 720 ILL. COMP. STAT. 5/8-1.1 (1992) (solicitation of murder); 720 ILL. COMP. STAT. 5/8-1.2 (1992) (solicitation of murder for hire); 720 ILL. COMP. STAT. 5/8-4 (1992) (attempted first degree murder); 720 ILL. COMP. STAT. 5/9-3.3 (1992) (drug-induced homicide); 720 ILL. COMP. STAT. 5/10-2 (1992) (aggravated kidnapping for ransom); 720 ILL. COMP. STAT. 5/11-17.1 (1992) (repeat violations of keeping a place of child prostitution); 720 ILL. COMP. STAT. 5/11-19.2 (1992) (exploitation of a child); 720 ILL. COMP. STAT. 5/12.4.1 (1992) (heinous battery); 720 ILL. COMP. STAT. 5/12-4.2 (1992) (aggravated battery with a firearm); 720 ILL. COMP. STAT. 5/12-4.3 (1992) (repeat viola-

there is now a new category, sometimes referred to as the "Super Class X" offense.⁹⁸ This new group raises the minimum mandatory sentence for certain Class X offenses to as high as 15 to 60 years.⁹⁹ In enacting this subsequent legislation, the General Assembly also changed the one Class X crime, delivery of narcotics, which accounted for the single largest group of new prison inductees. The General Assembly cut the necessary amount of drugs in half for a mandatory sentence.¹⁰⁰ The 1977 determinate sentencing law and its subsequent alterations over the last sixteen years have dramatically affected Illinois' prison population.

Today, Illinois' sentencing and corrections policy is under attack from all sides. Some of the original supporters of H.B. 1500 criticize the judicial alterations of the determinate sentencing scheme that have nullified the procedural safeguards on institutional discretion.¹⁰¹ Absent these safeguards on institutional discretion, today's sentencing and corrections system resembles the nineteenth century punitive model more than the theory of "just deserts." Others criticize the system for its dramatic effect on prison overcrowding.¹⁰² Another group, prison employees, criticize the new system for its effect on their working conditions and

tions of aggravated battery of a child); 720 ILL. COMP. STAT. 5/12-11 (1992) (home invasion); 720 ILL. COMP. STAT. 5/12-13 (1992) (repeat violation of criminal sexual assault); 720 ILL. COMP. STAT. 5/12-14 (1992) (aggravated criminal sexual assault); 720 ILL. COMP. STAT. 5/18-2 (1992) (armed robbery); 720 ILL. COMP. STAT. 5/20-1.1 (1992) (aggravated arson); 720 ILL. COMP. STAT. 5/24-1.1 (1992) (unlawful use or possession of a firearm or explosive in a correctional facility); 720 ILL. COMP. STAT. 5/30-1 (1992) (treason); 720 ILL. COMP. STAT. 5/31A-1.1 (1992) (bringing or possessing contraband in a penal institution); 720 ILL. COMP. STAT. 5/31A-1.2 (1992) (employee bringing or possessing contraband in a penal institution); 720 ILL. COMP. STAT. 5/33A-3 (1992) (armed violence with a Category 1 weapon); 720 ILL. COMP. STAT. 5/24-3.2 (1992) (discharge of a firearm with a metal-piercing bullet); 720 ILL. COMP. STAT. 5/33D-1 (1992) (contributing to the delinquency of a minor who commits a Class X felony); 720 ILL. COMP. STAT. 570/401 (1992) (manufacture and delivery of certain controlled substances); 720 ILL. COMP. STAT. 570/405 (1992) (calculated criminal drug conspiracy); 720 ILL. COMP. STAT. 570/407 (1992) (manufacturing, delivery and sale of drugs in schools, public housing, etc.).

98. An example of a Super Class X felony is found in 720 ILL. COMP. STAT. 570/401 (a)(1)(D)(1992) (ILL. REV. STAT. ch. 56 1/2, para. 1401 (a)(1)(1) (1991)).

99. *E.g. id.*

100. Compare ILL. REV. STAT. ch. 38, para. 1005-5-3 (c)(2)(c) (1985) (amended 1986) (providing that the delivery of 30 grams or more of any substance containing cocaine will receive a mandatory sentence) with 730 ILL. COMP. STAT. 5/5-5-3-(c)(2)(c) (1992) (ILL. REV. STAT. ch. 38, para. 1005-5-3(c)(2)(c) (1991) (amended 1992) (providing that the delivery of 15 grams or more of a substance containing cocaine will receive a mandatory sentence).

101. See, e.g., Schuwerk 2, *supra* note 62, at 264-65 (criticizing subsequent legislative acts for compounding "the problems inherent in developing a rational sentencing system").

102. *E.g.*, Casper, *supra* note 16, at 238-39; Michael R. Gottfredson & Don M. Gottfredson, *Guidelines For Incarceration Decisions: A Partisan Review*, 1984 U. ILL. L. REV. 291, 304-05; see Thompson, *supra* note 2, at 203 (admitting that

safety.¹⁰³ While others comment on the large fiscal burdens determinate sentencing places on the State's already limited financial resources.¹⁰⁴ Although all groups agree that some type of change is necessary, they debate the means and timing of legislative action.

In response to a plan suggested by the General Assembly, Governor Jim Edgar recently set up a blue-ribbon panel of various groups to make recommendations on possible changes to the current sentencing system.¹⁰⁵ These recommendations, along with others, are expected to reach the Illinois legislature in 1993. Illinois has gone full circle in its theories and techniques of penology. There will be a myriad of choices available to the General Assembly, from modification to a total restructuring of the system. None of these choices will prove effective unless fiscal responsibility and an awareness of the limits of law enforcement are the cornerstones of the proposed solution.

III. THE LIMITS OF LAW ENFORCEMENT

A perfect law enforcement system would prevent all crimes. Jails and prisons would be unnecessary, obsolete and superfluous. Professor Hans Zeisel aptly noted that law enforcement, as we know it, "begins to function when it has failed."¹⁰⁶ The common perception of law enforcement is one of apprehension, trial, conviction and sentencing. Ideally, crime would be deterred absolutely and the current perception of law enforcement would only be of historical significance.¹⁰⁷ Society, however, is a long way from that ideal.

Where has law enforcement failed? "The truth is that law enforcement, important and essential as it is, cannot by itself signifi-

determinate sentencing has greatly contributed to Illinois' prison overcrowding problem).

The Illinois Department of Corrections has also criticized the dramatic effect determinate sentencing has had on the prison population. TRANSITION PAPER, *supra* note 3, at 3, 4.

103. Bob Merrifield, *Guard Union Calls for Prison Summit*, CHI. TRIB., July 23, 1991, § 2, at 5. On July 22, 1991, Steve Culen, executive director of Council 31 of the American Federation of State County and Municipal Employees which represents 10,000 prison workers, requested Governor Edgar to set up a panel composed of several interest groups to consider "stopgap measures" to help protect prison workers. *Id.* The union leader stated that "[w]hile we believe these steps will help improve security, we are certain that they will not resolve the underlying problem in the Illinois prison system-severe overcrowding." *Id.*

104. Thompson, *supra* note 2, at 203.

105. See Michael Ramsey, *Lawmakers Take Middle Road on Crime as Prisons Overflow*, CHI. DAILY L. BULL., July 22, 1991, at 1. (discussing the General Assembly's avoidance of overcrowding and financial problems in the prison system).

106. HANS ZEISEL, *THE LIMITS OF LAW ENFORCEMENT* 15 (1982).

107. *Cf.* MORRIS, *supra* note 55, at 59 (striving to define a humane form of punishment "until it is no longer needed for social control").

cantly reduce crime."¹⁰⁸ The public perception, which seems to be shared by many legislators, prosecutors and judges, is that a hard nosed attitude of stiff penalties can significantly reduce crime.¹⁰⁹ Illinois followed this approach as it shifted away from indeterminate sentencing, toward determinate sentencing, increased penalties for many offenses, and reduced the number of probationable offenses. Since no one, least of all an elected official, wants to be labeled "soft on crime," the politically expedient answer has been to favor legislation which punishes more severely and reduces the discretionary powers of judges and prison administrators.¹¹⁰ Yet, the bottom line is that "law enforcement is unable to significantly reduce our high rate of crime."¹¹¹

Increasing the penalties for crimes, by mandating prison sentences and lengthening the time served per offense, is particularly unlikely to have a significant impact on our crime rate. Professor Zeisel demonstrated this too long ignored fact a decade ago, when he conducted a study of the impact penalties have on crime.¹¹² In his research sample of 1,000 felonies, 540 were reported to the police, but only sixty-five persons were arrested.¹¹³ Of the sixty-five arrestees, thirty-six were convicted but only seventeen were sentenced to a period of incarceration.¹¹⁴ Since Professor Zeisel's study was conducted in New York, the peculiar problems of that city could be used to discount his findings. Alert to this problem, he noted that two earlier works, one in 1928 by Felix Frank-

108. ZEISEL, *supra* note 106, at 15.

109. See Bagley, *Sentencing*, *supra* note 57, at 1-17 (stating that this perception is only a delusion, and that this "get tough" attitude may not reduce crime rates).

110. See *id.* (mentioning the political get-tough-on-crime themes which get a lot of lip service each election year).

111. ZEISEL, *supra* note 106, at 4.

112. *Id.*

113. *Id.* at 17, 18.

114. *Id.* at 17-19 (explaining the tabulation methods and the potential for some exaggeration of the system's inefficiency). Since Professor Zeisel conducted his study in New York City, the peculiar problems of that city could be used to discount his findings. See *id.* at 15 (noting only that New York's larger population leads to higher crime numbers). Alert to this problem, however, he noted two earlier works which reached similar conclusions, but conducted in different cities. See *id.* at 21 (citing FELIX FRANKFURTER & ROSCOE POUND, *CRIMINAL JUSTICE IN CLEVELAND* 96 (1922) and NATIONAL COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, NO. 9 REPORT ON PENAL INSTITUTIONS, PROBATION AND PAROLE (1931) ("Wickersham Comm'n")). In his 1931 report, George Wickersham, the Chairman of the National Commission on Law Observance and Enforcement, concluded:

We conclude that the present prison system is antiquated and inefficient. It does not reform the criminal. It fails to protect society . . . We consider it both unwise and unnecessary for the States to spend large sums of money in the construction of maximum security, congregate prisons . . .

NATIONAL COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, *supra* at 170.

furter and Roscoe Pound and the other in 1936 by the Wickersham Commission, reached similar conclusions.¹¹⁵

Current information enhances the validity of Professor Zeisel's findings.¹¹⁶ Since 1980, the percentage of known violent offenses which were cleared by arrest (not convicted) has never exceeded forty-eight percent.¹¹⁷ During the same years, property crimes were cleared by arrest at a rate of less than eighteen percent.¹¹⁸ After combining violent crimes and property crimes, the percentage cleared by arrest from 1980-89 was less than twenty-two percent.¹¹⁹ Since conviction rates are less than 100%,¹²⁰ apparently eighty percent (or more) of all known offenses go unpunished.

Moreover, Chief Isaac Fullwood, a twenty year police officer in Washington, D.C., also came to realize the limits of law enforcement.¹²¹ During his twenty year stay, D.C. had an ever increasing murder rate.¹²² According to Fullwood, "more people per capita are arrested in Washington than anywhere else followed by South Africa."¹²³ He complained in a recent interview for the *New York Times*, that "politicians . . . have sold people a bill of goods: that tough law enforcement, tougher penalties, mandatory minimum sentences, the death penalty will make a difference in the war on crime" ¹²⁴ In Fullwood's words, "they won't."¹²⁵ Chief Fullwood admits there must be a more comprehensive strategy, one that understands the limits of law enforcement.¹²⁶ Illinois must reach that same conclusion sometime soon.

A system which relies too heavily on punishment cannot succeed when so many crimes do not result in an arrest. Without an arrestee, there is no one to punish. Without punishment, the incapacitative and deterrent effects of a prison sentence are essen-

115. ZEISEL, *supra* note 106, at 21.

116. See generally BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., SOURCEBOOK (1991) (providing national criminal arrest and conviction data) [hereinafter SOURCEBOOK].

117. See *id.* at 447, tbls. 4.25, 4.26 (providing data on national, urban, suburban and rural "cleared by arrest" rates).

118. *Id.*

119. *Id.*

120. See ZEISEL, *supra* note 106, at 18-23 (graphing occurrence, report, arrest and conviction rates).

121. Felicity Barringer, *Conversations/Isaac Fullwood Jr.; Washington's Departing Police Chief Laments The Sleep of Murderers*, N.Y. TIMES, Sept. 20, 1992, § 4, at 7. Isaac Fullwood eventually became the Chief of Police in Washington, D.C. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. Barringer, *supra* note 121, at 7.

126. *Id.*

tially irrelevant.¹²⁷

One answer to this dilemma might be to increase the number of arrests. That, however, is easier said than done. Most arrests are a function of timing rather than detective work.¹²⁸ When the police observe the crime, are near the scene or arrive quickly, the chances of arrest are good.¹²⁹ But the police cannot be everywhere. Without substantial increases in the number of beat officers, an appreciable increase in the arrest rate is unlikely.¹³⁰

The cost of increasing the number of beat officers, necessary to increase the arrest rate, is prohibitive. Illinois already spends approximately \$2.34 billion on its State and local justice systems.¹³¹ Police protection accounts for more than half of that total. Considering the recent calls for layoffs, budget cuts, and other cost savings which dominate discussions of State and local budgets,¹³² it is unrealistic to expect dramatic increases in the number of policemen hired by the State or by local governments.

Furthermore, an increase in the number of police officers would not only drive the budget of police departments markedly upward, it would also push the other components of the judicial system to, or beyond, their limits. For example, a significant increase in the number of arrests would overburden many already overcrowded jails.¹³³ Clogged judicial dockets would reach gridlock.¹³⁴ More prisons and more guards would be needed. More guards would require more health insurance, which costs about \$34 million in 1989 alone.¹³⁵

Money spent on prisons means less money for schools, day care

127. See *infra* notes 185-205 for a discussion of deterrence and notes 206-223 for a discussion of incapacitation.

128. See ZEISEL, *supra* note 106, at 33.

129. *Id.* at 32-33 fig. 9.

130. See *id.* at 33-34.

131. SOURCEBOOK, *supra* note 116, at 4 tbl. 1.4.

132. Dennis Conrad, *Prison Chief Warns of Consequences of Stiffer Sentences*, CHI. DAILY L. BULL., Feb. 18, 1993, at 1.

133. See generally Bleich, *supra* note 7, at 1125 (discussing the factors contributing to the debate over prison overcrowding); Russell W. Gray, *Wilson v. Seiter: Defining the Components of and Proposing a Direction for Eighth Amendment Prison Condition Law*, 41 AM. U. L. REV. 1339 (1992) (noting the problem of prison overcrowding and enumerating the requirements for establishing that prison conditions violate the eighth amendment).

134. See generally Nancy Levit, *The Caseload Conundrum, Constitutional Restraint and the Manipulation of Jurisdiction*, 64 NOTRE DAME L. REV. 321 (1989) (noting the practice of federal courts to shuttle cases or decision making authority back to the state courts in order to help alleviate their backlog of cases); Angela Wade, Note, *Summary Jury Trials: A "Settlement Technique" that Places a Shroud of Secrecy on Our Courtrooms?* 23 IND. L. REV. 949 (1990) (discussing the summary jury trial as a means of alleviating overcrowded court dockets).

135. SOURCEBOOK, *supra* note 116, at 13, tbl. 1.9.

centers and roads.¹³⁶ If there is not enough money for our schools and our most vulnerable children, it is unlikely police budgets can be substantially increased. Finite budgets demand tough choices. Illinois has avoided this problem for years. Our politicians chatter about "tough-on-crime" legislation, but the crime rate has not dropped. We spend more money now on police, jails, and prisons than we did ten years ago but we are not safer in our homes or our schools.¹³⁷ Delay in facing this problem will only aggravate an already critical problem. Because we cannot hire enough policemen to make arrest more likely, it is unreasonable to assume that severe sentences for those who are arrested will significantly reduce crime.¹³⁸

We are not particularly successful at prosecuting those who are arrested. Professor Zeisel's study of New York cases showed a conviction rate, following a felony arrest, of less than sixty percent.¹³⁹ In a more recent study of 584,450 arrestees in eight states, only fifty-nine percent were convicted.¹⁴⁰ The figures for Illinois are consistent with Professor Zeisel's study and with the Justice Department's current findings. It is time for Illinois to develop a statewide sentencing plan which recognizes the limits of law enforcement and takes into account the ever rising cost of incarceration.

IV. WHAT CAUSED THE PRISON POPULATION EXPLOSION?

Conventional wisdom assumes the scale of imprisonment is a function of the crime rate.¹⁴¹ As the crime rate increases, the rate of imprisonment should increase, if the conventional wisdom were

136. On September 28, 1992, many Chicago high school principals met to discuss a proposed 43% cut in their budgets for extracurricular activities. Jacquelyn Heard, *All or Nothing on Sport Funding, Principals Say*, CHI. TRIB., Sept. 29, 1992, § 1, at 1. On the same day, a court appointed monitor of the Illinois Department of Children and Family Services filed a report criticizing that agency's plans for the future as "significantly" and "seriously flawed." Leslie Baldacci, *Family Agency Feels Heat, Oversees Calls D.C.F.S. Reform 'Flawed'*, CHI. SUN TIMES, Sept. 29, 1992, at 1. This agency, charged with helping the most vulnerable children in the state, was badly underfunded. However, the budget for 1992 required cost-savings cuts of 10% of its employees. *Id.* This led its then-Director, Sue Suter, to quit. *Id.*

137. William Recktenwald & Jennifer Lenhart, *The Killing Way Weighs Heavily, Homicide Rate Has a New Meaning in 2 Communities*, CHI. TRIB., Sept. 29, 1992, § 2, at 1 (suggesting that the number of murders in Chicago in 1992 was on course for a record high).

138. See *infra* notes 185-205 for a discussion of the deterrence theory of punishment.

139. ZEISEL, *supra* note 106, at 18, fig. 3.

140. BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., NO. 2, NAT'L UPDATE 8 (Oct. 1991) [hereinafter NATIONAL UPDATE].

141. See generally FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE SCALE OF IMPRISONMENT* 121 (1991) [hereinafter ZIMRING & HAWKINS, IMPRISONMENT].

on the mark.¹⁴² However, the research of Zimring and Hawkins shows that there are "major discontinuities" between crime rate and prison population.¹⁴³ The Federal Bureau of Investigation ("F.B.I.") "index crime rates decreased during the 1980's [while] rates of imprisonment [rose]."¹⁴⁴ Zimring and Hawkins found that there was a negative correlation between crime rates and rates of imprisonment.¹⁴⁵ They offer some plausible explanations for this finding, although they do not suggest that there is no relationship between crime rates and imprisonment rates.¹⁴⁶ They conclude that policymakers overestimate the correlation between index crime rates and the size of our prison populations.

Nor do changes in the political climate have a direct correlation on the rate of imprisonment.¹⁴⁷ It is often assumed that a law enforcement mentality, usually associated with conservatives, will result in higher conviction and imprisonment rates. Liberal governments are viewed as softer on crime thus causing a decrease in the rate of imprisonment. One problem with this oversimplified approach is that public perception of "crime and punishment"¹⁴⁸ does not change appreciably, even when their elected officials seem to take tougher law enforcement positions. The public always thinks criminals are treated too leniently.¹⁴⁹ It does not matter whether imprisonment rates rise or fall, the general public believes sentences should be stiffer.¹⁵⁰ Thus, it is wrong to assume that the increase in rates of imprisonment is directly tied to the political party which is in power. If that were true, the decline in these rates during law and order administrations would be inexplicable.¹⁵¹

Demographics are sometimes cited as the cause of the prison population explosion. As it turns out, demography is no better at predicting rates of imprisonment than are crime rates or politics.¹⁵² For example, crime is a young man's vice; it is the male population between ages twenty to twenty-nine which accounts for most crimes.¹⁵³ That demographic group remained fairly constant

142. *Id.*

143. *Id.* at 122.

144. *Id.*

145. *Id.*

146. ZIMRING & HAWKINS, IMPRISONMENT, *supra* note 141, at 124.

147. *Id.* at 125.

148. See FEODOR DOSTOEVSKY, CRIME AND PUNISHMENT (George Gibian ed., 1975) (discussing the effects of an individual's sense of guilt as punishment when society fails to punish).

149. ZIMRING AND HAWKINS, IMPRISONMENT, *supra* note 141, at 128-30.

150. *Id.*

151. *Id.* at 130-31.

152. *Id.* at 131-32.

153. NATIONAL UPDATE, *supra* note 140, at 8; Casper, *supra* note 16, at 231; Thompson, *supra* note 2, at 203.

throughout the 1980's. During that same decade, the rate of imprisonment also should have remained stable if there was a close correlation between demography and the rate of imprisonment. Instead, the 1980's saw a dramatic increase in the incarceration rate. In the 1960's, the opposite occurred; the youthful offender age group increased by twenty percent but the crime rate fell.¹⁵⁴ Again, the easy, oversimplified answer is wrong. The rate of imprisonment is not simply a function of the size of the young male population.

Drug usage and poor economic conditions are two more favorites of the conventional wisdom. Neither, however, can explain the recent dramatic increase in the prison population.¹⁵⁵ Zimring and Hawkins did not find a close relationship between the imprisonment rate and unemployment or between the level of drug usage and the imprisonment rate. Unemployment rates fluctuated throughout the 1980's; the imprisonment rate rose steadily.¹⁵⁶ Likewise, drug arrests which increased exponentially from 1960-70 did not result in a correspondingly large increase in the rate of imprisonment during those years.¹⁵⁷

The Illinois prison population explosion cannot be tied to an increasing crime rate, more youthful offenders, a weakening economy or increased drug usage. All of these factors play some role in the size of our prison population, but none of them account for the 300% increase in our prison population over the past decade and a half. The more reasonable inference from the existing data is that Illinois has chosen to send many more, usually poor and undereducated people to prison. The existing data proves that more prisoners does not mean more crime and that longer sentences does not necessarily reduce crime.

V. THEORIES OF PUNISHMENT

Criminal sentencing is a complex task which involves the evaluation of a variety of often conflicting theories and concerns.¹⁵⁸ While theories of punishment abound, consistency in application is difficult to find.¹⁵⁹ Before determining which penological theory forms the basis for a particular sentence or sentencing scheme, it is necessary to briefly examine some of these philosophies. This section discusses the four traditional theories of sentencing, retribu-

154. ZIMRING & HAWKINS, IMPRISONMENT, *supra* note 141, at 132.

155. *Id.* at 132-36.

156. *Id.* at 133, fig. 5.6.

157. *Id.* at 135, fig. 5.7.

158. Paul H. Robinson, *Hybrid Principles for the Distribution of Criminal Sanctions*, 82 NW. U. L. REV. 19, 20-24 (1987).

159. Franklin Zimring, *Principles of Criminal Sentencing, Plain and Fancy*, 82 NW. U. L. REV. 73, 73-75 (1987) [hereinafter Zimring, *Principles of Criminal Sentencing*].

tion, deterrence, incapacitation, and rehabilitation, and examines how those theories often conflict. None of these theories directly account for, or indirectly consider, the cost of incarceration. These theories place no limits on the amount of money the State must, or is likely, to spend. However, if cost is a consideration, as it should be, Illinois must come to grips with the benefits and drawbacks of these sentencing philosophies.

A. *Retribution*

Until the late eighteenth century, America and England primarily based their sentencing policies on the theory of retribution. Retribution institutionalized social vengeance. Since people assumed behavior was the product of free will, those who violated the law were responsible for their conduct and deserved punishment.¹⁶⁰ Society punished wrongdoers so these wrongdoers would not have an unfair advantage over law abiding citizens.¹⁶¹ Retributive sanctions had a strong moral appeal with a firm Biblical foundation.

Retributive punishment has taken many forms: mutilations, public executions and floggings. Retribution, which is sometimes referred to as "just deserts," is still an important component of Illinois sentencing statutes.¹⁶²

1. *Retribution in Reality*

Illinois, like most states, has established ranges of sentences within which a particular class of offenses may be punished.¹⁶³ These classifications represent a legislative determination of just punishment for every class of felony. Within these statutory classifications, punishment is presumptively sufficient to satisfy the retribution factor of the sentencing equation. As long as the sentence meets the statutory guidelines for the offense charged, the legislature has determined that the retribution factor has been satisfied.

Factors such as prior criminal history, exceptional brutality, or susceptibility to rehabilitation cause sentences to differ for the same class of offense. Murder is a brutal crime, the punishment

160. See generally Immanuel Kant, *Fundamental Principles of the Metaphysic of Morals*, in 42 GREAT BOOKS OF THE WESTERN WORLD (Thomas K. Abbott trans., 1980).

161. *Id.*

162. See *People v. La Pointe*, 88 Ill. 2d 482, 493, 431 N.E.2d 344, 349 (1981) (recognizing "the concept that punishment should fit the offender and not merely the crime"); *People v. Morgan*, 59 Ill. 2d 276, 280-81, 319 N.E.2d 764, 767 (1974) (considering a defendant's remorse, respect for the judicial system and the viciousness of the crime when determining sentence).

163. 730 ILL. COMP. STAT. 5/5-5-1 (1992) (ILL. REV. STAT. ch. 38, para. 1005-5-1 (1991) (amended 1992) (setting forth the appropriate sentencing ranges for various crimes).

imposed by judges varies anywhere from twenty years to death.¹⁶⁴ A judge must find factors to distinguish a twenty year sentence from the death sentence. Finding those missing factors is a difficult assignment in many cases, and applying them consistently is even more difficult.

Nevertheless, appellate judges often reduce murder sentences. In *People v. Smith*,¹⁶⁵ a trial court sentenced an eighteen year old defendant with one prior conviction, to 60 to 100 years for murder. The trial court identified retribution as the principal reason for the original sentence. On appeal, the court reduced the sentence to 20 to 40 years because the original sentence "severely reduc[ed] the possibility of defendant's rehabilitation."¹⁶⁶ Since the appellate court valued rehabilitation more than the trial court, the appellate court reduced the sentence.

An appellate court reduced a 25 to 50 years sentence to a 14 to 25 years sentence in *People v. Horton*.¹⁶⁷ The defendant, a seventeen year old member of the Insane Maniac Cobras street gang, shot another young man, for gang related reasons. Citing the need to consider the defendant's potential for rehabilitation, the court cut the defendant's sentence in half.¹⁶⁸ In *People v. Gibbs*,¹⁶⁹ the defendant shot the victim at point blank range. Here too, the appellate court reduced the 50 to 100 year sentence to 15 to 45 years because the defendant was nineteen years old, employed, and had no prior criminal record.¹⁷⁰ In each of these cases, the unavoidable

164. See 730 ILL. COMP. STAT. 5/5-5-3 (1992) (ILL. REV. STAT. ch. 38, para. 1005-5-3 (c)(1) (1991)) (setting forth sentencing guidelines for the crime of murder).

165. 50 Ill. App. 3d 320, 321, 365 N.E.2d 558, 559 (1st Dist. 1977) (reducing a 60 to 100 year sentence for murder to 20 to 40 years).

166. *Id.* at 328, 365 N.E.2d at 564 (acknowledging the defendant's young age and lack of criminal record in reducing a murder sentence).

167. 3 Ill. App. 3d 150, 157, 356 N.E.2d 1044, 1049 (1st Dist. 1976) (finding that the defendant's sentence was excessive and failed to consider the defendant's "possibility of rehabilitation").

168. *Id.* "The sentence imposed [by the trial court] severely diminished the possibility of defendant's rehabilitation," so the appellate court reduced the sentence. *Id.*

One court sentenced a 24 year old man, who had a job and no prior record, to a prison term of 50 to 70 years. *People v. Gill*, 7 Ill. App. 3d 24, 26, 286 N.E.2d 516, 517 (5th Dist. 1972) (noting the defendant's lack of education and status as a father in reducing a murder sentence). Although the defendant shot an elderly man in cold blood over a minor misunderstanding, the appellate court reduced the sentence 15 to 45 years. *Id.* at 26, 286 N.E.2d at 517.

169. 49 Ill. App. 3d 644, 645, 364 N.E.2d 491, 492 (1st Dist. 1977) (determining that the trial court abused its discretion in failing to consider the seriousness of the offense and the "objective of restoring the offender to useful citizenship" in a murder sentence). The defendant walked up to the victim's front door, knocked, and shot the victim at point blank range. *Id.*

170. *Id.* at 647, 364 N.E.2d at 494 (holding that age and the lack of a criminal record of the defendant indicates a propensity for rehabilitation).

tension in a system which values both retribution and rehabilitation caused the conflict between the trial and appellate court decisions.

Courts have also reduced criminal sentences based on other mitigating factors, such as poor social environment, limited education,¹⁷¹ or an express desire to continue education.¹⁷² In these cases, the original sentence was also within the legislatively established parameters for retribution. For example, in *People v. Drumheller*,¹⁷³ the defendant beat a fourteen month old child to death. Yet, the court reduced his sentence from 70 to 125 years to one which allowed parole after eleven years and which had a maximum release date of approximately thirty-one years. A defendant, with a prior assault to commit murder conviction, had his murder sentence reduced from 99 to 100 years to 20 to 35 years in *Abernathy v. People*.¹⁷⁴ A defendant found guilty of murder and attempted murder had his murder sentence reduced in *People v. Viser*,¹⁷⁵ while another defendant with two prior felony convictions had his murder sentence reduced in *People v. Field*.¹⁷⁶ In *People v. Williams*,¹⁷⁷ the jury found the accused, who had a prior felony conviction, guilty of murder, armed robbery and attempted robbery. The appellate court reduced his sentence to thirty years.¹⁷⁸ While the authors have chosen to examine murder sentences, reductions oc-

171. *People v. Kosanovich*, 69 Ill. App. 3d 748, 751-52, 387 N.E.2d 1061, 1063-64 (1st Dist. 1979) (considering a defendant's "unstable family life" as a factor in reducing an armed robbery sentence).

172. *People v. Nelson*, 106 Ill. App. 3d 838, 847, 436 N.E.2d 655, 662 (1st. Dist. 1982) (reducing an armed robbery sentence of 20 years to 10 years after considering the defendant's possibility of obtaining a G.E.D. or job training).

173. 15 Ill. App. 3d 418, 424, 304 N.E.2d 455, 460 (2d Dist. 1973) (recognizing that while "society is outraged by the murder of a child," the court must consider the defendant's background in the possible mitigation of an imposed sentence).

174. 123 Ill. App. 2d 263, 273, 259 N.E.2d 363, 369 (5th Dist. 1970) (determining that the trial court should provide a "spread" between maximum and minimum sentences when reducing a 99-100 year sentence).

175. 82 Ill. 2d 568, 586-87, 343 N.E.2d 903, 913 (1975) (finding a sentence of 199 to 200 years for murder excessive).

176. 13 Ill. App. 3d 74, 83, 299 N.E.2d 754, 761 (5th Dist. 1973) (reducing a sentence of 45 to 90 years to a sentence of 30 to 90 years in an effort to meet "guidelines . . . relat[ing to] minimum and maximum sentences").

177. 3 Ill. App. 3d 1, 7, 279 N.E.2d 100, 104 (1st Dist. 1971) (reducing a felony conviction from 15 to 30 years because of defendant's young age).

178. *Id.* at 7, 279 N.E.2d at 105; *see also* *People v. Kane*, 140 Ill. App. 3d 928, 932, 489 N.E.2d 500, 503 (1st Dist. 1980) (reducing the sentence of a repeat class X felon); *People v. Adams*, 8 Ill. App. 3d. 8, 13, 288 N.E.2d 724, 728 (1st Dist. 1972) (reducing a murder sentence by 35 years); *People v. Hill*, 6 Ill. App. 3d 746, 752, 286 N.E.2d 764, 769 (1st Dist. 1972) (reducing an armed robbery and murder sentence by 20 years); *People v. Cunningham*, 132 Ill. App. 3d 519, 519, 270 N.E.2d 147, 147 (1st Dist. 1971) (abstract op.) (reducing a sentence by six years of a defendant who murdered his wife); *People v. Golden*, 1 Ill. App. 3d 947, 947, 274 N.E.2d 892, 892 (1st Dist. 1971) (abstract op.) (reducing a murder sentence for a defendant with a prior misdemeanor conviction by 15 years).

cur in all felony classifications.¹⁷⁹

These sentence reductions prove that judges not only consider retribution as a legitimate sentencing consideration, but also that judges differ over the weight retribution should be given when reviewing an otherwise lawful sentence. As this brief review of murder sentences proves, it is not at all unusual for appellate courts to value retribution differently than trial courts. Retribution is but one factor in the sentencing equation, and it sometimes conflicts with other legitimate concerns.

2. Retribution's Role in Sentencing Policy

Retribution — “just deserts” — has a valid role in any sentencing policy. Illinois' high rate of incarceration suggests that courts do not ignore the retribution component of sentencing.¹⁸⁰ Over the past two decades, Illinois courts imposed mandatory sentences for crimes which were previously probationable, and have imposed longer prison sentences. Moreover, the key actors in the criminal justice system benefit by seeking and imposing a sentence which is fully retributive. Prosecutors run on records of high convictions rates and tough sentences. Elected judges are seldom criticized for being too tough on crime. Consequently, these key decision-makers have vested interests in long prison sentences. Therefore, they are not likely to overlook or undervalue retribution.

The role of retribution, however, should not be more important than several other legitimate concerns. The cost of unabashed retribution is incalculable. A sentence which is more punitive than the crime justifies undermines public morale and confidence in the government.¹⁸¹ Extreme sentences adversely affect the public's

179. See *People v. Neither*, 230 Ill. App. 3d 546, 555, 595 N.E.2d 124, 129 (1st Dist. 1992) (reducing a sentence by 56 years for a defendant who was convicted of four robberies, two aggravated batteries and possession of stolen motor vehicles); *People v. Donald*, 222 Ill. App. 3d 794, 802, 584 N.E.2d 417, 422 (1st Dist. 1991) (finding a 25 year sentence excessive for a defendant convicted of aggravated criminal sexual assault and aggravated criminal sexual abuse); *People v. Anderson*, 142 Ill. App. 3d 240, 243, 488 N.E.2d 557, 559 (1st Dist. 1985) (reducing a defendant's residential burglary sentence by six years).

180. Ronald J. Ostrow, *U.S. Imprisons Black Men at 4 times S. Africa's Rate*, L.A. TIMES, Jan. 5, 1991, at A1. See SOURCEBOOK, *supra* note 116, at 605 tbl. 6.56 for a comparison of incarceration rates across the nation. See generally MARC MAUER, AMERICANS BEHIND BARS: A COMPARISON OF INTERNATIONAL RATES OF INCARCERATION (The Sentencing Project ed., 1991) (maintaining that the “United States has the world's highest known rate of incarceration, with 426 prisoners per 100,000 population”).

181. Professor Zimring reports that during the twentieth century the Peking government exhibited the heads of drivers who were executed for exceeding the speed limit. FRANKLIN E. ZIMRING & GORDON J. HAWKINS, DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL 11 (1973) [hereinafter ZIMRING & HAWKINS, DETERRENCE].

perception of the role of government, and the cost of imprisonment continues to rise if retribution is overvalued in our sentencing laws.

The challenge is to impose a sentence which is sufficiently retributive without unnecessarily escalating costs or encouraging offenders to commit more violent offenses. "If the punishment is the same for simple theft, as for theft and murder, you give thieves a motive for committing murder."¹⁸² A sentencing policy which punishes minor offenses as severely as major ones, encourages major offenses.¹⁸³ Legislatures must assure that the cost of punishment does not exceed its benefits. Sentences which are purely retributive can escalate the cost of punishment.¹⁸⁴ If government is trying to become more cost efficient, retribution cannot assume the dominant role in Illinois' sentencing laws.

B. Deterrence

Deterrence developed as an alternative theory of punishment in the late eighteenth century as a result of changing philosophies of human conduct and dissatisfaction with the administration of purely retributive punishments.¹⁸⁵ Deterrence as a penological model was based on the theory of utilitarianism.¹⁸⁶ Proponents of deterrence argued that human behavior was a function of a "hedonistic-calculus," that people chose behavior options which maximized pleasure or minimized pain.¹⁸⁷ Accordingly, criminal punishment should be proportionate to the undesirability of the crime. Rational people are less likely to commit crimes as the cost of the penalty increases, and it is hoped, punishment of one offender would discourage others from committing the same offense.

Deterrence, like retribution, is sometimes used to justify long prison sentences.¹⁸⁸ "In European countries sentences greater than five years are rare."¹⁸⁹ However, sentences, in the United States, are much longer.¹⁹⁰ But are long prison sentences necessary to protect the public? Do they deter others from committing crimes or do

182. *Id.* at 204 (quoting JEREMY BENTHAM, *Principles of Penal Law, reprinted in* 1 THE WORKS OF JEREMY BENTHAM 400 (John Bowring ed., (1843)).

183. *Id.*

184. *See, e.g.,* Thompson, *supra* note 2, at 204. Retribution does not ordinarily include any consideration for the cost to taxpayers, on whose behalf retribution is sought. *Id.*

185. For a more exhaustive study of deterrence see ZIMRING & HAWKINS, DETERRENCE, *supra* note 181.

186. *See* Bentham, *supra* note 182 at 365.

187. *Id.*

188. *See* RONALD L. GOLDFARB & LINDA R. SINGER, AFTER CONVICTION 178-87 (1973).

189. *Id.* at 178.

190. *See* BUREAU OF JUST. STAT., U. S. DEP'T OF JUST., CORRECTIONAL POPULATION IN THE UNITED STATES, 1988 at 58-61 tbls. 5.1, 5.2, 5.3, 5.4 (1991) (showing

they merely incapacitate the sentenced prisoner at great financial cost to society without any significant corresponding reduction in crime? Researchers posed these questions to experienced correctional officials across the country and many of them agreed "that only a small minority of all present inmates in American prisons" were so dangerous that lengthy prison sentences were necessary to protect society from them.¹⁹¹ Others, however, believe that deterrence, through stiff prison sentences, is a viable plan.¹⁹²

Deterrence theorists often fail to recognize that while their positions are sometimes diametrically opposed, the propositions on which they rest their arguments are not "mutually exclusive."¹⁹³ The fact that increasingly severe penalties do not eliminate crime, or even reduce it in some cases, does not mean that punishment fails as a deterrent.¹⁹⁴ Nor does the "common observation" that people "seek to avoid unpleasant consequences"¹⁹⁵ mean that every penalty deters or that all criminal action can be deterred. As Professor Zimring aptly notes, the issue is really one of "marginal deterrence," not absolute deterrence.¹⁹⁶

The first issue that policymakers must address is whether a more severe penalty would significantly increase the deterrence rate for a particular offense.¹⁹⁷ Answering that question is not easy, because deterrence is a multi-factored equation. First, some criminals are brain damaged or psychotic. They may engage in criminal behavior because a mysterious voice instructed them or because they do not truly appreciate the difference between right and wrong. The threat of future punishment is of little or no value in these cases. Second, other potential criminals may have little to lose and much to gain from a criminal venture. A high school dropout with no hope of a job and the chance to make quick money selling drugs may well choose to run a risk that an employed, college educated person would not run. Yet the range of permissible punishment, the threatened deterrence, is the same for both.

the number of prisoners incarcerated under state or federal jurisdiction by sentence lengths in 1987 and 1988).

191. GOLDFARB & SINGER, *supra* note 188, at 179.

192. See Norval Morris, *Impediments to Penal Reform*, 33 U. CHI. L. REV. 627, 631 (1966) (stressing that penal reform must strive to achieve greater social protection).

193. ZIMRING & HAWKINS, *DETERRENCE*, *supra* note 181, at 4-7.

194. Johannes Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949, 957 (1966).

195. ZIMRING & HAWKINS, *DETERRENCE*, *supra* note 181, at 5.

196. *Id.* at 13-14.

197. See William Chambliss, *Types of Deviance and the Effectiveness of Legal Sanctions*, 1967 WIS. L. REV. 703, 707-08 (concluding that the legal system may be operating inefficiently in the manner that it imposes penalties for specific crimes).

Third, nearly all studies of this issue suggest that the probability of apprehension plays a significant role in the calculus of deterrence.¹⁹⁸ Fear of getting caught deters criminality as long as there is a threat of some punishment. However, increasing the severity of the punishment does not always have a corresponding deterrent effect.¹⁹⁹ “[P]otential criminals do seem to calculate the chances of being apprehended more than the punishment for the offense if caught.”²⁰⁰ Of course, that conclusion does not mean that we should arrest criminals and immediately set them free. What that conclusion suggests is that, for example, a thirty year sentence is not necessarily a greater deterrent than a twenty-five year sentence. Ironically, an increase in the probability of apprehension, followed by a perceived prison sentence, may deter more crime than an increase in the punishment without a corresponding increase in the probability of apprehension.²⁰¹

Fourth, the cost of lengthy prison sentences reduces the funds available to apprehend criminals. Therefore, the extent that a prison sentence exceeds its deterrent value, imprisonment is no longer cost effective. Criminal justice is a zero sum game. Money spent on incarceration is money lost to apprehension. Money spent on unnecessarily long prison sentences may contribute to an increase in criminal activity by reducing the funds available for apprehension. Examples of this regrettable result abound. Pennsylvania, for example, passed legislation substantially increasing the penalty for forcible rape in 1966. A review of police records to determine the effect of the increased penalty revealed that: “Philadelphia found no relief from forcible and attempted rape either during the excitement leading up to the imposition of strong penalties for these offenses or after the imposition itself. This [held] true with respect to both the frequency and intensity of these crimes.”²⁰² Philadelphia had the same experience as California. In California,

198. See ZIMRING & HAWKINS, DETERRENCE, *supra* note 181, at 160 (stating that individuals must believe that the agency is capable of catching and punishing offenders in order to be deterred from committing the crime); see Gary Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968) (proposing an economic statistical approach to analyzing the efficiency of legislation to deter crime); Richard A. Posner, *An Economic Theory Of The Criminal Law*, 85 COLUM. L. REV. 1193, 1195 (1985) (setting forth an economic justification for penalties under criminal law).

199. See CALIFORNIA YOUTH AND ADULT CORRECTIONS AGENCY, THE ORGANIZATION OF STATE CORRECTIONAL SERVICES IN THE CONTROL AND TREATMENT OF CRIME AND DELINQUENCY 155 (1967).

200. *Id.*

201. ZIMRING & HAWKINS, DETERRENCE, *supra* note 181, at 164-65.

202. ZIMRING & HAWKINS, DETERRENCE, *supra* note 181, at 198 (citing to GEORG RUSCHE & OTTO KIRCHHEIMER, PUNISHMENT AND SOCIAL STRUCTURE 193-205 (1939)); Barry Schwartz, *The Effect in Philadelphia of Pennsylvania's Increased Penalties For Rape and Attempted Rape*, 59 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 509, 514 (1968).

narcotics' laws were dramatically stiffened in 1961, but the increased penalties did not slow down the rates of arrest for narcotics violations. Over a seven year period, the number of narcotics arrests rose by almost 2,000 percent.²⁰³

Illinois has had a similar experience. The "Class X" legislation of the 1970's is still in force today largely because it appears to be "tough on crime." Penalties have been increased and in some instances sentencing discretion has been greatly reduced. Probation is less available now than it was twenty years ago.²⁰⁴ Nevertheless, over those same twenty years there has not been a corresponding decrease in crime. In particular, violent crimes have not diminished. Natural life sentences are too routinely imposed, and the range of permissible punishment for murder is quite high. The proof is strong and growing — lengthy prison sentences are costly but their marginal deterrence value is questionable at best. Further, available data "suggest that increases in legislatively provided penalties for major crimes have little impact as a marginal deterrent in many situations where officials place great faith in such increases."²⁰⁵ A fiscally responsible sentencing policy will demand more "bang for the buck." There is a point of diminishing returns where increasing the penalty does not have a corresponding deterrent impact. At that point, fiscal responsibility demands a closer look at any planned increases in the penalty structure. Clearly, where the costs outweigh the benefits, increased penalties should be avoided.

C. Incapacitation

Incapacitation is a devastatingly simple and, to a point, an unassailable theory. An offender who is in prison cannot commit crimes against the public. Incapacitation is an individualized form of deterrence.²⁰⁶ The convicted felon is deterred, temporarily, from further criminal conduct, in the free community, because the felon is incarcerated.

Besides its inherent conflict with numerous Illinois decisions, incapacitation is a theoretical failure because society is unable to accurately predict future dangerousness.²⁰⁷ First, incapacitation works only if the persons incapacitated are likely to commit new crimes. There is no need for incapacitation *qua* incapacitation once

203. See also ZIMRING & HAWKINS, DETERRENCE, *supra* note 181, at 197-98 (discussing marginal deterrence).

204. See generally Aspen, *supra* note 1, at 344-51 (discussing how the new law has discarded the idea that the penitentiary should be a place for rehabilitation).

205. ZIMRING & HAWKINS, DETERRENCE, *supra* note 181, at 201.

206. *Id.*

207. MORRIS, *supra* note 55, at 68-78.

the fear of future criminality is very low. At that point society is paying too much for too little security.

Advocates of incapacitation admit, however, that this approach has serious limitations. For example, under the incapacitation model, youthful offenders should be imprisoned more often and for longer sentences than older ones. Since "crime is a young man's occupation," the group most in need of incapacitation are youthful offenders.²⁰⁸ Older offenders, on the other hand, are among the lowest recidivism groups and should be incarcerated for the shortest terms under an incapacitation theory. The probability of a person over age 50 committing any crime is extremely low, only 4.2% of all persons arrested are over age 50.²⁰⁹ If the age level is raised to age 60 the probability of arrest drops to only 1.4%.²¹⁰ This is true even though these groups make up a large percentage of the total population. Incapacitation beyond age 50 usually adds little if anything to society's safety but costs society hundreds of thousands of dollars.²¹¹ Ironically, Illinois, like most other jurisdictions, is well-stocked with appellate decisions reducing sentences just because the offenders were young.²¹² These cases are irreconcilable with an incapacitation theory, however, conventional sentencing theories often conflict.²¹³

Professor Norval Morris cites a compelling example of the failure of the incapacitation theory, which demonstrates the forecasting problems inherent in incapacitation analysis. A 1966 Supreme Court decision,²¹⁴ released hundreds of psychologically disturbed prisoners because correctional staff, psychiatrists and others who knew the prisoners, believed the prisoners were dangerous, and would commit new crimes if released.²¹⁵ Follow-up studies, however, showed that only two percent returned to institutions for the

208. LARRY J. SIEGEL, *CRIMINOLOGY* 84-85 (1983); CHARLES E. SILBERMAN, *CRIMINAL VIOLENCE, CRIMINAL JUSTICE* 195 (1978); Robinson, *supra* note 158, at 19-24.

209. SOURCEBOOK, *supra* note 116, at 414, tbl. 4.3.

210. *Id.*

211. SILBERMAN, *supra* note 208, at 194.

If it is the world you seek there can be no strict justice; and if it is strict justice you seek there can be no world.

Why do you grasp the rope by both ends seeking both the world and strict justice? Let one of them go, for if you do not relent a little, the world cannot endure.

Id. (quoting Abraham's conversation with God).

212. See *supra* notes 165-79 and accompanying text for an overview of Illinois cases in which the convicted individual received a reduced sentence.

213. Robinson, *supra* note 158, at 19-24.

214. *Id.* at 69 (discussing *Baxtrom v. Herold*, 383 U.S. 107 (1966)).

215. *Id.* These were the inmates deemed most dangerous and most likely to recidivate. *Id.*

criminally insane.²¹⁶ Researchers, therefore, concluded that predictions of dangerousness were grossly overinclusive and resulted in the unnecessary detention of a substantial majority of inmates beyond the time necessary to protect society. If trained professionals could not accurately predict future dangerousness for the most dangerous of inmates, there is little reason to hope they could do better for a more representative cross-section. Thus, Professor Morris concluded that predictions of future dangerousness should play no role in sentencing because this approach "presupposes a capacity to predict future criminal behavior quite beyond our present technical ability."²¹⁷

Second, incapacitation theory has "only [a] modest impact on crime . . . [but] requir[es] enormous increases in prison populations."²¹⁸ Illinois had the fastest growing prison population in the nation during 1989.²¹⁹ In 1977, Illinois had an adult prison population of over 10,000; currently the prison population exceeds 30,000.²²⁰ Incarceration expenses surpassed \$601 million in 1992, more than two times the amount spent by the state in 1983.²²¹ New arrestees and annual expenses of \$16,400 per inmate explain this high figure.²²² Although more arrestees are going to prison and staying longer, crime may well be increasing.

In addition to its failure to deter future criminality, incapacitation imposes a substantial burden on taxpayers.²²³ The theory of increasing prison terms collapses amid statistics that show our inability to predict future criminality. Additionally, the modest effects, if any, on crime do not approach justification for the extravagant fiscal impact. A coherent and fiscally responsible sentencing policy must take these facts into account.

D. Rehabilitation

Every Illinois sentence must include some consideration of the defendant's rehabilitative potential.²²⁴ This constitutional mandate is sometimes difficult to square with the statutory mandate that a

216. *Id.*

217. MORRIS, *supra* note 55, at 62.

218. Jacqueline Cohen, *Incapacitation as a Strategy for Crime Control: Possibilities and Pitfalls*, 5 CRIME & JUST.: AN ANNUAL REVIEW OF RESEARCH 1, 74 (1983)

219. TRANSITION PAPER, *supra* note 3, at 1.

220. *Id.* at 1-4; COMPTROLLER'S MONTHLY FISCAL REPORT, *supra* note 4, at 4.

221. TRANSITION PAPER, *supra* note 3, at 1.

222. *Id.* at 3, 5.

223. David E. Greenberg, *The Incapacitative Effect of Imprisonment: Some Estimates*, 9 LAW SOC'Y REV. 541, 541-80 (1975) (setting forth data relating to the incapacitative effect of imprisonment on crime).

224. See ILL. CONST. art. I, § 11.

sentence should not depreciate the seriousness of the offense.²²⁵ A finding of some rehabilitative potential does not necessarily result in a sentence less than the maximum.²²⁶ Mitigating factors, such as rehabilitative potential, are subject to countervailing considerations like the seriousness of the offense and other aggravating factors.²²⁷

The constitutional command, that rehabilitative potential be a factor in every sentence, is an outgrowth of what Francis Allen calls the rehabilitative ideal.²²⁸ She defines the rehabilitative ideal as "the notion that the primary purpose of penal treatment is to effect changes in the characters, attitudes, and behavior of convicted offenders, so as to strengthen the social defense against unwanted behavior, but also to contribute to the welfare and satisfaction of offenders."²²⁹ Probation, parole, prison work farms, and prison counseling programs are manifestations of the rehabilitative idea.²³⁰ The divergent means employed by supporters of the rehabilitative ideal range from corporal punishment to prayer and educational programs.²³¹ Illinois currently offers a variety of rehabilitative programs. Religious services are conducted in every Illinois prison for all major religions and some smaller sects. Prisons also offer educational programs from remedial reading to high school equivalency and college courses. Job training, work releases, and other employment related services are generally available to Illinois inmates, as are individual and group counseling services for drug and alcohol addicted inmates and for inmates experiencing

225. See *supra* notes 165-179 and accompanying text for several cases, in which judges reduced sentences due to mitigating factors.

226. See, e.g., *People v. Powell*, 154 Ill. App. 3d 1005, 1011, 512 N.E.2d 1364, 1368 (1st Dist. 1987). The existence of mitigating circumstances does not require a court to reduce a potential sentence, because mitigating and aggravating factors "shall be accorded weight," but are not necessarily determinative. See *id.* (vacating a maximum sentence and remanding only because the court considered an improper aggravating factor). The lesson of *Powell* and numerous other cases is that no mitigating factor, including rehabilitative potential, will necessarily effect the sentence imposed. *Id.* See also 730 ILL. COMP. STAT. 5/5-5-3.1, 3.2 (1992) (ILL. REV. STAT. ch. 38, para. 1005-5-3.1, 3.2 (1991)) (requiring the courts to weigh the factors, but not to alter potential sentences as a result).

227. Rehabilitative potential, usually found in young or first-time offenders, provides a reason for imposing a less severe sentence. See *supra* notes 165-179 and accompanying text for a discussion of several cases, in which judges reduced sentences due to possible rehabilitative potential. Illinois has made no discernable effort to resolve, other than on a case by case basis, the tension between rehabilitative potential and the need to impose a sentence which will not depreciate the seriousness of the offense.

228. See generally FRANCIS ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE* (1981).

229. *Id.* at 2.

230. See generally NORVAL MORRIS & MICHAEL TONRY, *BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM* (1990); DAVID T. STANLEY, *PRISONERS AMONG US: THE PROBLEM OF PAROLE* (1976).

231. ALLEN, *supra* note 228, at 3.

family and psychiatric problems. In these respects, the rehabilitative ideal is not dead in Illinois.

Francis Allen traces the general support for the rehabilitation ideal and the academic dominance of this theory to the 1970's.²³² By the mid 1970's, though, that support began to wane, and the call for sentences as punishment grew steadily louder.²³³ Illinois' shift from indeterminate sentencing to determinate sentencing reflected the changing attitude of society as a whole.

Allen calls the decline of the rehabilitative ideal "substantial" and "precipitous."²³⁴ She traces the decline to a number of factors, but chiefly to a loss of confidence in our socializing institutions.²³⁵ Pervasive pessimism about government agencies hallmarked the Reagan and Bush presidency. The call to get government off our backs was appealing to a significant majority of the voters over the past twenty years. These trends are symptomatic of a loss of confidence in the rehabilitative ideal.

Allen also notes that support for a rehabilitative ideal presumes that there is a consensus on the objective of rehabilitation.²³⁶ Our pluralistic melting pot, however, does not present the optimum conditions for consensus. What is a cure and how it is to be achieved, are questions which can not be easily answered in our society.²³⁷ "Yet rational penal policy demands that the scrutiny of policy options proceed and that efforts be made to identify the problems characteristic of such alternatives and to inquire which of the old dilemmas are likely to persist."²³⁸ Illinois policymakers have made meager efforts to identify the persistent problems and to seek alternative solutions, particularly in the area of criminal sentencing.

It is clear to anyone who visits an Illinois prison or reads the Department of Corrections' publications that the principal concern of wardens is not rehabilitation. Their principal concern is confinement without additional violence. Prison overcrowding has exacerbated the violence within Illinois prisons and renewed the Department's concern for confinement first and rehabilitation later.

Some people call prisons classrooms of crime, because recidivism rates are unacceptably high. From these easily made observa-

232. *Id.* at 5-7.

233. *Id.* at 8-9.

234. *Id.* at 10.

235. *Id.* at 19.

236. ALLEN, *supra* note 228, at 25-33.

237. See ANTHONY BURGESS, *A CLOCKWORK ORANGE* (1972) for a literary examination of this question.

238. ALLEN, *supra* note 228, at 61.

tions, too many policymakers assume that all efforts at rehabilitation are and will be unsuccessful. More thoughtful observers recognize that a "coercive cure" is unlikely and that rehabilitative programs should be facilitative not mandatory.²³⁹ The Illinois Department of Corrections should offer rehabilitative programs so the truly motivated inmate can use them to change himself. Participation in those programs, however, should be voluntary and non-participation should not adversely affect release dates.

Rehabilitation occurs only when there is a personal commitment to long term change. If the inmate participates in programs because it "looks good" to the parole board, the personal commitment necessary for "rehabilitation" is missing.²⁴⁰ A coherent sentencing policy must take into account: a) the possibility of a personal decision to change; b) the need to facilitate that commitment; and c) the unlikelihood of a coerced cure. Rehabilitative programs should remain a part of the Illinois prison system, and the State should consider the potential for personal change when sentencing and releasing inmates.

VI. ILLINOIS' PRISON POPULATION AND COSTS: AN OVERVIEW

From 1920 through 1977, Illinois' prison population remained relatively static, ranging from 5,000 to 10,000 inmates,²⁴¹ even though the State's general population increased from 6.5 million to approximately 11.3 million during the same period.²⁴² Illinois' prison population, however, increased drastically after 1977. Between 1983 and 1992, Illinois' total adult and juvenile prison population rose from 26,001 to 55,489.²⁴³ Contributing to the growth rate were consecutive 20.9 percent and 19.1 percent adult prison population explosions in fiscal years 1989 and 1990, the nation's highest rate for those periods.²⁴⁴ This tremendous increase in the prison population over the past fourteen years was accompanied by an increase in the State's general population of less than one percent.²⁴⁵ The Department of Corrections predicts a 60.7% growth rate in the adult population (18,463 inmates) by the year 2000.²⁴⁶ This policy of imprisoning a vastly larger number of persons can only be explained by Illinois' sentencing "reform."

239. *Id.* at 83.

240. *Id.* at 82-84.

241. TRANSITION PAPER, *supra* note 3, at 1.

242. THE WORLD ALMANAC AND BOOK OF FACTS 1992 74-75 (Mark S. Hoffman ed., 1991) [hereinafter WORLD ALMANAC].

243. COMPTROLLER'S MONTHLY FISCAL REPORT, *supra* note 4, at 3.

244. *Id.*; TRANSITION PAPER, *supra* note 3, at 1.

245. WORLD ALMANAC, *supra* note 242, at 74-75.

246. COMPTROLLER'S MONTHLY FISCAL REPORT, *supra* note 4, at 4.

As noted in an earlier section,²⁴⁷ Illinois' sentencing policy underwent three major transformations during the second half of this century: the 1961 Code, the Unified Code of 1973, and the Class "X" Sentencing Reform of 1977. Of these three changes, only the final one, the sentencing reform of 1977, had any meaningful impact on the prison population. The 1977 law, which imposed determinate sentencing, abolished parole, and increased felony and mandatory sentences, marked the beginning of Illinois' prison population explosion.

State spending for corrections over the past ten years exemplifies this growing phenomenon. The Department of Corrections was the fifth largest spender of General Revenue Funds in fiscal 1992.²⁴⁸ The \$565.5 million spent by corrections in fiscal 1992 was \$321.8 million more than used by the same department in fiscal 1983.²⁴⁹ Spending in five of the past ten years showed double digit percentage increases.²⁵⁰ The Capital Development Fund ("C.D.F.") also contributed substantial funds to finance the massive prison expansion program.²⁵¹ Over the past ten years, \$541.6 million of C.D.F. monies were used to build and expand new prisons.²⁵² After all of this, Illinois' correctional facilities still cannot keep pace with its ever-increasing prison population.

From fiscal 1983 to fiscal 1992, the number of individuals in corrections custody or under corrections supervision increased more than twofold, from 26,001 to 55,489.²⁵³ During this same time period, the number of individuals incarcerated in adult institutions increased from 13,310 to 28,720.²⁵⁴ Of the 55,489 individuals under the control of the Illinois Department of Corrections at the end of fiscal 1992, 52,775 (95.1%) were in adult programs. Of this figure, 28,720 (51.7%) were in adult correctional centers, 1,013 (1.8%) in community correctional centers, 699 (1.3%) under electronic monitoring and 22,343 (40.3%) under parole supervision.²⁵⁵ Although Illinois experienced a massive correctional facilities expansion during these

247. See *supra* notes 16-105 and accompanying text for an overview of Illinois' experience with sentencing policies.

248. COMPTROLLER'S MONTHLY FISCAL REPORT, *supra* note 4, at 2. The state agencies which used more general funds were the Department of Public Aid, the State Board of Education, state universities and the Department of Mental Health and Developmental Disabilities. *Id.*

249. *Id.* at 1.

250. *Id.*

251. *Id.* The Capital Development Fund receives contributions from bond sales for use in capital projects. *Id.* at 2.

252. COMPTROLLER'S MONTHLY FISCAL REPORT, *supra* note 4, at 2.

253. *Id.* at 3. This figure does not include those individuals held in the state's 93 county jails, which had an average daily population of 11,944 in fiscal 1991. *Id.*

254. *Id.* at 3.

255. *Id.* The remaining 2,714 individuals are in juvenile programs. *Id.*

ten years, prison crowding and inmate unit costs have increased while staff/prisoner ratios and the number of single cell inmates have decreased.

In fiscal 1983, the adult prison population was 13,735 in facilities rated for a capacity of 13,518 (102% of rated capacity).²⁵⁶ During the next ten years, the rated capacity for Illinois' correctional facilities increased to 24,215, including community correctional centers and electronic monitoring programs.²⁵⁷ This includes six newly constructed facilities which have been built but are not open, due to the fiscal crisis.²⁵⁸ At the end of fiscal 1992, the number of adult inmates in custody grew to 30,432 raising the number of inmates to rated capacity to 126%.²⁵⁹ The Department of Corrections' inmate annual costs for adult prisoners also rose from \$13,252 to \$15,716.²⁶⁰ Although the number of staff personnel increased 87.4%, from 3,575 to 6,700, during this ten year period, the staff to inmate ratio decreased to .340, including a security staff to inmate decrease to .240.²⁶¹ Accompanying this decrease was the reduction of single celled inmates from 38% in fiscal 1984 to 27% at the end of fiscal 1992.²⁶² It is not surprising that both the Illinois Department of Corrections and the State Comptroller's Office have laid the blame for the inmate population explosion and its accompanying costs on the 1977 sentencing reforms.²⁶³

Two of the fastest growing groups of adult prisoners in the past decade have been drug offenders and residential burglars. These offenders often receive mandatory prison terms, regardless of the individual's prior criminal history, age or degree of violence involved in the crime.²⁶⁴ There were 534 drug offenders in Illinois prisons at the end of 1983.²⁶⁵ By the end of 1991, this number increased nearly one thousand percent to 5,271.²⁶⁶ Prisoners convicted of residential burglary also account for the drastic increase in the prison population since 1982, when the legislature mandated a

256. COMPTROLLER'S MONTHLY FISCAL REPORT, *supra* note 4, at 4.

257. *Id.*

258. *Id.* at 27.

259. *Id.* at 4.

260. *Id.* at 5.

261. COMPTROLLER'S MONTHLY FISCAL REPORT, *supra* note 4, at 4.

262. *Id.*

263. STATISTICAL PRESENTATION 1991, *supra* note 6, at i; COMPTROLLER'S MONTHLY FISCAL REPORT, *supra* note 4, at 3-4.

264. See 730 ILL. COMP. STAT. 5/5-5-3 (1992) (ILL. REV. STAT. ch. 38, para. 1005-5-3 (1991) (amended 1992) (imposing the applicable minimum term of imprisonment for the conviction of residential burglary or the violation of the Controlled Substance Act).

265. *Id.*

266. STATISTICAL PRESENTATION 1991, *supra* note 6, at i; COMPTROLLER'S MONTHLY FISCAL REPORT, *supra* note 4, at 4.

prison sentence for the crime.²⁶⁷ The number of persons imprisoned for residential burglary has increased from 1,199 to 1,351 in the past nine years.²⁶⁸ These are two examples of crimes, which are often non-violent in nature, but have a penalty of a mandatory prison term with no possibility of early parole, contribute to Illinois' prison population explosion and its accompanying costs. The Illinois Department of Corrections recently projected the growth of the prison population to be 60.7% before the end of the century.²⁶⁹ This projection is based on the current determinate sentencing scheme with its nondiscretionary mandatory sentences and abolition of early parole.²⁷⁰ The only way the legislature can decrease these future costs while providing for the public safety is to modify the "front end" variable of prison population, admissions; the "back end" variable, releases; the conditions of confinement, and alternatives to prison incarceration. To this end and with fiscal responsibility in mind, the authors suggest a modest proposal.

VII. PROPOSAL

Illinois will not achieve a fiscally responsible sentencing policy without first recognizing the divergent, and often competing, interests which control the number of new prison sentences and releases each year. At the "front end," admissions are not controlled by a statewide policy. County prosecutors and judges determine what charges are filed, the guilty pleas which are entered, whether charges will be dropped or reduced and ultimately, what sentence is imposed. Admissions are a function of the discretionary powers of officials with a vested interest in sentencing an individual to prison rather than probation and to longer rather than shorter sentences.²⁷¹ No elected prosecutor or judge wants to be labeled soft on crime and these elected officials control the rate of prison admissions. It is unrealistic to assume these elected officials will propose, let alone implement, a policy which will significantly reduce the number of prison admissions or shorten the length of prison sentences.

The State, not individual counties, bears the expense of the ever increasing prison population. Illinois Department of Corrections spokespersons annually complain that there are too many

267. COMPTROLLER'S MONTHLY FISCAL REPORT, *supra* note 4, at 4.

268. STATISTICAL PRESENTATION 1991, *supra* note 6, at 48.

269. COMPTROLLER'S MONTHLY FISCAL REPORT, *supra* note 4, at 6.

270. *Id.*

271. John Kass & William Recktenwald, *More Jails Called Cure to Killings*, CHI. TRIB., Sept. 5, 1991, § 1, at 1 (reporting that the then-United States Attorney, Fred Foreman, and Cook County State's Attorney, Jack O'Malley, called for more prisons to be built as a cure for the state's murder epidemic and further stated that taxpayers would support the measure).

prisoners, too few guards and not enough money.²⁷² These complaints have fallen on deaf ears. To establish a fiscally sound sentencing policy, the "front end" powers, prosecutors and judges, must be given some leeway to offer probation, electronic monitoring and other alternative sentences in non-violent felony cases. This is particularly appropriate for first time offenders. Yet, year after year, Illinois' sentencing laws have reduced the discretionary powers of prosecutors and judges by mandating prison sentences in non-violent cases.

Since these "front end" elected officials have a vested interest in prison sentences, it is not advisable or necessary to check their discretionary powers by prohibiting electronic monitoring for non-violent first time offenders. By returning discretionary authority to prosecutors and judges, Illinois would reduce the number of prison admissions. However, given the officials' interests in appearing "tough on crime," prosecutors and judges cannot be counted on, alone, to significantly reduce the costs of an excessive and ever growing prison population. Therefore, any sentencing reform which is fiscally responsible must include a release, or "back end" component. Therefore, the authors submit the following three part proposal.

Part one of this proposal suggests changing the statute mandating prison sentences should be changed to permit alternative sentences for non-violent crimes. The Unified Code of Corrections²⁷³ sets out the crimes for which penitentiary sentences are mandatory.²⁷⁴ The list of crimes includes Class X felonies,²⁷⁵ certain forcible felonies,²⁷⁶ residential burglary and various narcotics offenses.²⁷⁷ Class X offenses include certain violent crimes and several narcotics offenses.²⁷⁸ The authors suggest that the General Assembly change the non-violent crimes for which a prison term is currently mandatory, narcotics offenses and residential burglary, to permit the sentencing judge to impose alternative sentences. This proposal does not change the classification of these crimes, that is, the range of years which a judge could impose as a sanction.

272. See Conrad, *supra* note 132, at 1.

273. 730 ILL. COMP. STAT. 5/1-1-1 (1992) (ILL. REV. STAT. ch. 38, para. 1001-1-1 (1991)).

274. See 730 ILL. COMP. STAT. 5/5-5-3 (1992) (ILL. REV. STAT. ch. 38, para. 1005-5-3(c)(2) (1991) (amended 1992) (listing those offenses that have a minimum mandatory term of imprisonment).

275. *Id.*

276. *Id.* The judge must impose a penitentiary sentence, if the offender is convicted of a forcible felony that is related to "the activities of an organized gang."

277. *Id.*

278. See, e.g., 720 ILL. COMP. STAT. 5/12-4.1 (1992) (ILL. REV. STAT. ch. 38, para. 12-4.1 (1991)) (designating heinous battery as a Class X felony).

Rather, the suggestion would change the conditions of confinement to permit probation or other alternative sentences where appropriate.²⁷⁹ Although this proposal may seem soft on crime, the authors submit that this change would be both fiscally responsible and more effective as a weapon in the war on drugs.

Currently, judges have no discretion in many drug sentencing hearings.²⁸⁰ Judges must sentence offenders to prison regardless of the defendant's individual attributes, such as his prior criminal record, age or drug dependency. If judges were permitted to impose alternative sanctions to fit the individual defendant (especially the first time offender), such as drug treatment, electronic monitoring, intensive probation, boot camp or other intermediate sentences,²⁸¹ the financial savings to the State could be substantial. At the same time, the incapacitative effect of electronic monitoring would provide adequate protection to the public.

Alternative sentencing for drug offenders is effective and cost efficient. In Miami, a new program with alternative sentencing for first time drug offenders showed a high success rate. Of the over 1740 individuals who participated in the program, the recidivism rate was only 3% compared to a 33% rearrest rate for similar offenders not in the program.²⁸² If Illinois implemented a similar program, the potential savings for individuals on electronic monitoring, instead of in prison, would be roughly \$10,000 per year per inmate.²⁸³ Moreover, a recent study shows that even where the State pays for the probation and drug treatment of offenders, it saves more money and is more effective than prison sentencing.²⁸⁴

279. See generally Jeffrey N. Hurwitz, Note, *House Arrest: A Critical Analysis of an Intermediate-Level Penal Sanction*, 135 U. PA. L. REV. 771, 772 (1987) (discussing other forms of punishment and rehabilitation).

280. See, e.g., 730 ILL. COMP. STAT. 5/5-5-3 (1992) (ILL. REV. STAT. ch. 38, para. 1005-5-3 (1991) (amended 1992) (listing the drug offenses where the court must sentence the offender to a term of imprisonment).

281. See Norval Morris, *Punishment Without Prison*, CHI. TRIB., Mar. 20, 1992, § 1, at 25. Professor Morris discusses the need for intermediate punishment which he defines as punishment which lies between prison and probation. Intermediate punishment includes community service orders, home confinement, house arrest, halfway houses, boot camps, drug and alcohol treatment, intensive probation and a variety of community-based punishments.

282. Christopher Boyd, *Miami Drug Program Boasts High Success Rate*, CHI. TRIB., May 4, 1992, § 1, at 16 (reporting that the Miami drug program for first time offenders shows a 97% success rate).

283. Compare Jerry Thomas & Andrew Martin, *Electronic Monitoring No Cure-All For Crime*, CHI. TRIB., Nov. 16, 1992, § 1, at 1 (reporting that I.D.O.C. spokesperson Nic Howell states that 5,000 persons have participated in the electronic monitoring program since its inception in 1989 and that the cost of monitoring an inmate electronically is \$5400 per year) with COMPTROLLER'S MONTHLY FISCAL REPORT, *supra* note 4, at 5 (asserting that the I.D.O.C. reports that the annual cost per adult prisoner in 1989 was \$16,462).

284. David Olson & Roger Przybylski, *Potential Savings Could Offset Costs of Drug Treatment for Offenders*, CHI. DAILY L. BULL., Dec. 4, 1991, at 2 (re-

Since many experts already agree that drug treatment, education and drug prevention are better tools in the war on drugs than law enforcement,²⁸⁵ this proposal would provide the judiciary with more effective and less expensive alternatives to incarceration.

Some who analogize drugs with violence might criticize this proposal as coddling criminals and not adequately protecting the public. The authors respond to this argument in two ways. First, the proposal permits alternatives to incarceration *only* for non-violent offenders. The proposal does not affect cases where a drug offender or residential burglar uses a weapon or otherwise threatens the use of violence. Further, there are existing statutes which prosecutors may use to upgrade these offenses to mandatory prison terms where violence or the threat of violence is present.²⁸⁶ Second, the proposal does not change the classification for these selected offenses. Thus, the sentencing judge may still sentence an individual to the same term which was previously permitted by law. This has a dual advantage. It places discretion back into the hands of the judiciary in carving out the appropriate sentence for an individual while muting the political concerns of legislators who do not wish to be labeled "soft on crime."

Part two of this proposal suggests expanding the judiciary's ability to impose intermediate and alternative sanctions. Judges currently may sentence an individual to imprisonment, periodic imprisonment, probation, impact incarceration, and (under very limited circumstances) electronic monitoring.²⁸⁷ However, these

printed from Illinois Criminal Justice Information Authority, The Compiler (comparing the cost of drug treatment and probation with prosecution and prison terms, and concluding that money can be saved by utilizing a drug treatment program).

285. See Rob Karwath, *Study Links High Dropout Rate to State Prison Overcrowding*, CHI. TRIB., Sept. 15, 1991, § 2, at 3 (asserting that a direct correlation exists between a state's high school dropout rate and its incarceration rate; for example, Minnesota has the highest graduation rate, and the second lowest incarceration rate, while the District of Columbia has the lowest graduation rate and the highest incarceration rate); see also Joseph B. Treaster, *Some Think the 'War on Drugs' is Being Waged on Wrong Front*, N.Y. TIMES, July 28, 1992, at A1 (citing several drug experts who opine that treatment, education and drug prevention are much more successful than law enforcement in the war on drugs).

286. See 720 ILL. COMP. STAT. 5/33A-1, 5/33A-3 (1992) (ILL. REV. STAT. ch. 38, paras. 33A-1, 33A-3 (1991)) (asserting that a person who commits a felony while armed with a dangerous weapon, such as a firearm or a dangerous knife, commits a Class X felony).

287. See 730 ILL. COMP. STAT. 5/5-7-1 (1992) (ILL. REV. STAT. ch. 38, para. 1005-7-1 (1991) (amended 1992) (imposing periodic imprisonment and electronic monitoring in conjunction with periodic imprisonment); 730 ILL. COMP. STAT. 5/5-8-1 (1992) (ILL. REV. STAT. ch. 38, para. 1005-8-1 (1991)) (requiring incarceration); 730 ILL. COMP. STAT. 5/5-8-1.1 (1992) (ILL. REV. STAT. ch. 38, para. 1005-8-1.1 (1991)) (imposing impact incarceration); 730 ILL. COMP. STAT. 5/5-6-1 (1992) (ILL. REV. STAT. ch. 38, para. 1005-6-1 (1991)) (describing the court's power to impose the sentence of probation).

sentences are permissible for limited classifications of offenses. The authors propose that the legislature permit the judiciary to impose these sanctions, especially home confinement with electronic monitoring, in a more expansive manner. This would allow judges to sentence an individual to electronic monitoring and home confinement in lieu of or in combination with a prison sentence. For example, where a sentencing judge desires to incapacitate an individual for two years, he could sentence the individual to one year in prison and one year electronic monitoring instead of two years in prison. The savings would be substantial both in reducing incarceration costs (at a rate of approximately \$10,000 per individual per year) and in preserving precious prison space for more deviant offenders. This suggestion will also alleviate the need for building new prisons, thus lowering construction costs.

Parts one and two of this proposal provide methods to deal with the "front end" variable in prison overcrowding, admissions. Part three of the proposal suggests a means to control the State's prison population if admissions continue to increase. The authors propose that the General Assembly authorize the governor to declare a state of emergency when the prison population reaches 98% of its rated capacity. If the governor declared a state of emergency, the director of the Department of Corrections would be authorized, in conjunction with the Prisoner Review Board, to release certain inmates to electronic monitoring. Several states already have similar statutes which have proven successful.²⁸⁸ Decreasing the overcrowding problem can not be overemphasized. Illinois has built fourteen new prisons in the last fifteen years, but even the Department of Corrections concedes that Illinois cannot build its way out of the overcrowding problem.²⁸⁹ If the sentencing changes proposed in parts one and two were not effective in reducing the prison population, part three of the proposal would ensure the availability of a safety valve for the Department of Corrections to control overcrowding. The authors also renew their proposal to return to the Prisoner Review Board, the power to parole inmates who have served the mini-

288. See, e.g., Michigan's Prison Overcrowding Emergency Powers Act, MICH. COMP. LAWS ANN. §§ 800. 71-79 (West 1982 & Supp. 1992); FLA. STAT. ANN. § 944.598(3) (West 1985 & Supp. 1993) (authorizing the release of inmates serving sentences of three years or less under certain emergency situations); see also Bleich, *supra* note 7, at 1168-70 (discussing various states' plans to deal with prison overcrowding); see generally Mark Dykstra, *Apart from the Crowd: Florida's New Prison Release Program*, 14 FLA. ST. U. L. REV. 779 (1986) (describing various remedies to prison overcrowding).

289. See Conrad, *supra* note 132, at 1; see also William Raspberry, *Makes the Case for the Futility of Imprisonment*, CHI. TRIB., May 20, 1991, § 1, at 11 (comparing the incarceration rate of the United States, which doubled during the 1980's with no decrease in the crime rate, with Germany and England, which both decreased their prison rates substantially in the 1980's with no increase in crime rate).

mum statutory prison sentence for their offense classification. This proposal, made in the first of these articles, would not entitle anyone to parole, but it would allow the Prisoner Review Board to release inmates because of a demonstrated potential for useful citizenship or to alleviate overcrowding.

CONCLUSION

Illinois cannot end the escalating cost of imprisonment but, to a significant degree, it can slow the overall cost to the taxpayers. By returning discretionary powers to the prosecutors and judges who control the rate of admissions, Illinois can slow down the admissions rates. There are non-violent offenses which currently carry mandatory prison terms upon conviction. Allowing electronic monitoring, home confinement or other alternatives to prison sentences for non-violent first offenders, will reduce the number of new prison sentences without jeopardizing public safety. Taking this modest step in conjunction with a release component will cap Illinois' prison population. A shift in sentencing which takes one year off prison sentences and switches that year to electronic monitoring can save hundreds of millions of tax dollars in less than a decade. Changing prison sentences to electronic monitoring saves approximately \$10,000 per year per inmate.²⁹⁰ There are more than 28,000 inmates in Illinois who are serving terms of imprisonment (excluding prisoners sentenced to death or to life without parole). If one year of each of those prison sentences was changed to electronic monitoring, Illinois would save in excess of \$280 million over the next 5 to 10 years. Whether this switch is at the "front end," the "back end" or a combination of the two is less important than the saving it will ensure.

Furthermore, if Illinois follows this proposal it may be able to lease the four prisons that have been built but are unoccupied due to the lack of funds.²⁹¹ By leasing these facilities to other states or to the federal government, Illinois can put people to work, as guards and other correctional staff, and can generate a profit from these leased facilities.

The Illinois Department of Corrections estimates that under the present sentencing policies there will be an increase in prison population of over sixty percent before the end of the century. The time for change is now and the only viable alternative is to place fiscal responsibility as the cornerstone of a new sentencing policy.

290. COMPTROLLER'S MONTHLY FISCAL REPORT, *supra* note 4, at 27.

291. See Ramsey, *supra* note 105, at 1 (asserting that the I.D.O.C. budget for 1991-1992 will delay the opening of Rend Lake Prison and work camps in Clayton, Duquoin, Paris and Green counties).

