
Robert P. Schuwerk

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ILLINOIS' EXPERIENCE WITH DETERMINATE SENTENCING: A CRITICAL REAPPRAISAL
PART 2:* EFFORTS TO IMPOSE SUBSTANTIVE LIMITATIONS ON THE EXERCISE OF JUDICIAL SENTENCING DISCRETION

Robert P. Schuwerk**

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* This article is the second of two articles by Professor Robert P. Schuwerk on Illinois' determinate sentencing. The first article appeared in the Volume 33, Summer 1984 issue.

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INTRODUCTION

This article is the second in a series discussing the evolution and application of Pub. Act No. 80-10991 (Act), Illinois' determinate sentencing law.2 The earlier article showed that the Act, also known as the Class X Bill,3 adopted two broad approaches to rationalizing the process by which sentences were bargained for, imposed, and served.4 The first approach was to place meaningful structural limitations on the exercise of discretion by prosecutorial, judicial, and correctional officials.5 The second was to devise direct substantive limitations on the exercise of sentencing discretion by the judiciary.6

The first article also reviewed the effectiveness of the structural controls just referred to, concluding that in the main those controls had been circumvented or invalidated.7 As a result, the Act's goal of fair and proportionate criminal sentences has been imperiled. Numerous remedies for that situation were proposed.8 Nevertheless, unless and until those remedies are implemented, the rationality of criminal sentences is dependent almost entirely on how the judiciary uses its authority as granted and limited by the Act's substantive sentencing provisions. This article examines that subject.

A detailed historical treatment of the evolution of the Act's substantive sentencing provisions9 will show that they were deliberately kept vague, subtle, and indirect,10 principally because of a fundamental political compromise that paved the way for the Act's passage. This compromise consisted of an agreement by the proponents of Governor Thompson's legislative package to accept a detailed set of rigorous structural controls on sentencing discretion. In return, the Governor's opponents agreed to accept substantive sentencing limitations that, at least facially, were hardly confining.11

Thus, the Act's substantive limitations on sentencing discretion, when viewed in isolation, were poorly suited to the task of providing the necessary

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3. Class "X" was a new felony crime category created by the bill for non-capital crimes that were to be punished most severely. Previously, Illinois had had four felony classes (along with murder, which was a separate class), ranging from class 1 (most serious) through class 4 (least serious). Most class X felonies had been class 1 felonies under prior laws. See infra notes 36-38 and accompanying text.
4. See Schuwerk, supra note 2, at 632-35.
5. Id. at 634, 640-43, 668-73, 696-707, 715-19.
6. Id. at 634-35.
7. Id. at 651-57, 673-707, 719-33.
8. Id. at 657-68, 708-14, 734-39.
9. See infra text accompanying notes 22-124.
10. See infra text accompanying notes 25-34, 52-113.
11. See infra text accompanying notes 47-113.
guidance to sentencing judges. Partly for that reason, the new law's efforts
to limit or standardize the exercise of judicial sentencing discretion have not
enjoyed a very great measure of success. Moreover, the Act's lack of clarity
and specificity was compounded by irrational features of the law itself and
by a number of judicial decisions vitiating most of its few explicit substantive
limitations on sentencing discretion.

The above assertions will be buttressed by an extensive analysis of judicial
interpretations and applications of the Act's provisions relating to natural
life sentences, consecutive sentences, and sentences for extended

12. See infra text accompanying notes 77-119, 130-63, 364-89, 519-49.
14. See infra text accompanying notes 125-216.

This article will not attempt to treat the imposition of the death penalty in Illinois, even
though the topic is integrally related to the subject of sentencing disparity and richly deserves
a detailed review. The reasons for not doing so are entirely pragmatic: An analysis of the vast,
complex subject of capital sentencing would appreciably expand an already lengthy article.

Nonetheless, a few observations are in order. Illinois is currently laboring under a death
penalty statute that, at varying times and in varying cases, a majority of the Justices of the Illinois Supreme Court has concluded is unconstitutional because it delegates undue discretion
to prosecutors. See People v. Lewis, 88 Ill. 2d 129, 179-210, 430 N.E.2d 1346, 1370-85 (Simon, J., dissenting), cert. denied, 456 U.S. 1011 (1982); People ex. rel. Carey v. Cousins, 77 Ill. 2d 531, 544-61, 397 N.E.2d 809, 816-24 (1979) (Ryan, J., dissenting) (Justice Ryan was joined in his dissent by Chief Justice Goldenhersh and Justice Clark). In a number of cases, arbitrary
exercises of that discretion have had to be corrected by the supreme court. See, e.g., People v. Walker, 84 Ill. 2d 512, 520-26, 419 N.E.2d 1167, 1173-76 (1981) (unconstitutional for state to seek death penalty after defendant withdrew from plea bargain for 60-year sentence), cert. denied, 104 S. Ct. 1297 (1984); id. at 527-33, 419 N.E.2d at 1176-79 (Ryan, J., concurring).

The prosecutorial actions reported in Walker highlight that the decision to pursue a death sentence is fraught with potential for whim and caprice. It is a decision made in secret, and requires neither explanation nor justification. In all but the rarest instances, the decision is not subject to review. While the offenders selected for the death penalty must meet certain criteria, see Ill. Rev. Stat. ch. 38, § 9-1(b) (1983), prosecutors frequently decide not to pursue a death sentence in cases that do qualify. No additional criteria have ever been formulated to govern the choice between pursuing or not pursuing that option.

Finally, the sentencing process in death penalty cases is also troublesome. To begin with, Illinois permits "death qualified" juries to decide the guilt or innocence of the accused, despite mounting evidence that such juries are conviction-prone. See People v. Szabo, 94 Ill. 2d 327, 353-57, 447 N.E.2d 193, 205-07 (1983); Lewis, 88 Ill. 2d at 146-47, 430 N.E.2d at 1354. Moreover, the supreme court has refused to give relief from what appears to be a pervasive practice of excluding racial minorities from juries in both capital and noncapital cases. See People v. Payne, 99 Ill. 2d 135, 136-39, 457 N.E.2d 1202, 1203-04 (1983), cert. denied, 105 S. Ct. 447 (1984); People v. Gaines, 88 Ill. 2d 342, 358-59, 430 N.E.2d 1046, 1054, cert. denied, 456 U.S. 1001 (1982); see also Williams v. Illinois, 104 S. Ct. 2364 (1984) (denial of certiorari in three Illinois cases raising systematic exclusion issue; Justice Marshall dissented); People v. Moore, Ill. 2d, 463 N.E.2d 728 (1984) (denial of defendant's petition for leave to appeal raising same issue; Justice Simon dissented).

Beyond these problems, the sentence in death penalty cases is not given any significant
guidance concerning what factors should be deemed sufficient to override a finding that a
defendant could be sentenced to death. See Lewis, 88 Ill. 2d at 143-46, 430 N.E.2d at 1352-54 (court will consider all relevant factors although statute lacks individualized focus); People v.
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regular terms. Limitations on the availability of time, resources, and data precluded an exhaustive empirical analysis of those subjects. A review of approximately one thousand cases that have arisen since the Act's effective date, however, presents the overall picture that trial judges frequently exercise their sentencing powers in an arbitrary and inconsistent fashion. Moreover, appellate review under the prevailing “abuse of discretion” standard has been completely ineffective in curbing such abuses.

Brownell, 79 Ill. 2d 508, 537-38, 404 N.E.2d 181, 196 (1979) (presence of mitigating factors does not preclude imposition of death penalty), cert. dismissed, 449 U.S. 811 (1980). Indeed, the jury—the true sentencer in capital cases where the defendant does not request sentencing by the court—can render its decision without reviewing any sort of evaluation of the defendant: A pre-sentence report is not required in capital cases. See Gaines, 88 Ill. 2d at 372-73, 430 N.E.2d at 1061 (judge not required to have pre-sentence report prepared before imposing sentence in capital case; jury’s finding that there were no mitigating factors that would preclude imposition of the death penalty obliged him to impose death sentence).

Although the supreme court conscientiously reviews all death penalty cases, considering not only errors of law but also those of proportionality, see People v. Glecker, 82 Ill. 2d 145, 411 N.E.2d 849 (1980), the court is probably not equipped institutionally to bring order to such a system, if indeed that can be done at all. See Dix, Appellate Review of the Decision to Impose Death, 68 Geo. L.J. 97 (1979).

This article makes no systematic effort to discuss the judiciary’s use of probation. Reasons for this include the relative dearth of reported cases in which probation was imposed and the even fewer number in which a defendant claimed that he or she was erroneously denied probation. Based on the limited information available, however, probation is not being withheld inappropriately with any great degree of frequency. See Schuwerk, supra note 2, at 698-99; infra notes 60, 75.

A thorough empirical study of sentencing practices in Illinois would be most welcome, as would a number of changes in the manner in which aggregate sentencing decisions are reported. The latter subject was treated briefly in Schuwerk, supra note 2, at 669, 695-701.

The author also realizes that a number of risks inhere in the methodology this article adopts—criticizing particular sentencing decisions (or classes of such decisions) based on appellate opinions—that would be largely obviated by an empirical approach. For one, a danger of bias exists in selecting the cases to be discussed, such as representing an exceptional case as typical. For another, there is the possibility that a decision which seems unsupportable based on the factors the appellate court chose to discuss, might be entirely defensible based on matters of record that were not mentioned in the reviewing court’s opinion.

The author has attempted to avoid these dangers to the extent possible by routinely acknowledging the existence of sound decisions respecting particular issues and by selecting cases that give every indication of providing a complete treatment of the principal factors the trial court thought pertinent to sentencing. If errors have occurred despite these precautions, the author extends his apology to the judges and courts involved.


20. See, e.g., People v. La Pointe, 88 Ill. 2d 482, 492, 431 N.E.2d 344, 348 (1982) (the defendant in this case is referred to as LaPointe by the Illinois appellate court; this article adopts the Illinois Supreme Court’s spelling of his name); People v. Perruquet, 68 Ill. 2d 149, 153, 368 N.E.2d 882, 883 (1977).
The net effect of this approach to appellate review has been to treat sentences that are not literally prohibited by the Act as being virtually unassailable, even where they fly in the face of the Act's overall concern for fairness, proportionality, and consistency in sentencing. This persistent transformation of questions of propriety into questions of judicial power or prerogative is both revealing and profoundly disturbing because, if this judicial attitude is immutable, the possibility of meaningful reform of sentencing practices is very much in doubt. At the very least, the only reforms with any chance of success would be stricter and more explicit limitations upon judicial sentencing discretion.

I. THE EVOLUTION AND CONTENT OF THE ACT'S SUBSTANTIVE CONTROLS ON JUDICIAL SENTENCING DISCRETION

A. The Early Reform Legislation

The most fundamental reforms proposed by the Act's early legislative predecessors were the institution of a system of determinate sentences and the abolition of parole. These measures were undertaken in an effort to lessen what was viewed as the arbitrary and undue exercise of discretion by prosecutors, judges, and correctional officials in the bargaining for, imposing, and serving of criminal sentences. Determinate sentences were seen as desirable primarily because they reduced the amount of discretion vested in correctional officials through the parole release process. Determinate sentences, however, increased the significance of the original sentencing decision, because the term imposed would be fully served less good-time credit earned. Recognizing this, proponents of the early legislation realized that it would be necessary to confine judicial sentencing discretion to some extent. Not wishing to prevent the imposition of just sentences through unduly restrictive guidelines, proponents of the early bills generally adopted an approach of structuring rather than limiting the exercise of discretion.

22. See House Amendment No. 1 to H.B. 1500, 80th Ill. Gen. Assembly, 1977 Sess.; S.B. 1885, 79th Ill. Gen. Assembly, 1976 Sess. Before the Act was adopted, Illinois had an indeterminate sentencing system, which allowed a judge to impose a minimum term and a maximum term on an offender with the release date within that period determined by the former Parole and Pardon Board. See ILL. REV. STAT. ch. 38, § 1003-3-1 to 1003-3-13 (1975). Determinate sentences call on judges to impose fixed terms of years on those offenders sentenced to prison, who then must serve their entire sentences, less any earned good-conduct credits. Under the determinate sentencing system, parole as a release mechanism is abolished. See ILL. REV. STAT. ch. 38, § 1003-3-3(b) (1983).
23. For a discussion of the main purposes of the legislation, see Schuwerk, supra note 2, at 635-38, 640-42, 668-73, 695-702, 715-19.
24. Id. at 637-38.
25. The Act attempted to insure that sentencing decisions were made in a reasoned, informed
 Nonetheless, it was believed that some substantive limits on judicial sentencing discretion were needed as well. This discretion was limited in three ways. First, this early legislation adopted a “least restrictive alternative” approach to sentencing, in which probation became the preferred disposition of all offenses for which it was authorized. Relatively narrow ranges of prison sentences were authorized, with more severe sanctions reserved for those offenders who clearly were not suitable candidates for some lesser penalty. Second, in an effort to bolster the “least restrictive alternative” sentencing principle and in order to provide general guidance to judges in sentencing matters, this early legislation also specified the more important mitigating and aggravating factors that sentencing judges should consider.

26. See infra text accompanying notes 52-68.
27. See Pub. Act No. 80-1099, § 3, 1977 Ill. Laws 3264, 3302 (codified at ILL. REV. STAT. ch. 38, § 1005-6-1(a) (1983)). This reversed prior law, under which probation was to be denied unless certain conditions were satisfied. See ILL. REV. STAT. ch. 38, § 1005-6-1(a) (1977).
28. Regular term prison sentences were intended to be the preferred incarcerative sanction under these bills, with extended term or consecutive sentences reserved for narrowly drawn classes of especially aggravated offenders. See Schuwerk, Commentary on Determinate Sentencing Bill 33-35, 51-54 (1975) [hereinafter cited as Proposal Commentary]; Schuwerk, Technical Paper—Comments on Proposed Determinate Sentencing Bill of the Subcommittee on Adult Corrections of the Illinois House Judiciary II Committee 32-34 (1977) [hereinafter cited as Technical Paper]. For example, House Amendment No. 1 to H.B. 1500, 80th Ill. Gen. Assembly, 1977 Sess., authorized extended term sentences for certain offenders found to “present a continuing risk of physical harm to the public.” Id. ¶ 5-5-3.2(a)(2) at 40. It also mandated such sentences for certain “repeat offender[s] whose imprisonment for an extended term is necessary to protect the public.” Id. ¶ 5-5-3.2(a)(3) at 40-43.
That bill took the same sort of approach to imposing consecutive sentences. It adopted a general rule flatly prohibiting sentences for offenses “which were committed as part of a single course of conduct during which there was no substantial change in the nature of the criminal objective.” Id. ¶ 5-8-4(a) at 56-57. It then went on, however, to require consecutive sentences where “one of the offenses . . . was a class 1 felony and extreme violence or severe bodily harm occurred.” Id. Thus, these early proposals approached extended term and consecutive sentences as sanctions reserved for the most violent or incorrigible offenders. While such sentences were to be relatively rare, it was expected that they would be imposed quite consistently when the requisite qualifying circumstances were present. See Schuwerk, Prepared Statement delivered to the Adult Corrections Subcommittee 3-7 (Dec. 1, 1976) [hereinafter cited as Schuwerk Statement].
in imposing sentences. Finally, the early bills limited judicial sentencing discretion by significantly narrowing the ranges of available regular term, extended term, and consecutive prison sentences for given offenses.

Proponents of the early bills did not view these substantive limitations as the most important aspects of the controls on judicial sentencing discretion, nor were those limitations well designed to serve that end. Instead, it was anticipated that various structural controls on the imposition and review of sentences would prove to be the major source of such restraints. Structural controls, coupled with increased information on sentencing practices, were expected to result in either a common law of sentencing or, better still, a detailed set of sentencing guidelines that would flesh out the bill's skeletal sentencing scheme.

B. The Original "Class X" Legislation

About the time that an early bill, House Bill (H.B.) 1500, was securing passage in the Illinois House of Representatives, Governor Thompson caused an eight-bill package of criminal justice legislation to be introduced in the Illinois Senate. The Governor's package had a very different approach to the use of determinate sentences and the need for sentencing reform. The Governor's principal bill, Senate Bill (S.B.) 1272, proposed that only those convicted of murder or seven other felony offenses receive determinate sentences. Those seven felonies were to be reclassified into a new felony class—"class X"—for which a mandatory six-year minimum prison term was created. The Senate bill also abolished parole for persons convicted of murder and class X offenses, with release possible only after they had served their full sentences less time off for good behavior.
S.B. 1272 did very little to address the concerns of the proponents of H.B. 1500 and its predecessors regarding the fairness of the sentences imposed upon and served by criminals in Illinois. Significantly, the Senate bill omitted all of the structural and substantive limitations on the exercise of sentencing discretion by prosecutors, judges, and correctional officials contained in the House bill. Proponents of S.B. 1272 were interested in determinate sentences only to the extent that such sentences would offer possibly greater deterrents to certain classes of potential offenders.

Fueled by philosophical differences and political considerations, the debate between the proponents of the House and Senate bills became exceptionally heated, even by the General Assembly's normally boisterous standards. No useful purpose would be served in recounting the byzantine, bizarre, and frequently dubious parliamentary maneuvers indulged in by all sides. The upshot of the whole affair was that H.B. 1500 was interred in the Senate Judiciary II Committee, while components of the Governor's Senate bill package either suffered a similar fate in the House Judiciary II Committee or were defeated on procedural grounds on the House floor. Thus, the 1977 regular legislative session ended in tumult with no sentence reform legislation passed.

C. The Compromise Leading to the Act

Shortly after the close of the 1977 regular legislative session, calls were issued for a special session to deal with criminal justice issues. Both Governor

41. See id.
42. Statements issued by Governor Thompson's office contemporaneously with the introduction of this legislative package made this point. Apparently, however, there was no concern at that juncture over how to select a fair sentence for these types of offenders. One example of the bill's cavalier attitude in this respect was its failure to provide any maximum sentence for murder or class X felonies, coupled with its failure to provide guidelines or restraints on the selection of an appropriate sentence. S.B. 1272, 80th Ill. Gen. Assembly, 1977 Sess., ¶ 5-8-1.1(c)(1), (2) at 17.
43. The author yields to temptation in mentioning one such instance that occurred when the Governor's crime package was introduced in the Senate and referred to the Senate Judiciary II Committee. That body passed all eight bills without any prior hearing. Instead, proponents and opponents were heard by the committee only after the bills were voted out. See Ill. S. J., 1st Sess., 52 (1977) (remarks of Sen. Rock); id. at 52-53 (remarks of Sen. Netsch).
44. The actual history of the bill is a bit more complicated. Upon referral to the Senate Judiciary II Committee, H.B. 1500, as amended, was further amended by Senate Amendment No. 1 into a form identical to the Governor's proposal. See 1st. S. J., 1st Sess., 3246-3252 (1977). It was voted out of committee, as amended, but eventually was returned to the committee. See Legislative Synopsis and Digest, 80th Ill. Gen. Assembly, 1977 Sess., at 1975.
45. This was the fate of Senate Amendment No. 1 to S.B. 165, 80th Ill. Gen. Assembly, 1977 Sess., a Republican sponsored revision of S.B. 1272 which included the class X proposal largely as set out in the latter bill, along with a modified habitual-offender provision and a number of other recommendations from the Governor's package. The amended bill passed the Senate, was sent to the House, and was referred to the House Judiciary II Committee where a "do pass" motion failed.
46. After S.B. 165 failed to be reported out of the House committee, one final effort was
Thompson and proponents of H.B. 1500 presented legislative proposals in the special session. The principal bill in the Governor's package, S.B. 11, was accompanied by a detailed message from him to the members of the General Assembly explaining why his legislation was preferable to H.B. 1500. The proponents of H.B. 1500 countered with new H.B. 15, a bill that was hardly different from their earlier proposal. Once the House and Senate bills had been introduced, a small group of key supporters of each bill began intense efforts to reach a compromise. Although not without their difficult moments, these efforts began bearing fruit almost immediately.

All three proposed areas of substantive control of judicial sentencing discretion—the principle of "least restrictive alternative" sentencing, the statutory specification of factors in mitigation and aggravation, and the narrowing of overall sentencing ranges—were in sharp dispute between the proponents of H.B. 15 and S.B. 11. Resolution of these differences was no easy matter. Like most hard-bargained legislative compromises, the Act approached and resolved the three issues in a somewhat ambiguous and inconsistent fashion.

The most plausible reading of the Act, however, indicates that it embodied a legislative compromise in which the proponents of S.B. 11 agreed to accept "least restrictive alternative" sentencing, some additional limitations on a number of proposed factors in aggravation, a substantial narrowing of the available sentencing ranges for more serious felonies, and a plethora of structural controls designed to make the sentencing process more rational and accountable. In return, the supporters of H.B. 15 agreed to accept a bill that, on its face, left extremely broad substantive sentencing discretion in judicial hands, especially regarding extended term sentences and consecutive sentences for more serious felonies. By and large, only the Act's structural controls and substantive principles of general applicability stood
as potential checks on judicial discretion. The materials that follow trace out those developments in detail.

1. The Principle of "Least Restrictive Alternative" Sentencing

A principal aim of the proponents of H.B. 15 and its predecessors was to have penal sanctions selected on a "least restrictive alternative" basis. One motivation for this position was a belief that such an approach would promote consistency, proportionality, and fairness in sentencing. A second motivation was a belief that more severe penal sanctions normally serve no rehabilitative purpose and, thus, should be reserved for situations in which punishment was properly the overriding sentencing goal. The proponents of S.B. 11, however, were of a different view. They saw incarceration—even lengthy incarceration—as the preferred sentencing alternative, with probation to be grudgingly doled out only to the particularly deserving.

Determining how these conflicting views were resolved requires a review of the Act's provisions relating to probation as a sentencing alternative and the application of various factors in aggravation in the sentencing process. An examination of those provisions shows that the Act rejected S.B. 11's proposals in favor of the "least restrictive alternative" approach called for by H.B. 15.

a. The Availability of Probation

H.B. 15 and S.B. 11 took polar-opposite positions as to the availability of probation. H.B. 15 proposed that probation be granted unless it was either flatly prohibited by the Illinois Unified Code of Corrections (Code) or found inappropriate by the court for certain reasons. Thus, probation would be the presumptively appropriate sentence when available. S.B. 11, on the other hand, required that probation be refused unless certain preconditions were met. Moreover, the particular preconditions of S.B. 11 included not only two of the three criteria then called for by Illinois law, but also contributions to this effort.

52. Proposal Commentary, supra note 28, at 32-34; Schuwerk Statement, supra note 28, at 5-7.
53. Proposal Commentary, supra note 28, at 32-33; Schuwerk Statement, supra note 28, at 3-5.
54. See S.B. 11, 80th Ill. Gen. Assembly, 1st 1977 Spec. Sess., ¶ 5-6-1(a) at 48-49 (probation to be denied unless certain very stringent conditions were met); id. ¶ 5-5-3.2(a) at 46 (regular term factors in aggravation to serve as reasons to impose lengthy sentences); id. ¶ 5-5-3.2(b)(4) at 46-47 (extended term sentences to be imposed on general deterrence rationale); see also Class X Analysis, supra note 48, at 32, 34-35, 37 (urging that extended term provisions of H.B. 1500 were too restrictive).
57. See Ill. Rev. Stat. ch. 38, § 1005-6-1(a)(1), (3) (1975) (imprisonment to be utilized as sentencing option where necessary for the protection of the public or where probation or conditional discharge would deprecate the seriousness of the offender's conduct and be inconsistent with the ends of justice); S.B. 11, 80th Ill. Gen. Assembly, 1st 1977 Spec. Sess., ¶ 5-6-1(a)(1), (2) at 48-49.
the requirements that "the character and attitude of the defendant indicate that he is unlikely to commit another crime" and that "the defendant is particularly likely to comply with the terms of a period of probation." The Act resolved this conflict by making probation available on precisely the terms proposed in H.B. 15. This elevation of probation to a preferred disposition for all probationable offenses reversed prior Illinois law in that regard, but its significance extends far beyond that fact. When that reversal is read in conjunction with the Act's preference for shorter regular terms sentences and its failure to mandate either extended term or consecutive sentences for any offenders other than three-time class X felons, the conclusion is inescapable that in adopting the Act the General Assembly embraced the principles of "least restrictive alternative" sentencing.

b. The Use of Factors in Aggravation of Regular Term Sentences

One major difference between S.B. 11 and H.B. 15 lay in the uses each would make of factors in aggravation of regular term prison sentences. The manner in which those differences were resolved provides additional support for the proposition that the Act adopted a "least restrictive alternative" sentencing principle. Under H.B. 15, the presence of factors in aggravation of regular term sentences weighed in favor of imposing a term of imprisonment rather than probation, but did not mandate a prison term unless otherwise specified. Under S.B. 11, however, the presence of even a single factor in aggravation would preclude probation and, further, would mandate a more severe regular term prison sentence. The clear thrust of the Senate

61. This reversal of prior law has been recognized by the supreme court. See People v. Cox, 82 Ill. 2d 268, 412 N.E.2d 541 (1980) (probation not to be denied unless statutory basis for doing so is apparent from record). Denying probation on a general deterrence rationale also appears widely recognized as inconsistent with probation's new favored status. Thus, probation may not be denied solely because it would deprecate the seriousness of the defendant's offense. Instead, it also must be inconsistent with the ends of justice in the case at bar. See, e.g., People v. Huffman, 78 Ill. App. 3d 525, 527-29, 397 N.E.2d 526, 528-30 (4th Dist. 1979); People v. Thomas, 76 Ill. App. 3d 969, 973-76, 395 N.E.2d 601, 603-06 (5th Dist. 1979); cf. People v. Knowles, 70 Ill. App. 3d 30, 32-35, 388 N.E.2d 261, 263-65 (4th Dist. 1979) (reaching result comparable to that in Huffman and Thomas, but applying pre-Act law).
62. See infra text accompanying notes 63-65.
63. H.B. 15, 80th Ill. Gen. Assembly, 1st 1977 Spec. Sess., ¶ 5-5-3.2(a)(1), (4) at 39, 41 (factors to be weighed in favor of imprisonment); id. ¶ 5-5-3.2(a)(2), (3) at 39-41 (aggravating factors would require imprisonment).
provisions was to shift the center of gravity away from probation or other nonincarcerative dispositions to terms of imprisonment.

The compromise struck on this issue tilted rather markedly toward the position advocated by the proponents of H.B. 15, by mandating that aggravating factors be given weight in favor of a regular term prison sentence, while only permitting the consideration of aggravating factors to extend sentences of that type. This clear legislative preference for shorter rather than longer sentences when probation was inappropriate is consistent with the principle of "least restrictive alternative" sentencing. When considered in conjunction with the preeminent position given to probation in the Act's overall sentencing scheme, this provision manifests a legislative intent that sentencing judges move upwards from the least restrictive (nonincarcerative) sanctions available to more and more restrictive penalties, and select the least restrictive alternative commensurate with the circumstances at hand.

c. The Use of Factors Qualifying Offenders for Extended Term or Consecutive Sentences

The ways in which factors could be used to qualify offenders for extended term or consecutive sentences also underwent a metamorphosis during the compromise process. The resulting changes provide further support for the notion that the Act embodies a "least restrictive alternative" sentencing principle. H.B. 15 presented a narrowly drawn catalogue of offenders who merited, and were required to receive, extended term or consecutive sentences. The compromise rejected this approach in favor of one similar to that of S.B. 11, which balanced more broadly phrased aggravating factors with permissive, rather than mandatory, extended term or consecutive sentences when those aggravating factors were present. The only exception to this rule was to require natural life sentences for certain three-time class X felons, a group clearly comprising a small number of dangerous, hard-core offenders.

This change, too, is consistent with a "least restrictive alternative" approach to sentencing in that it permits the factors that could trigger a lengthy sentence to be overridden by mitigating circumstances. In adopting this

68. The compromise fashioned mandated natural life sentences for three-time class X felons whose crimes were committed after the effective date of the Act, with the second crime committed after conviction for the first and the third crime committed after conviction for the second. Pub. Act. No. 80-1099, § 1, 1977 Ill. Laws 3264, 3269 (codified at Ill. Rev. Stat. ch. 38, § 33B-1(a) (1979)) This provision has since been amended (codified as amended at Ill. Rev. Stat. ch. 38, § 33B (1983)).
2. The Specification of Factors in Mitigation and Aggravation

The Act's utilization of factors in mitigation and aggravation as a guide to judicial sentencing decisions, while well intentioned, has proven to be ineffective and confusing. The factors in mitigation are clear and substantively unobjectionable but they have failed, in all likelihood, to have any significant impact on sentencing decisions.69 The various factors in aggravation, on the other hand, have had a significant impact. Due to various defects in drafting and errors in interpretation and application, however, that impact unfortunately has been more harmful than beneficial.70

a. Factors in Mitigation

The Act listed a series of factors in mitigation71 to "be accorded a weight in favor of withholding or minimizing a sentence of imprisonment."72 For a variety of reasons, however, that admonition probably has had no real effect on sentencing decisions. For one thing, although the factors apply to all dispositions whether by trial or by plea,73 the overriding determinant of the sentence imposed after a plea involving a bargain as to sentence is likely to be the agreed-upon sentence itself.74 For the relatively few cases that remain, the noncontroversial and common sense nature of the factors themselves virtually assures that they would have been considered by a sentencing judge even in the absence of a statute. Arguably, the mere listing of these factors, especially when coupled with the requirement that they be given some weight, may have both increased and standardized their use to some degree.75 Any benefit along those lines, however, was minimized by the fact

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69. See infra text accompanying notes 71-76.
70. See infra notes 77-92 and accompanying text.
74. The Act itself makes the plea bargain struck a factor that the court must take into consideration. See Pub. Act No. 80-1099, § 3, 1977 Ill. Laws 3264, 3295 (codified at ILL. REV. STAT. ch. 38, § 1005-4-1(b) (1983)). As to why that factor is likely to be decisive, see Schuwerk, supra note 2, at 643 n.62.
75. There is no hard evidence either way on this question. Although the use of probation had modestly increased since the Act became effective, see Schuwerk, supra note 2, at 698-99, that upturn could just as readily be due to other factors—such as the new status of probation...
that the Act failed to rank or quantify the importance of the mitigating factors either among themselves or in relation to any aggravating circumstances that might be present in a given case. This failure, of course, permitted the proclivities of particular judges to weigh heavily in the balance, even in apparently similar cases.

b. Factors in Aggravation

The Act took an even looser approach to factors in aggravation. It specified seven considerations required to be weighed in favor of imposing a regular term prison sentence instead of a non-prison alternative. In addition, these seven factors could be utilized to impose a regular term sentence that was longer than the minimum. On a fair reading, the Act also permitted judicial accretions to the specified list. Next, the Act made the presence of either of two additional factors a precondition to the discretionary imposition of an extended term prison sentence. Finally, the Act specified the aggravating factors that had to be present before consecutive sentences could be imposed for offenses growing out of a single course of conduct. But, as with extended term sentences, the imposition of a consecutive sentence was made optional rather than mandatory.

as a preferred sentencing alternative or changes in plea bargaining practices—rather than to the specification of mitigating factors. On the other hand, as the legal principles underlying probation’s new favored status have been interpreted correctly, see supra note 60, it certainly is possible that this increase is due to a faithful implementation of the Act.

76. See supra note 30 and infra notes 77-92 and accompanying text.


78. See infra notes 578-85 and accompanying text.


It was extremely unlikely that this system of statutory factors in aggravation would have any rationalizing effect on sentencing practices without the judiciary's thoughtful and enthusiastic implementation of additional limitations. Putting aside purely interpretive questions for the time being, the difficulties involved fell within three broad areas. First, the Act encouraged unrestrained judicial discretion. Second, it failed to devise a method for deciding upon an extended term or consecutive sentence. Third, it gave insufficient guidelines for choosing a particular sentence from within the statutory range.

Concerning the first of these flaws, the Act's system unnecessarily encouraged the exercise of unrestrained judicial sentencing discretion in several ways. It authorized judicial additions to existing regular term factors in aggravation, subject only to the general limitation that the factors be "consistent with the purposes and principles of sentencing set out in [the Act]." The Act then expanded judicial sentencing discretion still further by including factors in aggravation that specifically allow a judge's own system of values to come into play in a manner related tangentially, at best, to the nature of the offender or the offense. For example, a judge's subjective belief that a prison sentence is "necessary to deter others from committing the same crime" may aggravate the defendant's sentence. Finally, the Act left its factors in aggravation unranked and unweighted in relative importance either among themselves or in opposition to any mitigating factors in a given case.

81. Many of the Act's factors in aggravation have proven very difficult to interpret. For discussions of a number of the major problems that have arisen, see infra notes 226-37, 302-29, 414-93, 641-753 and accompanying text.


83. Pub. Act No. 80-1099, § 3, 1977 Ill. Laws 3264, 3301 (codified at ILL. REV. STAT. ch. 38, § 1005-5-3.2(a)(7) (1983)). There are two important limitations on this statement. First, the Act specifically makes general deterrence alone an insufficient basis to deny probation. See supra note 60.

In addition, general deterrence is not an available basis for imposing an extended term sentence, although it is frequently utilized in that manner. See, e.g., People v. Lobdell, 121 Ill. App. 3d 248, 459 N.E.2d 260 (3d Dist. 1983); People v. Longoria, 117 Ill. App. 3d 241, 452 N.E.2d 1350 (2d Dist. 1983). This precedent is clearly in error for two reasons. First, the Act's list of factors justifying an extended term sentence is all-inclusive. See Pub. Act No. 80-1099, § 3, 1977 Ill. Laws 3264, 3301, 3310 (codified at ILL. REV. STAT. ch. 38, §§ 1005-5-3.2(b), 1005-8-2(a) (1983)). Second, the General Assembly specifically considered and rejected legislation that would have allowed a general deterrence rationale to support such sanctions. See S.B. 11, 80th Ill. Gen. Assembly, 1st 1977 Spec. Sess., § 5-5-3.2(b)(4) at 46-47. Presumably, the General Assembly concluded that such lengthy sanctions should be imposed only when appropriate in light of the defendant's personal circumstances. Unfortunately, this principle has not always been recognized. See infra text accompanying notes 317-29, 425-93.

84. See supra note 30. A number of these factors, such as "caus[ing] . . . serious harm" or having "a history of prior delinquency or criminal activity," see Pub. Act. No. 80-1099, § 3, 1977 Ill. Laws 3264, 3301 (codified at ILL. REV. STAT. ch. 38, § 1005-5-3.2(a)(1), (3) (1983)), obviously embraced a wide range of conduct. The Act, however, did not attempt to grade the
Thus, absent a thoughtful and diligent implementation by the judiciary, the Act’s system of aggravating factors threatened to become little more than a license to place a judicial thumb on the sentencing scales in an essentially unreviewable manner.

A second and closely related problem was the Act’s failure to devise a satisfactory method for deciding when to resort to its more draconian extended term and consecutive sentences. The Act specified the necessary preconditions for such a sentence but not the sufficient ones. This approach was flawed in three respects. First, the ostensibly distinct forms of behavior triggering those harsher sentences were really not distinct at all. Second, the Act permitted a judge to reject extended term and consecutive sentences in favor of a regular term sentence, despite the presence of the qualifying behavior required by the more severe alternatives. Thus, even if a classification of behavior into distinct, relatively discrete categories were possible, such an effort would have been largely nullified because the Act allowed judges to either ignore or consider the qualifying behavior without providing any explicit guidance as to how that decision should be made.

85. See supra notes 77-80. The Act sets forth seven factors in aggravation which must be accorded weight in favor of imposing a term of imprisonment or may be considered by the court as reasons for imposing a more severe sentence. See Pub. Act No. 80-1099, § 3, 1977 Ill. Laws 3264, 3301 (codified at Ill. Rev. Stat. ch. 38, § 1005-5-3.2(a)(1)-(7) (1983)). It also provides other factors, such as prior felony convictions in Illinois of the same or greater class as that involved in the current offense or the existence of exceptionally brutal or heinous behavior accompanying the offense, that may be considered by the court as reasons to impose an extended term sentence upon any offender who was at least 17 years old on the date the crime was committed. See Ill. Rev. Stat. ch. 38, § 1005-5-3.2(b) (1983). Finally, the Act also provides that the court may impose consecutive sentences for certain felonies where the defendant afflicted severe bodily injury. Ill. Rev. Stat. ch. 38, § 1005-8-4(a) (1983). In no case, however, does the presence of a particular type of aggravating factor mandate that a sentence of that type be imposed.

86. For example, a defendant who tortured his victim in the course of raping her could be found simultaneously to have “caused . . . serious harm,” for purposes of receiving a regular term sentence, to have engaged in “exceptionally brutal or heinous behavior indicative of wanton cruelty,” for purposes of receiving an extended term sentence, and also to have committed “a class X . . . felony [in the course of which] the defendant inflicted severe bodily injury,” for purposes of receiving a consecutive sentence. See Pub. Act No. 80-1099, § 3, 1977 Ill. Laws 3264, 3301, 3311 (codified at Ill. Rev. Stat. ch. 38, §§ 1005-5-3.2(a)(1), 1005-5-3.2(b)(2), 1005-8-4(a) (1983)). Those provisions of the Act that allowed both extended term sentences or natural life sentences to be imposed on murderers upon the identical showing that they had engaged in “exceptionally brutal or heinous behavior indicative of wanton cruelty,” Pub. Act No. 80-1099, § 3, 1977 Ill. Laws 3264, 3301, 3308 (codified at Ill. Rev. Stat. ch. 38, §§ 1005-5-3.2(b)(2), 1005-8-1(a)(1) (1983)), threatened to be even more unfathomable. See infra notes 165-216 and accompanying text.


88. The Act’s only clues as to which of the sentencing alternatives to choose were a
Third, and perhaps most distressingly, many of the Act's aggravating factors were clearly inappropriate in many cases in which they were literally applicable. For example, one provision of the Act permitted an extended term sentence to be imposed on certain offenders who had prior convictions of the same or a greater class of felony. The routine application of this provision would have resulted in extended term sentences being imposed most often on those recidivist felons committing the least serious class of felony and least often on those committing the most heinous crimes. Basing resort to lengthy sentences on this factor, without specifying what additional aggravating circumstances might make resort to such sanctions appropriate, greatly increased the likelihood of substantial and unjustified sentencing disparities.

Finally, assuming that all of the foregoing problems had been solved and that a rational decision had been made between a regular term, extended term, or consecutive prison sentence, one last difficulty remained: the selection of a particular sentence from within the frequently vast range available. With the exception of regular term sentences, the Act's various factors in aggravation are limited to suggesting a particular category of prison sentence without providing any explicit guidance as to how to select a sentence from within the available range. This problem could have been alleviated somewhat if the Act had sought to grade or quantify the broad range of conduct embraced within a number of its factors in aggravation, but this was not done. Consequently, only the Act's general principle of least restrictive sentencing and its overriding concern for consistency and proportionality in sentencing matters applied to this final aspect of the sentencing decision. The effect of such tacit and amorphous limitations, however, was problematic. Unless those precepts were adhered to assiduously by sentencing judges and policed zealously by courts of review, a very real risk existed that a sentencing judge would view the entire range of the more severe penalties as equally available to an offender who merited one of those sanctions. Because those ranges span a substantial term of years, at least for more serious offenses, the potential discretion vested in sentencing judges by the Act is enormous.

91. See infra notes 364-89, 425-93, 519-49 and accompanying text.
92. See Schuwerk, supra note 2, at 686-89.
3. The Breadth of Sentencing Ranges

As the various bills culminating in the Act wended their way through the legislative process, one of the principal areas of dispute centered on whether there was a sufficient range of punishments available for the most serious offenders.\(^9\) The basic structure of the earliest proposal, S.B. 1885, called for a total range of punishments for such offenses as shown in Chart 1 below.\(^4\)

<table>
<thead>
<tr>
<th>Felony Class</th>
<th>Regular Term</th>
<th>Extended Term</th>
<th>Consecutive Term</th>
</tr>
</thead>
<tbody>
<tr>
<td>M</td>
<td>20-30</td>
<td>NL* or Death</td>
<td>—</td>
</tr>
<tr>
<td>1</td>
<td>6-10</td>
<td>12-18</td>
<td>24-30**</td>
</tr>
</tbody>
</table>

* NL = Natural Life  
** Based on both felonies being class I felonies

This early legislation limited the imposition of extended term sentences to a relatively small group of exceptionally aggravated offenses.\(^5\) Its even more severe consecutive sentences were available only when the sentencing judge found that a consecutive sentence was "required to protect the public from further criminal conduct by the defendant"\(^6\) and that the extended terms of imprisonment authorized by the bill were "not adequate for that purpose."\(^7\)

These limitations were sharply criticized in a number of quarters on several grounds.\(^8\) It was argued, for example, that narrow ranges did not provide sufficient differentiation between the most and least culpable offenders of a given type. It was also asserted that the upper limits of these ranges were too low to provide sufficiently severe punishment for more aggravated versions of the offenses or for defendants with lengthy prior criminal histories. Finally, prosecutors maintained that their ability to obtain plea bargains would be adversely affected because the narrow ranges would impair the state's ability to offer significant sentencing concessions.

H.B. 1500 accommodated these concerns, but only to a limited extent. The bill expanded the regular term, extended term, and consecutive sentenc-

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93. The term "serious offenders" is used to describe murderers and what were formerly class I felons, prior to passage of the Act. There appeared to be no serious opposition to proposed limitations on the sentences available for class 2, class 3, and class 4 felons.


95. Extended term sentences would have been available to a narrowly defined group of brutal or recidivist defendants whose imprisonment for an extended term was found necessary to protect the public. Id. ¶ 5-5-3.2(a)(2), (3) at 29.

96. Id. ¶ 5-8-4(b) at 47.

97. Id.

98. The author recalls these arguments being raised by a number of witnesses who were either prosecutors or judges.
ing ranges for murder and class 1 felonies. This expansion, however, was offset to a considerable degree by a number of provisions that made it unlikely that judges would resort to extended term or consecutive sentences with any frequency. The net effect of these changes was to make the maximum extended term and consecutive sentences under H.B. 1500 more severe than those available under the earlier bill for class M and class 1 felonies, but less severe for other classes of felonies.

The Act, however, abandoned this approach. Although both regular and extended term sentencing ranges for serious felonies were expanded once

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99. The regular term, extended term, and consecutive sentence ranges proposed in H.B. 1500, as amended, are set out below:

<table>
<thead>
<tr>
<th>Felony</th>
<th>Regular Term</th>
<th>Extended Term</th>
<th>Consecutive Term</th>
</tr>
</thead>
<tbody>
<tr>
<td>Class M</td>
<td>20-40</td>
<td>NL*</td>
<td>31-50**</td>
</tr>
<tr>
<td>Class 1</td>
<td>6-25</td>
<td>25-50</td>
<td></td>
</tr>
</tbody>
</table>

* NL = Natural Life
** Based on both felonies being class 1 felonies.

100. In addition to containing all of S.B. 1885's limitations on the use of those lengthier sentences, the amended version of H.B. 1500 also proposed to retain the requirements of then-existing law (which S.B. 1885 had proposed to eliminate) that required that defendants first have been committed to the Department of Corrections (DOC) for a diagnostic examination and report. Compare S.B. 1885, 79th Ill. Gen. Assembly, 1976 Sess., ¶¶ 5-5-3.2, 5-8-2 at 28-30, 43-44 (extended term sentences may be imposed without DOC examination and report) with House Amendment No. 1 to H.B. 1500, 80th Ill. Gen. Assembly, 1977 Sess., ¶¶ 5-5-3.2, 5-8-2 at 40-43, 55-56 (extended term sentences require DOC evaluation of offender). Because the DOC continued to lack the facilities and resources to complete such reports, the prospects of using this greatly enlarged sentencing range to any significant extent was inconsequential.

H.B. 1500, as amended, exhibited similar caution in its proposed use of consecutive sentences. It rejected the position taken by S.B. 1885 that consecutive sentences be tied to extended terms and proposed instead to return to then-existing law in selecting the available ranges for such sentences. Compare S.B. 1885, 79th Ill. Gen. Assembly, 1976 Sess., ¶¶ 5-8-2, 5-8-4(c)(2) at 43-44, 48 (setting out extended term sentence ranges and linking consecutive sentences to them) with House Amendment No. 1 to H.B. 1500, 80th Ill. Gen. Assembly, 1977 Sess., ¶¶ 5-8-1, 5-8-4(c)(2) at 52-55, 57 (setting out regular term sentence ranges and linking consecutive sentences to them).

101. Differences in the resulting maximum consecutive terms are set out below.

<table>
<thead>
<tr>
<th>COMPARISON OF MAXIMUM CONSEQUENTIAL SENTENCES AVAILABLE UNDER S.B. 1885 AND H.B. 1500 FOR VARIOUS COMBINATIONS OF CLASSES OF FELONIES</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>S.B. 1885/H.B. 1500</strong></td>
</tr>
<tr>
<td>First Felony</td>
</tr>
<tr>
<td>1</td>
</tr>
<tr>
<td>1</td>
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<tr>
<td>2</td>
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<tr>
<td>3</td>
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<tr>
<td>4</td>
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</tbody>
</table>

again, as shown in Chart 2 below, those changes were rather modest.\footnote{102}{See H.B. 15, 80th Ill. Gen. Assembly, 1st 1977 Spec. Sess., §§ 5-8-1(a), 5-8-2(a) at 52, 54-55; Pub. Act No. 80-1099, § 3, 1977 Ill. Laws 3264, 3310 (codified at ILL. REV. STAT. ch. 38, §§ 1005-8-1(a), 1005-8-2(a) (1983)).}

<table>
<thead>
<tr>
<th>Felony Class</th>
<th>Regular Term</th>
<th>Extended Term</th>
<th>Consecutive Term***</th>
</tr>
</thead>
<tbody>
<tr>
<td>M</td>
<td>20-40 or NL**</td>
<td>40-80</td>
<td>40-160</td>
</tr>
<tr>
<td>X*</td>
<td>6-30</td>
<td>30-60</td>
<td>12-120</td>
</tr>
<tr>
<td>1*</td>
<td>4-15</td>
<td>15-30</td>
<td>8-60</td>
</tr>
</tbody>
</table>

* Class X felonies under the Act were largely former class 1 felonies.

** NL = Natural Life

*** Based on both felonies being of the same class

Of far greater significance were the Act’s increase in the availability of extended term and consecutive sentences and the enormous expansion of the total ranges of consecutive sentences. The Act dispensed with efforts to limit imposition of extended term and consecutive sentences to those few offenders whose particularly egregious prior criminal records or conduct on the occasion in question made any lesser sentence inappropriate.\footnote{103}{Compare H.B. 15, 80th Ill. Gen. Assembly, 1st 1977 Spec. Sess., §§ 5-5-3.2(b), 5-8-2(b), 5-8-4(c)(2) at 39-41, 55, 56-57 (linking consecutive sentences to regular term sentences and requiring a DOC examination and report before imposing them) with Pub. Act No. 80-1099, § 3, 1977 Ill. Laws 3264, 3301, 3311-12 (codified at ILL. REV. STAT. ch. 38, §§ 1005-5-3.2(b), 1005-8-2, 1005-8-4(c)(2) (1983)) (linking consecutive sentences to extended term sentences and eliminating need for DOC examination and report).}

Moreover, in some circumstances consecutive sentences could range from the sum of the shortest two regular term minima to the sum of the longest two extended term maxima for the various offenses involved.\footnote{104}{See Pub. Act No. 80-1099, § 3, 1977 Ill. Laws 3264, 3312 (codified at ILL. REV. STAT. ch. 38, § 1005-8-4(c)(2) (1983)).}

The Act, however, offered no explicit guidance on how to utilize the vast discretion provided by such a broad range. Indeed, no cogent rationale for creating this range was
In 1985, Illinois' determinate sentencing was provided. This state of affairs obviously increased the likelihood of capricious sentencing decisions, with only judicial restraint and vigilance as any real protection.

4. Unduly Confining Efforts to Limit Sentencing Discretion

The Act's loose and ambiguous treatment of factors in mitigation and aggravation and its expansive authorization of extended terms and consecutive sentences complicated the development of a rational sentencing system. Ironically enough, these complications were exacerbated by the Act's overly rigid insistence on mandatory minimum prison sentences in a variety of circumstances. In addition to perpetuating all prior provisions for mandatory minimum sentences, the Act created a variety of new offenses carrying those terms. The Act also added to the circumstances in which a defendant's prior record would render an otherwise probationable offense

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105. One conceivable rationale for this broad range is to allow for the common judicial practice of imposing relatively short sentences on probation or parole violators, which run consecutively to those imposed for their previous offenses. See cases cited infra notes 226-232. This possibility, however, is weakened by the Act's requirement that consecutive sentences not be imposed unless they are necessary to protect the public from further criminal conduct by the defendant. See Pub. Act No. 80-1099, § 3, 1977 Ill. Laws 3264, 3311 (codified at Ill. Rev. Stat. ch. 38, § 1005-8-4(b) (1983)). It is difficult to see how such sentences have been squared with a "protect the public" requirement where the defendant could be incarcerated for as long a period by concurrent sentences. See infra notes 228-31 and accompanying text.

Another possible rationale for this provision is to permit imposition of longer than regular term sentences on offenders who appear to be particularly dangerous but who are not eligible for extended term sentences because of their youth. See Pub. Act No. 80-1099, § 3, 1977 Ill. Laws 3264, 3301 (codified at Ill. Rev. Stat. ch. 38, § 1005-5-3.2(b) (1983)) (defendant must have been at least 17 when he committed offense to be eligible for extended term sentence).

Several apparent instances of imposing these longer terms on young offenders have been reported. See People v. Perez, 115 Ill. App. 3d 446, 450 N.E.2d 870 (1st Dist. 1983) (16-year-old defendant given consecutive sentences of 35 and 15 years for brutal execution style murder and attempted murder); People v. Hicks, 112 Ill. App. 3d 303, 446 N.E.2d 516 (3d Dist. 1983) (defendant given consecutive 20-year sentences for particularly brutal rape and deviate sexual assault of young child), aff'd, 101 Ill. 2d 366, 462 N.E.2d 473 (1984) (supreme court's opinion revealed that defendant was 15 at time of crime).


nonprobationable\textsuperscript{108} and created a mandatory natural life sentence without possibility of parole for certain defendants convicted of three or more class X felonies.\textsuperscript{109}

As is discussed in more detail elsewhere,\textsuperscript{110} these provisions have had two distinct adverse effects on the development of a rational sentencing process. First, in a number of cases, these provisions have compelled the imposition of sentences that even the judges and prosecutors involved believed were too severe.\textsuperscript{111} Second, and far more frequently, the provisions have fostered pleas and sentences to inappropriate charges in an effort to evade the disposition called for by law.\textsuperscript{112} While some of these cases are explainable as efforts to do justice in the case at hand,\textsuperscript{113} that justice is attained only at the substantial cost of distorting the seriousness of the criminal activity involved and undermining the overall credibility and fairness of the sentencing process.

5. \textit{Subsequent Developments}

Unfortunately, many of the disturbing aspects of the Act's provisions aimed at controlling the judiciary's substantive sentencing discretion have been exacerbated by developments occurring subsequent to its passage. As an example, the General Assembly has continued to expand the list of factors

\begin{footnotes}
\item[110] See Schuwerk, \textit{supra} note 2, at 645-51, 660-61.
\item[111] \textit{Id.} at 648-49 n.79; \textit{see also} People \textit{v.} Taylor, 102 Ill. 2d 201, 205-09, 464 N.E.2d 1059, 1062-64 (1984) (affirming power of General Assembly to establish mandatory natural life sentence for murder as applied to defendants to whom trial judge would have given lesser sentence were it available).
\item[112] See Schuwerk, \textit{supra} note 2, at 645-51.
\item[113] Since the passage of the Act, numerous courts have balked at imposing, and occasionally have simply refused to impose, its more severe penalties. For a representative cross-section of the various stratagems employed, see People \textit{ex rel.} Daley \textit{v.} Schreier, 92 Ill. 2d 271, 442 N.E.2d 185 (1982) (disallowing the trial judge's imposition of a class 3 felony penalty provision upon defendant convicted of a class X felony on the basis that the class X felony classification was unconstitutional, and therefore, its penalty provision inapplicable); People \textit{ex rel.} Daley \textit{v.} Limperis, 86 Ill. 2d 459, 460, 427 N.E.2d 1212, 1215 (1981) (expressing disapproval of the trial judge's device to avoid imposing a class X felony sentence by entering a non-appealable acquittal of the class X offense of delivering over 30 grams of cocaine; trial judge had found defendants guilty of delivering lesser amounts even though the parties had \textit{stipulated} that the quantity involved exceeded 30 grams); People \textit{ex rel.} Carey \textit{v.} Bentivenga, 83 Ill. 2d 537, 541, 416 N.E.2d 259, 263 (1981) (issuing a writ of mandamus directing the trial judge to vacate its order granting defendant probation for a non-probationable burglary involving less than five dollars of merchandise); People \textit{v.} Baes, 94 Ill. App. 3d 741, 745-46, 419 N.E.2d 47, 51 (3d Dist. 1981) (holding that a court cannot order a prosecutor to \textit{nolle prosequi} a charge merely because the prosecutor and the court believe that imposing even the minimum available sentence for that offense on the defendant would be unduly harsh, but indicating that the prosecutor remained free to take such action).
\end{footnotes}
that *permit* imposition of extended term sentences,\(^{114}\) without attempting to address the vexing question of what factors should be *sufficient* to trigger those penalties in a particular case. While these legislative efforts undoubtedly were well intended,\(^{115}\) they have only compounded the problems inherent in developing a rational sentencing system. Creating additional factors that a court may or may not weigh in a particular case, without establishing when or to what extent these factors must be considered, will only multiply the chances for random or capricious action by a sentencing judge.

The reverse side of this coin—eliminating judicial discretion altogether in particular cases—has also been employed expansively by the General Assembly since the Act’s passage. The legislature has created numerous additional nonprobationable offenses\(^ {116}\) and has expanded the circumstances in which offenders are subject to mandatory natural life sentences.\(^ {117}\) These measures, apparently a response to what is perceived as unduly lenient sentencing,\(^ {118}\)


\(^{115}\) These factors appear to have been motivated by a number of particularly vicious assaultive crimes against women, small children, the elderly, and the physically handicapped. Undoubtedly, many crimes involving these victims warrant particularly harsh punishment but it seems unlikely that they all do. It is unfortunate that the General Assembly gave such qualities controlling significance in determining which offenders merited lengthy sentences.


\(^{118}\) The General Assembly may be right in believing that sentences are not being imposed in accordance with its expectations, but it seems to have misperceived both the reasons for that phenomenon and the proper response. Most sentences—and in all likelihood an even greater
also appear likely to create more problems than they solve because of the distortions they foster in the plea bargaining and sentencing processes. 119

D. Conclusion

While the Act included a number of broad limitations on substantive sentencing discretion, those limiting provisions were not intended to serve as an all-encompassing set of sentencing guidelines. Nor were they well suited to that purpose. 120 Rather than mandate the many details of sentencing guidelines, the General Assembly sought to enlist the judiciary in developing them. To facilitate that process, as well as to promote sensible sentencing decisions in particular cases, the General Assembly contented itself with structural controls on the sentencing process. 121 Such an approach, it was hoped, would provide a workable mechanism for a judicially sponsored fleshing-out of the Act's broad sentencing principles and, over time, a fairer and more coherent sentencing system. 122

As the earlier article in this series demonstrated, however, the Act's elaborate system of structural controls—at least as it affects prosecutors and judges—has been largely nullified through judicial decisions. 123 Those decisions evince remarkable hostility toward those modest and indirect efforts to control substantive sentencing discretion. Thus, it would be surprising indeed if the judiciary had fashioned a tightly reasoned and consistent sentencing system out of the Act's direct efforts to curtail sentencing discretion. 124 No such pleasant surprise has occurred, nor is any in the offing.

proportion of those that would be deemed unduly lenient—are imposed pursuant to plea bargains. In most cases, if judges are imposing sentences that could be considered too light in some objective sense, it is only because prosecutors ask for them. See Schuwerk, supra note 2, at 645-51.

If that is indeed the nature of the problem, mandatory minimum sentences are not the solution. These sentences are effective only in those cases in which the parties do not bargain away the charge to which they apply. Id. at 649-51. Even then, there is no assurance that sentences greater than the minimum terms are applied in a rational manner. Instead, Illinois needs to develop more explicit legislative expectations about what sentences are appropriate in the general run of cases and to devise mechanisms to insure that those expectations are carried out. The author's earlier article proposed a number of such measures. See Schuwerk, supra note 2, at 651-68, 708-09. This article will propose a number of others. See infra notes 550-68, 608-38, 754-55, 798-872, 898-903 and accompanying text; Appendix to text, at 396-407.

120. See supra notes 69-92 and accompanying text.
121. See Schuwerk, supra note 2, at 668-69, 701-02.
122. Id. at 641-43.
123. Id. at 651-68, 673-85, 691-707, 719-33.
124. The manner in which the judiciary implemented the Act's sentencing election provisions manifests this attitude. The Act specifically provided that inmates whose crimes had been committed prior to the effective date of the Act, but who had not been sentenced as of that date, had a right to elect between sentencing under the new Act or under prior law. Pub. Act No. 80-1099, § 3, 1977 Ill. Laws 3264, 3315 (codified at Ill. Rev. Stat. ch. 38, § 1008-2-4(b) (1983)). This right raised the issues of what information, if any, a defendant was entitled to receive before making such an election, and who was responsible for providing it to him.
II. Natural Life Sentences

The Act provided for natural life sentences in two circumstances. The first allowed for natural life sentences to be imposed at the court's discretion for murders that the sentencing judge found to have been "accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty." The second called for mandatory natural life sentences for offenders convicted of a third class X offense, if all three offenses had been committed after the effective date of the Act and if each had been committed after conviction of the immediately preceding one.

Two subsequent enactments expanded the circumstances calling for natural life sentences. The first significantly broadened the applicability of the three-time class X offender natural life category by specifying that only the last of the three class X offenses must have been committed after the Act's

While some early cases stated that the legislature intended that defendants be informed in a general way of the differences and consequences which would flow from election under either sentencing law, see People v. Peoples, 71 Ill. App. 3d 842, 846, 390 N.E.2d 554, 557 (3d Dist. 1979), these requirements were always found to be minimal. Thus, courts repeatedly held that there was no requirement that the defendant be told what sentence he or she would receive under each alternative. Id. at 845-46, 390 N.E.2d at 557; accord People v. Menke, 74 Ill. App. 3d 220, 390 N.E.2d 441 (5th Dist. 1979); People v. Dozier, 67 Ill. App. 3d 611, 385 N.E.2d 155 (4th Dist. 1979). There was also no requirement that the effect of the new law's good-conduct credits be explained to the defendant. Menke, 74 Ill. App. 3d at 222, 390 N.E.2d at 443. Indeed, even outright misinformation concerning such matters was not found to be a basis for vacating guilty pleas based on that misinformation, at least where the defendants acknowledged that they also had been advised by counsel concerning their choice. Id. As one court put it, "neither statute nor any Supreme Court rule requires that specific admonitions be given or that the election be knowing and intelligent." People v. Gunner, 73 Ill. App. 3d 533, 539, 392 N.E.2d 165, 169 (5th Dist. 1979) (emphasis added).

Although not impermissible, this was certainly a grudging construction of legislation concerned with promoting fairness in sentencing. On the one hand, it could be argued that where the General Assembly wished to provide persons with the right to specific information about sentencing, it had done so explicitly; for example, in connection with the Prisoner Review Board (PRB) setting of mandatory release dates for incarcerated inmates. See Pub. Act. No. 80-1099, § 3, 1977 Ill. Laws 3264, 3276 (codified at Ill. Rev. Stat. ch. 38, § 1003-3-2.1 (1983)). Consequently, the absence of such provisions concerning judicial sentencing elections was a strong indication that the court was not required to furnish defendants with such information.

On the other hand, it would have been more consistent with the Act's underlying rationale if the judiciary had considered it appropriate to furnish those persons awaiting sentencing with at least as much information concerning the consequences of their sentencing election as the PRB was giving to those already incarcerated. The fact that they did not take that view now seems to have been more than a legalistic matter of statutory construction. Instead, it has overtones of a rebellion against legislative efforts to curtail judicial sentencing prerogatives.


effective date.\textsuperscript{127} The second created a third class of offenders for which natural life sentences were mandated: persons convicted of multiple murders who were not sentenced to death.\textsuperscript{128} Recent case law has addressed the constitutionality of each of these natural life sentence provisions, as well as the additional issue of how discretionary natural life sentences have been utilized.

\textbf{A. The Constitutionality of Natural Life Sentences}

There are three types of natural life sentences under the Act: the two mandatory versions based on multiple murders or prior class X convictions, and the discretionary version for exceptionally brutal or heinous murders.\textsuperscript{129} All three types of sentences have been subject to attack on constitutional grounds. These attacks have been unsuccessful to date, although valid arguments remain unanswered.

\textbf{1. Mandatory Natural Life Sentences}

In \textit{People v. Taylor},\textsuperscript{130} the Illinois appellate court was confronted with defendants who had each been convicted of murdering two victims. The trial judge had sentenced them to natural life imprisonment under a section of the Code providing that the court "shall" sentence multiple murderers to natural life imprisonment.\textsuperscript{131} The trial judge, however, would have imposed a lesser sentence had one been permitted by law.\textsuperscript{132}

This interpretation, however, seems contrary to the language of the provision, which states that every person with the requisite criminal record "shall be adjudged an habitual criminal" and that all such offenders "shall be sentenced to life imprisonment." ILL. REV. STAT. ch. 38, § 33B-1(a), (e) (1983). Moreover, the notion that resort to the provision is discretionary with the prosecutor has been uniformly rejected in judicial opinions. See, e.g., People v. McNeil, 125 Ill. App. 3d 876, 466 N.E.2d 1058 (1st Dist. 1984); People v. Tobias, 125 Ill. App. 3d 234, 465 N.E.2d 608 (1st Dist. 1984); People v. Withers, 115 Ill. App. 3d 1077, 450 N.E.2d 1323 (1st Dist. 1983), cert. denied, 104 S. Ct. 1332 (1984). Consequently, this article will treat the provision as mandatory.


\textsuperscript{131} ILL. REV. STAT. ch. 38, § 1005-8-1(a)(1)(c) (1983).

\textsuperscript{132} 115 Ill. App. 3d at 624, 450 N.E.2d at 1258.
The defendants argued on appeal that natural life sentences in these circumstances violated the Illinois Constitution, which requires that all penalties be determined "both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." The appellate court agreed that a constitutional violation would occur if the word "shall" in section 5-8-1(a)(1)(c) was mandatory. But in a remarkable construction proving the eternal verity of the adage that necessity is the mother of invention, the court said that "shall" really meant "may." This was true, the court concluded, because under any other reading the statute would unduly intrude on the sentencing prerogatives of the judiciary by forbidding individualized consideration of a defendant’s circumstances.

The appellate court's construction of section 5-8-1(a)(1)(c) was clearly erroneous. Section 5-8-1(a)(1)(b) of the Code refers to circumstances in which a court may impose natural life sentences for murders. Thus, basic principles of statutory construction alone ordinarily would have dictated that the legislature's use of the word "shall" rather than "may" in section 5-8-1(a)(1)(c) was intended to render the latter provision mandatory. Moreover, unless section 5-8-1(a)(1)(c) were mandatory, it would have been completely superfluous because other sections of the Code already gave trial courts the discretion to impose natural life sentences on multiple murderers. Once again, basic canons of statutory construction should have led the appellate court to reject an interpretation of the provision that rendered it mere surplusage.

On appeal, the Illinois Supreme Court reversed the appellate court, concluding for the above reasons that section 5-8-1(a)(1)(c) was mandatory. The supreme court also found that the appellate court had erred in concluding that section 5-8-1(a)(1)(c), if mandatory, would be unconstitutional. The supreme court noted that the legislature's powers to define offenses and prescribe penalties have traditionally been given broad sway.

133. Id. at 623, 450 N.E.2d at 1258.
134. Id. at 629-30, 450 N.E.2d at 1262-63.
135. Id. at 624-30, 450 N.E.2d at 1258-62.
137. See People ex rel. Morrison v. Sielaff, 58 Ill. 2d 91, 92, 316 N.E.2d 769, 770 (1974) (entire statute must be considered in ascertaining legislative intent); Estate of Kritsch, 65 App. 3d 404, 409, 382 N.E.2d 50, 54 (1st Dist. 1978) (statutes that pertain to same subject should be considered together to ascertain legislative intent).
139. See, e.g., People v. Lutz, 73 Ill. 2d 204, 212, 383 N.E.2d 171, 174 (1978); Skillet Fork River Outlet Union Drainage Dist. v. Fogle, 382 Ill. 77, 85, 46 N.E.2d 73, 77 (1943).
141. Id. at 205-09, 464 N.E.2d at 1062-64.
142. Id. at 207-08, 464 N.E.2d at 1062-63.
options neither violated defendant's constitutional rights nor ran afoul of the doctrine of separation of powers.\footnote{143}

The supreme court's constitutional analysis in \textit{Taylor} seems to be sound under current precedent, although the constitutionality of mandatory natural life sentences, particularly as applied to offenses not resulting in death, presents a close question. Modest extensions of recent capital punishment cases decided by the Illinois and United States Supreme Courts could provide a basis for arguing that mandatory natural life sentences are constitutionally suspect. In describing the special heightened review to be given to death sentences and in seeking to limit such intensive scrutiny to those cases, traditional analyses have stressed the qualitative difference between imprisonment and death as penalties.\footnote{144} Nonetheless, a natural life sentence, like the death penalty, "utterly rejects the possibility of rehabilitation."\footnote{145} Article 1, section 11 of the Illinois Constitution of 1970, however, requires that all sentences be imposed only after taking the possibility of rehabilitation into account.\footnote{146} Requiring imposition of a natural life sentence, then, seems to violate this provision.

That conclusion is buttressed by the United States Supreme Court's invalidation of mandatory death penalty statutes and by the more intensive scrutiny the Court recently applied to natural life sentences in \textit{Solem v. Helm}.\footnote{147} The \textit{Solem} case held that a state may not constitutionally impose a natural life sentence without possibility of parole upon a defendant convicted of several nonviolent felonies.\footnote{148} Taken together, those authorities could be construed as invalidating mandatory natural life sentences as a matter of either federal or state law.

This line of analysis, however, has found no favor with courts construing the constitutionality of mandatory natural life sentences for three-time class X felons.\footnote{149} Efforts to invoke the provisions of article 1, section 11 have

\begin{footnotesize}
\footnote{143. \textit{Id.} at 209, 464 N.E.2d at 1064.}
\footnote{144. See, e.g., \textit{Furman v. Georgia}, 408 U.S. 238, 306 (1972) (Stewart, J., concurring) (death penalty differs in kind, not just in degree, from imprisonment).}
\footnote{145. People v. Merchel, 91 Ill. App. 3d 285, 294, 414 N.E.2d 804, 811 (5th Dist. 1980).}
\footnote{146. 1970 Ill. Const. art. 1, §11. That article provides that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." \textit{Id.}}
\footnote{147. 103 S. Ct. 3001 (1983); \textit{see also} Roberts v. Louisiana, 428 U.S. 325 (1976) (invalidating Louisiana's mandatory death penalty statute); Woodson v. North Carolina, 428 U.S. 280 (1976) (invalidating North Carolina's mandatory death penalty statute).}
\footnote{148. 103 S. Ct. at 3016.}
been unsuccessful. Beginning with the decision in People v. Withers, every court to consider the question has concluded that mandatory natural life sentences for such "three-time losers" do not violate that constitutional provision. Rather, the constitutional mandate to consider a defendant's rehabilitative potential is considered to be satisfied by the defendant having been given at least two prior opportunities to present mitigating circumstances.

This treatment of article 1, section 11's protections seems flawed, however, because that provision states that all sentences, not just some, are to be based in part on the rehabilitative potential of the defendant. Nothing in the constitution's language suggests that because an earlier sentence was imposed in conformity with its terms, a subsequent sentence need not be.

Challenges based on federal law have been equally unavailing to three-time class X convicts. Although the Withers court concluded that mandatory natural life sentences were constitutional without referring to Solem, the later Illinois case of People v. McNeil did consider Solem's impact. The McNeil case, however, concluded that Solem's prohibition of natural life sentences for recidivist felons should be limited to offenders whose prior convictions were for nonviolent offenses.

Assuming that Solem provides the proper framework for analysis in this area, it is not as easily disposed of as the McNeil court supposed. Under Solem, the constitutionality of a penal sanction is to be judged primarily by comparing it with (1) the sentences typically imposed on similarly situated offenders in the same jurisdiction; (2) the sentences imposed for other offenses in that jurisdiction, and (3) the sentences imposed on similarly situated offenders in that jurisdiction, and (3) the sentences imposed on similarly
situating offenders in other jurisdictions. Although the supreme court in Taylor focused on the last of these requirements in sustaining mandatory natural life sentences, it did not address either of the first two; it is those two that render Illinois' scheme to be of doubtful validity.

The reason those requirements are troublesome is that under Illinois law many offenders with three or more class X convictions cannot receive natural life sentences because of the peculiarities of their cycles of crime and conviction. For example, a rapist who commits ten rapes before his first arrest is only one-third of the way to a natural life sentence even if he is convicted of all ten crimes, because none of the crimes was committed after conviction of the first. If after serving his time for those crimes, he should commit another ten rapes before being apprehended, he is still only two-thirds of the way to a natural life sentence because none of the second ten rapes were committed after a second conviction. Such an offender undoubtedly could receive a lengthy sentence. It is open to serious question, however, whether that fact should sustain a statute that requires natural life sentences for offenders committing as few as three class X felonies while forbidding such sanctions for those committing a substantially greater number of such offenses.

Even if this provision is not constitutionally infirm, however, the existence of the anomalies just described calls for a rethinking of the whole subject of mandatory natural life sentences, particularly as applied to three-time class X convicts. The proper approach to sentence selection for persons currently subject to mandatory natural life sentences should not vary from that used in other cases. The sentencing decision should be based primarily on the severity of the defendant's prior criminal record, with any aggravating features of the current crime serving to enhance the sentence further. Such a system would consistently increase sentences for persons who showed a propensity for criminal behavior. Moreover, those increases would be graduated so that sentences for crimes posing the greatest threats to public safety.

157. 103 S. Ct. at 3010-11.
158. This requirement is imposed by ILL. REV. STAT. ch. 38, § 33B-1(d)(4) (1983).
159. This requirement is also a prerequisite to imposition of a natural life sentence. ILL. REV. STAT. ch. 38, § 33B-1(d)(3) (1983).
160. In this instance the offender would be eligible for an extended term sentence of up to 60 years. ILL. REV. STAT. ch. 38, § 1005-5-3. 2(b)(1) (1983). If the offender also committed another felony in the course of this criminal episode and "inflicted severe bodily injury" on the victim, the offender would be eligible for longer consecutive sentences. Id. § 1005-8.4(a), (c)(2).
161. Although the temptation to incarcerate all these offenders permanently is understandable, a different approach appears preferable. In its present form, the Act allows indefensible sentencing disparities. Moreover, natural life sentences impose substantial costs on the penal system. From the perspective of public safety, these costs may be largely unjustified because crimes of violence are overwhelmingly committed by younger offenders. At the very least, it seems obvious that the correctional funds needed to incarcerate more elderly inmates until their death could be better spent on efforts to rehabilitate less incorrigible inmates or to incarcerate more dangerous offenders for somewhat longer periods.
162. See infra notes 806-49 and accompanying text.
safety—those involving brutality and violence—would be enhanced at the greatest rate.\textsuperscript{163}

2. \textit{Discretionary Natural Life Sentences}

The Act allows the discretionary imposition of natural life sentences for murders found to have been “accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty.”\textsuperscript{164} This provision has been challenged unsuccessfully as being void for vagueness and contrary to the provisions of article 1, section 11 of the Illinois Constitution.\textsuperscript{165} Void for vagueness arguments were disposed of in a manner typified by \textit{People v. La Pointe}.\textsuperscript{166} The \textit{La Pointe} court observed that the words of the statute had “ordinary and popularly understood meanings.”\textsuperscript{167} These meanings, coupled with the statute’s objectives, kept the words from being “so ill defined that their meaning will ultimately be determined by the opinions and whims of the trier of fact rather than any objective criteria.”\textsuperscript{168} Nor were natural life sentences banned by the Illinois Constitution’s requirement that penalties consider restoring the offender to useful citizenship, because legislative history strongly indicated that this constitutional requirement was not intended to bar even the death penalty.\textsuperscript{169}

The \textit{La Pointe} court also considered and rejected an equal protection challenge to natural life sentences, noting that equal protection of the laws “does not require equality or proportionality of penalties for dissimilar conduct.”\textsuperscript{170} The General Assembly under its broad police powers could reasonably determine that imposing natural life sentences on “murderers who have demonstrated . . . their capacity for particularly brutal and heinous crimes indicative of wanton cruelty . . . would remedy the evil” posed by those murderers.\textsuperscript{171} The \textit{La Pointe} court concluded that the Act presented “a legitimate means by which the legislature might seek to protect society.”\textsuperscript{172}

The recent case of \textit{People v. Cartalino},\textsuperscript{173} however, has raised one further

\textsuperscript{163} \textit{See infra} notes 837-39 and accompanying text; Appendix to text, Chart 3, at 396; Chart 4, at 405.


\textsuperscript{166} 88 Ill. 2d 482, 431 N.E.2d 344 (1982).

\textsuperscript{167} \textit{Id.} at 499, 431 N.E.2d at 352.

\textsuperscript{168} \textit{Id.}

\textsuperscript{169} This argument was not raised in \textit{La Pointe}, but other authorities have reached this conclusion. \textit{See, e.g.}, \textit{People v. Nobles}, 83 Ill. App. 3d 711, 716-17, 404 N.E.2d 330, 335 (4th Dist. 1980).

\textsuperscript{170} 88 Ill. 2d at 500, 431 N.E.2d at 352 (quoting \textit{People v. Bradley}, 79 Ill. 2d 410, 416, 403 N.E.2d 1029, 1031 (1980)).

\textsuperscript{171} 88 Ill. 2d at 501, 431 N.E.2d at 352.

\textsuperscript{172} \textit{Id.} at 501, 431 N.E.2d at 353.

\textsuperscript{173} 111 Ill. App. 3d 578, 444 N.E.2d 662 (1st Dist. 1982).
argument against discretionary natural life sentences. In that case, the defendant noted that both extended term and natural life sentences were authorized as punishment for murders accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty. He then argued that this scheme unconstitutionally gave the sentencing court "totally unbridled discretion to sentence a defendant convicted of murder to a term of natural life rather than an extended term based on the identical finding that the murder was exceptionally brutal or heinous." The appellate court rejected that argument, stating that a finding of brutality or heinousness, without more, was not a sufficient basis under the Act for imposing either sentence. Instead, the sentencing judge was required to consider all other constitutionally or statutorily specified factors before determining what sentence to impose. Thus, it was simply not accurate to state that a sentencing court had totally unbridled discretion to choose between natural life and extended term sentences. The Cartalino court concluded that it was therefore constitutional to use the same circumstances to trigger application of either natural life or extended term prison sentences.

The Cartalino court clearly was correct in concluding that the presence of exceptionally brutal or heinous behavior was a necessary but not a sufficient basis for imposing a natural life or extended term sentence. Nonetheless, the opinion was unhelpful on the ultimate issue facing a sentencing judge in such a case: exactly what combinations of circumstances over and above exceptionally brutal or heinous behavior should be present before the Act's lengthier sanctions are imposed? Before reaching that issue, however, it is useful to examine the factors that the courts have considered in deciding whether or not to impose discretionary natural life sentences, and how rationally and consistently the courts have exercised their sentencing discretion in such cases.

B. The Exercise of Judicial Discretion in Non-Mandatory Natural Life Sentence Cases

The reported cases reflect a number of judicial efforts to impose rational limits on the imposition of discretionary natural life sentences. Some of these efforts, however, are not conceptually sound and, perhaps for that reason, have been largely ignored. Even limitations that do seem appropriate, however, have generally not been recognized. Consequently, additional legislation is necessary to control the undue sentencing disparities that have resulted.

People v. Merchel proposed one solution to the fundamental problem

175. 111 Ill. App. 3d at 591, 444 N.E.2d at 673.
176. Id.
177. Id.
178. See supra text accompanying notes 85-91.
179. 91 Ill. App. 3d 283, 414 N.E.2d 804 (5th Dist. 1980).
of deciding which exceptionally brutal or heinous murders should qualify offenders for natural life sentences. The Merchel court limited judicial discretion somewhat by holding that natural life sentences were inappropriate unless the qualifying reprehensible behavior had been engaged in by the person to be sentenced.\textsuperscript{180} This judicial limitation, however, does not seem to be consistent with the literal language of the Act and, perhaps for that reason, has not been widely followed. In order for a murder to qualify a defendant for a discretionary natural life sentence, the Act requires only that the offense be accompanied by the requisite behavior. It does not go on to require that the defendant being sentenced, rather than a co-felon, must have engaged in the conduct.\textsuperscript{181} The General Assembly probably intended to permit the imposition of a natural life sentence upon all convicts involved in brutal or heinous crimes regardless of which co-felon performed the qualifying conduct, as long as the other requirements of this provision of the Act were satisfied.

Among those other requirements, however, is that the conduct in question be "indicative of wanton cruelty." That language appears to limit imposition of discretionary natural life sentences to defendants who have demonstrated a capacity to engage in the requisite culpable behavior, whether or not they performed it personally.\textsuperscript{182} This test, while somewhat broader than Merchel, nonetheless retains a requirement of personal responsibility for the behavior justifying a natural life sentence. Absent such a showing, it seems both

\textsuperscript{180} Id. at 293, 414 N.E.2d at 810.
\textsuperscript{181} Compare Pub. Act No. 80-1099, § 3, 1977 Ill. Laws 3264, 3301, 3308 (codified at ILL. REV. STAT. ch. 38, §§ 1005-3.2(b)(2), 1005-8-1(a)(1) (1983)) (extended term allowed for felony conviction where the offense was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty; natural life imprisonment allowed for murder accompanied by the same behavior) with Pub. Act No. 80-1099, § 3, 1977 Ill. Laws 3264, 3311 (codified at ILL. REV. STAT. ch. 38, § 1005-8-4(a) (1983)) (consecutive sentence not to be imposed in specified circumstances unless the "defendant inflicted severe bodily injury"). It should be noted, however, that the supreme court held in People v. Sangster, that personal culpability also was not required under § 1005-8-4(a). Sangster, 91 Ill. 2d 260, 265-66, 437 N.E.2d 625, 628 (1982). It is argued below that Sangster was erroneously decided. See infra text accompanying notes 323-29.

\textsuperscript{182} Such a showing could be made out, for example, by establishing that a defendant had ordered a particularly brutal or heinous murder to be committed. See, e.g., People v. Johnson, 123 Ill. App. 3d 1008, 463 N.E.2d 877 (4th Dist. 1984) (natural life sentence affirmed where defendant ordered confederate to kill unresisting victims); People v. White, 122 Ill. App. 3d 24, 460 N.E.2d 802 (4th Dist. 1984) (natural life sentence affirmed for criminal mastermind who ordered the slaying of his gangland rivals—the same crime involved in Johnson).

This showing also could be made out by establishing the active assistance or assent of the nonparticipating defendant to his colleagues "exceptionally brutal or heinous behavior." See, e.g., People v. Rivera, 126 Ill. App. 3d 197, 205, 466 N.E.2d 1144, 1148-49 (1st Dist. 1984) (extended term sentence for murder affirmed where defendant held victim while confederate stabbed him repeatedly). It should be noted, however, that whether this sentences would be appropriate in such cases is an entirely different question, and can be determined only upon a review of all pertinent factors. See People v. Cartalino, 111 Ill. App. 3d 578, 591-92, 444 N.E.2d 662, 673 (1st Dist. 1982); supra text accompanying notes 173-78.
inconsistent with the Act's "wanton cruelty" standard and utterly inappropriate from the standpoint of elemental fairness to impose a natural life sentence on one defendant based on the qualifying conduct of another. 183

Another judicially fashioned limitation on the use of discretionary natural life sentences is based on the fact that such sentences utterly reject the possibility of rehabilitation. 184 For that reason a number of cases held that a natural life sentence could be properly sustained only if the record supported a specific finding that the defendant was devoid of rehabilitative potential. 185 Other courts, however, rejected this view and instead merely required that "the trial judge must weigh and give consideration to the rehabilitative potential of the defendant" as well as to the seriousness of the offense before imposing sentence. 186

These two tests, while not dissimilar in phrasing, led to markedly different outcomes. Whenever explicit, on-the-record consideration of mitigating circumstances was required, the natural life sentences were vacated on appeal. In contrast, cases that permitted a mere tacit balancing by the trial judge resulted in the natural life sentences being sustained. People v. Goodman 147 is illustrative of cases in the former category. In Goodman, the defendant received a natural life sentence for a murder in which he had sought to rob his victim in a tavern. The victim had resisted and in the ensuing struggle, the defendant had repeatedly and fatally stabbed the victim. Although the defendant had a prior criminal record, the sentencing judge was presented with a number of factors in mitigation, including the defendant's own fear of death or great bodily harm. 188 The trial judge, however, did not allude to any mitigating circumstances, nor was there any indication in the record that he had taken them into account before imposing a natural life sentence. The appellate court vacated the sentence, concluding that, before a natural life sentence could be sustained, the record had to indicate affirmatively and clearly that evidence of the defendant's rehabilitative potential had been considered and given due weight by the trial judge. 189

183. See infra notes 459-67 and accompanying text.
188. Id. at 749, 424 N.E.2d at 668.
189. Id. at 750-53, 424 N.E.2d at 669-71.
The approach taken in *Goodman* is sound. The imposition of such an extraordinary penalty should be reserved only for those hardened violent offenders whose backgrounds present no plausible prospect of rehabilitation. There are numerous cases, however, in which the *Goodman* approach has not been followed. For example, in *People v. Bartik*, the defendant was sentenced to natural life for a brutal murder he committed during the course of an armed robbery and burglary. Although the defendant had raised a number of mitigating factors, the trial judge had not referred to them in pronouncing sentence. Nor had the judge found that the defendant was utterly devoid of rehabilitative potential. Nonetheless, the appellate court affirmed the sentence even though it found that sentences of terms of years had been imposed in other cases "where the balance of aggravating and mitigating circumstances appeared to be more heavily against the defendant than in this case." The result in *Bartik* shows a rather cavalier disregard for both the enormity of a natural life sentence in general and the disparity resulting from its imposition in that particular case. Under *Bartik*, the validity of discretionary natural life sentences becomes a question of power rather than propriety. Could the judge have imposed such a sentence? If so, it will be affirmed. This tendency was also manifested in *People v. Newsome*, in which the defendant was sentenced to natural life for a murder committed in the course of an armed robbery. Although the offense was potentially a capital one, the state's evidence revealed that the defendant had shot his victim only after the latter had threatened the defendant with a pistol and the defendant had warned the victim against such resistance. In those circumstances the defendant's decision to shoot, standing alone, does not seem sufficient to brand him as the brutal, hardened offender for whom a natural life sentence is appropriate. Nonetheless, Newsome's natural life sentence was sustained

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190. See authorities cited supra note 185 and infra notes 330-51, 494-518 and accompanying text.
192. Id. at 697, 418 N.E.2d at 1110.
193. Id. at 701, 418 N.E.2d at 1112. The judge did state, however, that he had noted and considered them. Id.
194. Id. at 702-03, 418 N.E.2d at 1113-14.
195. Id.
197. Id. at 1046, 443 N.E.2d at 635-36.
199. 110 Ill. App. 3d at 1046, 443 N.E.2d at 636.
200. Newsome's only apparent prior record was a minor possessory drug offense and a charge of assault. Id. at 1057, 443 N.E.2d at 643. Newsome's sentence seems more severe than those imposed in comparable circumstances. For example, in *People v. Ramos*, 110 Ill. App. 3d 225, 441 N.E.2d 1153 (1st Dist. 1982), the defendant received an 80-year sentence for killing a bystander while fleeing from an armed robbery in which his codefendant had been shot and killed. Id. at 226-27, 441 N.E.2d at 1154-55. The sentence is unusually severe for this kind of killing absent a lengthy prior record. See cases cited infra note 215.
on appeal solely on the basis that the law permitted imposition of such a sentence in any capital case.201

The additional factors needed to make imposition of a natural life sentence appropriate seem clear enough: the requisite degree of personal wrongdoing in the case at bar, and clear evidence—best documented by a lengthy history of violent behavior—that rehabilitation is utterly improbable.202 Due regard for concepts of proportionality and fairness dictate that natural life sentences should be reserved for the most hardened and incorrigible offenders, especially given the fact that sentences of up to eighty years are available for those murders that are also punishable by natural life sentences.203

After the Illinois Supreme Court's decision in People v. La Pointe,204 however, there is no real hope for the needed judicial self-restraint. In reversing the appellate court and reinstating the natural life sentence imposed on a young armed robber-murderer,205 the supreme court unwisely expanded the circumstances in which natural life sentences could be imposed. The La Pointe court first adopted an expansive definition of the murders that could be classified as involving exceptionally brutal or heinous behavior, indicative of wanton cruelty.206 Referring to dictionary definitions of "brutal" and

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201. 110 Ill. App. 3d at 1057, 443 N.E.2d at 644. The Newsome approach seems contrary to that of People v. Cartalino, 111 Ill. App. 3d 578, 444 N.E.2d 662 (1st Dist. 1982). Cartalino sustained the constitutionality of discretionary natural life sentences only because it concluded that the presence of a qualifying factor for such a sentence is not a sufficient basis for imposing it. Id. at 592, 444 N.E.2d at 673.

The court in People v. Hargis, 118 Ill. App. 3d 1064, 456 N.E.2d 250 (4th Dist. 1983), also provides an instructive contrast to the approach taken in Newsome. In Hargis, the court vacated a sentence of natural life because the trial judge had imposed it in the mistaken belief that the defendant had been eligible for the death penalty. Id. at 1080-81, 456 N.E.2d at 259-60. The Hargis court reasoned that the judge's mistaken perception of the sentencing options available to him might have led him to impose a more severe sentence than was warranted. While the factual situation in Hargis is unusual, one should not lose sight of its underlying principle: that imposition of a natural life sentence should be a fully informed and carefully deliberated act.

202. See supra notes 184-201 and accompanying text. A number of natural life sentences based on the "exceptionally brutal or heinous behavior" rationale do not seem to meet this standard. See, e.g., People v. McKinney, 117 Ill. App. 3d 591, 599, 453 N.E.2d 926, 931 (1st Dist. 1983) (affirming natural life sentence for 21-year old defendant suffering from psychological problems for which he was being treated, who killed armed robbery victim while on felony probation); People v. Darnell, 97 Ill. App. 3d 830, 419 N.E.2d 384 (3d Dist. 1981) (affirming natural life sentence for 16-year-old defendant, based on testimony of expert witnesses regarding his incorrigibility). For the manner in which the proposed sentencing guidelines would handle these types of cases, see Appendix to text, Chart 4, at 405.


204. 88 Ill. 2d 482, 431 N.E.2d 344 (1982).

205. La Pointe involved an 18-year-old defendant who had been convicted of murdering a cab driver during an armed robbery. As revealed by the appellate court's opinion, the most damning evidence in aggravation of the offense was that the defendant had ruthlessly executed his victim in order to avoid identification and, thereafter, had flaunted the deed—by wearing a t-shirt with the words "Elmhurst Executioner" lettered on it while in jail awaiting trial. People v. La Pointe, 85 Ill. App. 3d 215, 217, 407 N.E.2d 196, 198-99 (2d Dist. 1980).

206. 88 Ill. 2d at 501, 431 N.E.2d at 353.
"heinous," the court concluded that any murder that could be viewed as "grossly bad" or as "cruel and cold-blooded," among other definitions, would suffice.\(^{207}\) Clearly, most murders would fit comfortably within this category. Next, the court found that the defendant's relatively modest criminal record constituted a significant history of criminal activity that justified imposition of a substantially enhanced sentence.\(^{208}\) In the court's view, the defendant's premeditated and deliberated killing coupled with his "significant history" of criminal activity and his "callous attitude and complete lack of remorse" prevented a natural life sentence from being an abuse of discretion.\(^{209}\)

The supreme court acted too quickly in allowing the imposition of a natural life sentence. Its substantial expansion of both the group of eligible murders and the group of eligible offenders will almost certainly confound any effort to make sense of the imposition of discretionary natural life sentences. Initially, the court can be faulted for failing to realize that discretionary natural life sentences may be imposed only upon a finding of "exceptionally" brutal or heinous behavior, not merely brutal or heinous behavior.\(^{210}\) The La Pointe opinion gave no operational significance to that qualifier. Moreover, the court failed to consider that by making extended term prison sentences available for identically aggravated murders, the legislature must have intended that natural life sentences be imposed only upon a far clearer showing of a defendant's propensity for violence and incorrigibility than was made in La Pointe.\(^{211}\) It is not enough to say that a

\(^{207}\) Id.

\(^{208}\) 88 Ill. 2d at 494-99, 431 N.E.2d at 349-52. The defendant had a prior burglary conviction and admitted to a long-term use of illicit drugs. Id.

\(^{209}\) Id. at 501, 431 N.E.2d at 353. Speaking on his own behalf at sentencing, La Pointe denied all memory of the offense, claiming to have been under the influence of LSD. He stated, "If I did [it], I am truly sorry. I am not no killer by instinct. If I did [do it], it was the LSD." 85 Ill. App. 3d at 217, 407 N.E.2d at 199.

The trial judge, however, found that La Pointe's crime was premeditated and deliberate, and had not been committed while the defendant was under the influence of extreme mental or emotional disturbance. Id. The trial judge inexplicably failed to refer to information contained in a pre-sentence report which had disclosed that the defendant had become very heavily involved in drugs, and suggested that the crime was probably a product of the defendant's unhappy home life and drug use. Id. at 217-18, 407 N.E.2d at 199-200. After concluding that the defendant lacked remorse and that no statutory factors in mitigation were present, the trial judge imposed a natural life sentence. Id. at 217-18, 407 N.E.2d at 199-200.

\(^{210}\) Id. A number of cases had noted that by making only "exceptionally brutal or heinous behavior" subject to lengthy sentences, the General Assembly had clearly intended to restrict the application of those provisions to a group of particularly egregious cases. See, e.g., People v. Schlemm, 82 Ill. App. 3d 639, 650, 402 N.E.2d 810, 818 (4th Dist. 1980), cert. denied, 449 U.S. 1127 (1981). The La Pointe court, however, made no reference to these authorities.


It was this perception that apparently lay at the heart of the appellate court's decision to
particular murder was accompanied by exceptionally brutal or heinous behavior and that such a crime may be punished with a natural life sentence. The real problem, which the court failed to recognize in its institutional zeal to defend the trial judge, is how to distinguish exceptionally brutal or heinous murders warranting natural life sentences from those sufficiently punished by lesser sentences.

The key to this distinction, as Cartalino held, lies in a careful consideration of all aspects of the offense and of the defendant's character and background, focusing on the defendant's amenability to rehabilitation. Before a natural life sentence is imposed, the record should demonstrate a clear basis for concluding that the defendant is markedly less likely to be rehabilitated than other defendants who committed equally atrocious murders but who were sentenced only to terms of years.

The supreme court's decision in La Pointe is also faulty for failing to recognize the importance of the Act's overriding principles and purposes in deciding when natural life sentences are appropriate. For example, the Act's least restrictive alternative sentencing philosophy was ignored by the La Pointe court. This principle, on its own, would preclude the imposition of natural life sentences except in those few cases in which no lesser sanction appears likely to protect the public adequately. Similarly, the La Pointe court did not even mention the Act's goals of consistency and proportionality.
in sentencing, nor did it attempt to evaluate La Pointe's sentence from those perspectives. Had the court done so, it would have found the sentence too harsh. Numerous defendants, sentenced to terms of years no longer than that recommended by the La Pointe appellate court, committed crimes every bit as grisly as La Pointe's.215

A general disregard for the Act's broader principles is not limited to the area of discretionary natural life sentences. It has a special significance, however, in this area. The indefensibly inconsistent imposition of natural life sentences threatens the very constitutionality of the statute. The Act's discretionary life sentence provision was sustained in Cartalino solely because trial judges do not have "totally unbridled discretion to sentence a defendant to natural life or to an extended term."216 Unless effective control on judicial discretion is imposed by the supreme court, however, "unbridled" seems a very apt description of the imposition of natural life sentences.

III. Consecutive Sentences

The Act's provisions regarding consecutive sentences are unusual in two respects. First, consecutive sentences are not mandated in any case. Second, when such a penalty is allowed, any sentence may be imposed between the sum of the regular term minima for the two least serious felonies involved and the sum of the maximum allowable sentences for the two most serious felonies involved.217 This sentencing structure obviously vests the judiciary with an enormous amount of sentencing discretion. Although some statutory limitations on that discretion exist, they have not had any widespread impact on sentencing practices. Consequently, the fairness and proportionality of consecutive sentences would be enhanced by the adoption of certain guidelines by the judiciary.

A. Restrictions on the Imposition of Consecutive Sentences

The Act imposed a number of explicit limitations on the availability of consecutive sentences. The first, applicable in all cases, forbade imposition of consecutive sentences unless the court found that "such a term is required

215. See, e.g., People v. Green, 125 Ill. App. 3d 734, 466 N.E.2d 630 (4th Dist. 1984) (18-year-old defendant with no prior record shot victim to prevent his identification of defendant; 60-year sentence for murder affirmed); People v. Hanna, 120 Ill. App. 3d 602, 457 N.E.2d 1352 (2d Dist. 1983) (defendant approached victim in parked car and shot him; 40-year sentence for murder affirmed); People v. Jones, 119 Ill. App. 3d 615, 456 N.E.2d 926 (1st Dist. 1983) (defendant, in the course of a burglary, strangled 65-year-old victim with electrical cord; sentence of 60 years for murder affirmed); People v. Perez, 115 Ill. App. 3d 446, 450 N.E.2d 870 (1st Dist. 1983) (16-year-old defendant with no prior criminal record convicted of execution-style murder and attempted murder; consecutive sentences totaling 50 years affirmed). While many of these defendants had no prior criminal records, they also did not appear to have other mitigating circumstances in their background in contrast to La Pointe.

216. 111 Ill. App. 3d at 591, 444 N.E.2d at 673.

217. See supra note 104.
to protect the public from further criminal conduct by the defendant." 218

The second limitation, also applicable in all cases, required sentencing judges to state the basis for their finding in the record. 219 Finally, the Act imposed a broad prohibition against consecutive sentences "for offenses which were committed as part of a single course of conduct during which there was no substantial change in the nature of the criminal objective." 220 The Act created an exception to this rule, however, by permitting (but not requiring) consecutive sentences to be imposed when at least one of the defendant's crimes was a class X or class 1 felony and "the defendant inflicted severe bodily injury." 221 Over and above these explicit limitations, however, were the implicit constraints imposed by the Act's embodiment of a least restrictive alternative principle of sentencing and its general concern for fairness and proportionality. The General Assembly anticipated that these considerations would eventually narrow the ranges of possible penalties that would be deemed appropriate in any given case. 222

None of these limitations has had any real effect on the imposition of consecutive sentences. Judicial decisions have diluted any impact that the reasoned basis and protection of the public limitations might have had if they had been rigorously enforced. 223 Moreover, judicial constructions narrowing the single course of conduct limitation and nullifying the personal infliction of injury requirement have kept them from limiting the imposition of consecutive sentences to any significant extent. 224 Finally, there has been absolutely no sign of any judicial concern over the impact of the Act's general sentencing principles on the selection of consecutive sentences. 225 For all of these reasons, consecutive sentences have every appearance of being little more than aberrant and unpredictable events.

1. The "Required to Protect the Public" Limitation

The requirement that consecutive sentences not be imposed unless they are required to protect the public from further criminal conduct by the defendant has two possible interpretations. First, it may be viewed as prohibiting consecutive sentences that are too short—that is, sentences resulting in a total period of incarceration that instead could have been achieved by longer concurrent sentences. Such a reading would invalidate numerous cases in

222. See Schuwerk, supra note 2, at 669, 701.
223. See infra notes 226-301 and accompanying text.
224. See infra notes 302-29 and accompanying text.
225. See infra notes 226-329 and accompanying text.
which relatively short sentences for current crimes were to be served consecutively to sentences that a defendant was already serving for past crimes. In addition, the occasional practice of imposing short consecutive sentences for crimes arising from different courses of conduct also would be interdicted.

This interpretation seems unassailable as a matter of logic. Nonetheless, in People v. Snyder, the supreme court disapproved of this construction. The Snyder court concluded that consecutive sentences were permissible as long as the record affirmatively indicated that the resulting lengthier sentence met statutory criteria. The construction adopted in Snyder is directly contrary to the language of the statute. As a matter of policy, however, the result is unobjectionable. Because the defendant could have been properly incarcerated for as long a period by a concurrent prison sentence, the use of consecutive sentences instead would seem to be harmless error. Consequently, it is proper to uphold such “short” consecutive sentences as long as concurrent sentences resulting in the same total period of incarceration would not have been disproportionately severe.

But there is a second and more obvious meaning to the “required to protect the public” limitation on consecutive sentences: a prohibition of consecutive sentences that are “too long.” Aside from possible rehabilitation, most convicts would eventually become so enfeebled by age that their continued imprisonment on a public safety rationale would be indefensible. Yet, the cases do not reflect this physical reality. Instead, one finds such

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226. See, e.g., People v. Testa, 125 Ill. App. 3d 1039, 466 N.E.2d 1126 (1st Dist. 1984) (consecutive sentences imposed for crime committed while out on bond for prior offense); People v. Pebbles, 125 Ill. App. 3d 213, 465 N.E.2d 539 (1st Dist. 1984) (requiring defendant’s concurrent sentences for 111 counts of theft by deception to run consecutively to unrelated felony theft); People v. Miller, 115 Ill. App. 3d 592, 450 N.E.2d 767 (2d Dist. 1983) (allowing consecutive sentences for two separate convictions—both drug-related—even where defendant was serving the first of two sentences), cert. denied, 104 S. Ct. 1302 (1984); People v. Green, 83 Ill. App. 3d 982, 404 N.E.2d 930 (3d Dist. 1980) (consecutive sentences for home invasion and armed robbery where each arose from separate circumstances).

227. See, e.g., People v. Clark, 124 Ill. App. 3d 14, 463 N.E.2d 981 (1st Dist. 1984) (four concurrent terms of 20 years for rape and armed robbery, along with two concurrent terms of 15 years for aggravated battery, may run consecutively to two prior sentences for armed robbery offenses that occurred earlier in the same evening); People v. Soloman, 116 Ill. App. 3d 481, 451 N.E.2d 953 (5th Dist. 1983) (consecutive sentences or prior crimes, entered pursuant to defendant’s plea of guilty, may be served consecutively to new sentences).

228. 77 Ill. 2d 459, 397 N.E.2d 799 (1979).

229. Id. at 462, 397 N.E.2d at 800. Appellate courts had previously held that consecutive sentences were improper where a concurrent term could be used to achieve at least as severe a result. See People v. Presley, 67 Ill. App. 3d 894, 385 N.E.2d 181 (4th Dist. 1979); People v. Kruse, 37 Ill. App. 3d 475, 346 N.E.2d 169 (4th Dist. 1976); People v. Dawson, 30 Ill. App. 3d 147, 332 N.E.2d 58 (4th Dist. 1975).

230. 77 Ill. 2d at 462-63, 397 N.E.2d at 800-01.

231. See ILL. REV. STAT. ch. 38, § 1005-8-4(b) (1983).

232. See infra notes 271-301 and accompanying text.
decisions as *People v. Smith*, in which ninety-six years of consecutive sentences were imposed on a sixty-two-year-old armed robber; *People v. Bush*, in which consecutive natural life sentences were imposed; *People v. Guyon*, in which a forty-five-year sentence was imposed consecutive to a natural life sentence; and *People v. Brownell*, in which a 100-year sentence was imposed consecutive to the death penalty. Moreover, there are multiple cases in which defendants have drawn the 120-year "jackpot" sentence allowed in certain situations. It is not atypical for Illinois courts to fail to take these gross physical limitations into account, although the courts are required by law to do so. Rather, these cases illustrate a general failure to give some degree of consistency and fairness to the imposition of these drastic sanctions.

2. The Reasoned Basis Requirement

The Act's drafters felt that the development of adequate guidelines for the imposition of consecutive sentences was sufficiently important to require express treatment. Thus, the Act requires that sentencing judges set out the bases for their conclusions that, "having regard to the nature and circumstances of the offense and the history and character of the defendant . . . a [consecutive] term is required to protect the public from further criminal conduct by the defendant." The rigor with which this requirement was enforced was probably the most important determinant of the rationality

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233. 111 Ill. App. 3d 494, 444 N.E.2d 565 (1st Dist. 1982). Smith, in addition to wounding one of his victims in the stomach, also had a "long criminal record which indicates consistent criminal activity since 1935." *Id.* at 501, 444 N.E.2d at 570. Thus, while the judge's sentence might not have complied with the Act, his reaction was certainly understandable.

234. 103 Ill. App. 3d 5, 430 N.E.2d 514 (5th Dist. 1981). It appears that imposition of a natural life sentence consecutive to any other sentence imposed for crimes growing out of the same transaction or occurrence is not authorized by the Act. In this situation, any consecutive sentences imposed may not exceed the sum of the extended term maxima for the two most serious felonies involved. Ill. Rev. Stat. ch. 38, § 1005-8-4(c)(2) (1983). However, no extended term sentencing provision authorizes a natural life sentence, *id.* § 1005-8-2, only a variety of regular term provisions do, *id.* § 1005-8-1(a)(1)(b), (c).


237. Such a sentence is available when a defendant has committed two or more class X felonies; each of those felonies is properly punishable by an extended term sentence of up to 60 years; and those sentences are made to run consecutively to one another. See, e.g., *People v. Gholston*, 124 Ill. App. 3d 873, 464 N.E.2d 1179 (1st Dist. 1984); *People v. Perruquet*, 118 Ill. App. 3d 293, 454 N.E.2d 1055 (5th Dist. 1983); *People v. DeSimone*, 108 Ill. App. 3d 1015, 439 N.E.2d 1311 (2d Dist. 1982).

and even-handedness of consecutive sentences. Now it appears that the reasoned basis requirement may not be enforced at all.

a. The Partial Nullification of the Reasoned Basis Requirement

The most direct assault on the reasoned basis requirement stems from the supreme court’s decisions in People v. Davis and People v. Hicks. In Davis, the court concluded that any mandatory legislative requirement that courts give reasons for imposing sentence would be unconstitutional. Thus, in order to avoid invalidating language in the Act calling for such statements, the court construed the mandatory language as merely directory. Of course, the Act’s reasoned basis requirement for consecutive sentences would also fall under this utterly indefensible interpretation. In Hicks, the Court followed Davis and held that the phrase, “the basis for which the court shall set forth in the record,” was also permissive rather than mandatory.

The impact of Davis and Hicks is unclear because each case apparently takes the position that a defendant can compel a trial judge to supply reasons for the sentence that is imposed. Consequently, astute counsel should be able to minimize the adverse impact of these cases to a large extent. But even if a defendant has not insisted on a statement of reasons, a remand for an explanation of those sentences should be required if the defendant can demonstrate the likelihood of prejudice arising from the consecutive sentences imposed. The substantial disparities that can result from prejudicial sentences, coupled with the private and public interests in preventing them, argue in favor of a more careful scrutiny of unexplained decisions to impose consecutive sentences.

b. Application of the Reasoned Basis Requirement

Despite Davis and Hicks, a number of cases have reached the adequacy of particular judicial explanations of sentencing decisions. A peculiar dichotomy has developed in the appellate courts in these cases. On the one hand, when sentences have been imposed consecutive to the completion of unexpired sentences for prior unrelated crimes, a stringent standard of review has usually been applied. On the other hand, when consecutive sentences for two related crimes have been challenged on appeal, an extremely lenient

239. 93 Ill. 2d 155, 442 N.E.2d 855 (1982).
241. 93 Ill. 2d 155, 162, 442 N.E.2d 855, 858 (1982).
242. For an analysis and criticism of the supreme court’s decisions in Davis and Hicks, see Schuwerk, supra note 2, at 681-85.
243. 101 Ill. 2d at 374-75, 462 N.E.2d at 476-77.
244. See Schuwerk, supra note 2, at 684.
245. “Prejudice” in this context means a colorable showing that a less severe sentence was appropriate. See Schuwerk, supra note 2, at 680-81, 683-84.
standard has been applied. This dichotomy has no basis in the Act. It is doubly perplexing because the potential harm of an unduly disparate consecutive sentence is greatest in the case of related crimes, when the level of scrutiny applied is the least thorough.

1. Unrelated Crimes.—In imposing sentences on offenders who are already imprisoned or on probation or parole, judges will frequently elect to make punishments for the current offenses run consecutive to the sentences imposed for earlier convictions. These later sentences will be referred to as consecutive sentences for unrelated crimes. The general trend in such cases is to make the second sentence relatively modest, so that the defendant's total period of incarceration does not exceed that which could have properly been imposed concurrently. Sentences are probably imposed in this way because of judicial antipathy to allowing offenders to work off newer sentences while serving those imposed for earlier crimes, a circumstance which seems to discount the second sentences. Nonetheless, the Act does not permit this perfectly understandable sentiment to serve as a basis for imposing sentences consecutive to those being served for unrelated crimes. Only a public protection rationale will suffice.

Given the availability of an equally onerous concurrent sentence, the public protection rationale may be too difficult a standard to meet. Perhaps for this reason, courts of review have been ruthless in policing consecutive sentences imposed on defendants already under sentence for unrelated crimes. People v. Green provides an excellent illustration. In Green, the defendant was given concurrent ten-year sentences for three class X felonies, to be served consecutive to two concurrent sentences for unrelated burglary offenses. The trial judge did not explain why he had imposed consecutive rather than concurrent sentences. Given the defendant's prior record, however, the appellate court could have inferred that the trial judge had believed that the prerequisites for imposing consecutive terms had been met. Instead, the appellate court decided that it could not make that determination on the basis of the record before it. The appellate court stated that it should not have to speculate as to the reasons for the trial judge's action, and concluded that the sentencing decision could not be properly reviewed on appeal absent the trial judge's explanation of his decision. As a result, the sentences were vacated and the case was remanded for further proceedings.

247. See infra notes 249-57 and accompanying text; see also People v. Ferguson, 99 Ill. App. 3d 779, 425 N.E.2d 582 (3d Dist. 1982) (affirming defendant's five-year sentence for burglary, consecutive to sentences he was then serving, where his prior criminal record included convictions for misdemeanor theft, two for felony theft and yet another for burglary).
250. Id. at 984, 404 N.E.2d at 931.
251. Id. at 987-88, 404 N.E.2d at 933-34.
252. Id. at 988, 404 N.E.2d at 934.
This "strict constructionist" position, which has been followed in many similar cases,253 was coupled with the observation that the Act required an explanation of the \textit{basis} for imposing consecutive sentences. A mere parroting of the statutory criteria was neither necessary nor alone sufficient to sustain such a sanction.254 As the appellate court sensibly stated in \textit{People v. Ferguson},255 to rule otherwise "would promote form over substance without giving defendants any further protection against arbitrary sentencing decisions."256 Consequently, \textit{Ferguson} and numerous other cases upheld consecutive sentences in which the records left no doubt of the defendants' dangerousness or the trial judges' reasons for imposing consecutive sentences, even though no explicit finding of the statutory prerequisites had been made.257

The trend toward a meticulous scrutiny of consecutive sentencing decisions of the type just described may have been undercut by the recent decision of the Illinois Supreme Court in \textit{People v. Pittman}.258 The defendant in \textit{Pittman} had been convicted of unlawful delivery of a small amount of heroin and was sentenced to six years in prison. His sentence was to be served consecutive to one imposed for an unrelated offense.259 The appellate court affirmed the sentence, even though there was no explicit finding by the trial judge that the defendant's extended imprisonment was necessary to protect the public.260 The trial judge had made reference to the defendant's repeated convictions involving "serious drugs" and the need to deter drug sellers. The appellate court found that the trial judge's reasoning had been clearly articulated and that it supported his decision to impose a consecutive sentence. Consequently, there was no need for a "formalistic recital" of the statutory factors.261 The supreme court affirmed the sentence, concluding that the trial judge's reasoning, coupled with the defendant's prior criminal record, comprised a sufficient showing of dangerousness to sustain the sentence.262

The \textit{Pittman} decision appears to be unobjectionable on its facts although somewhat unfortunate in its tone. The six-year sentence imposed on Pittman was for a class 1 felony, which carries a minimum prison sentence of four

\begin{footnotesize}
\footnote{253. See supra notes 226, 227, 246.}
\footnote{255. 99 Ill. App. 3d 779, 425 N.E.2d 582 (3d Dist. 1982).}
\footnote{256. \textit{Id.} at 786, 425 N.E.2d at 586.}
\footnote{257. \textit{Id.; see also} \textit{People v. Logan}, 117 Ill. App. 3d 753, 453 N.E.2d 1317 (1st Dist. 1983) (trial court need not use specific statutory language where record supports imposition of consecutive sentences).}
\footnote{258. 93 Ill. 2d 169, 442 N.E.2d 836 (1982).}
\footnote{259. \textit{Id.} at 171-72, 442 N.E.2d at 837.}
\footnote{260. 100 Ill. App. 3d 838, 427 N.E.2d 276 (5th Dist. 1981).}
\footnote{261. \textit{Id.} at 844, 427 N.E.2d at 281.}
\footnote{262. 93 Ill. 2d at 176-78, 442 N.E.2d at 839-41.}
\end{footnotesize}
years. This was also the defendant’s fourth felony conviction. Although he had a number of mitigating factors in his background, which the court ignored, his total time in custody would not have been excessive in light of the legislatively established penalties for his offense and his prior record. In short, the sentence imposed on Pittman is acceptable because it meets the test proposed above: he could have been properly subjected to a longer concurrent sentence that would have left him incarcerated for the same total time he would be serving under the consecutive sentences.

Nonetheless, the Pittman opinion is not entirely satisfactory. Particularly regrettable are its reiteration of the great deference to be shown to trial judges’ decisions and its failure to disapprove of the general deterrence rationale apparently relied upon by the trial court. While deference to the trial judge’s determination was entirely appropriate in the Pittman case, it would be improper in those cases in which sentences of extraordinary length are imposed. In those situations, the Act’s overriding concerns for proportionality and fairness call for a more thorough and careful review of trial judges’ sentencing decisions.

2. Related Crimes.—Consecutive sentences are also occasionally imposed

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264. 93 Ill. 2d at 178, 442 N.E.2d at 840.
265. While Pittman had a history of narcotic use, he had never been convicted of delivery prior to the instant offense. 100 Ill. App. 3d at 844-45, 427 N.E.2d at 281 (Karns, J., dissenting). The “delivery” in the instant case had been made to a police informant, who was then facing quite serious drug charges himself, which he was apparently trying to mitigate by helping make cases against others. Id. at 839-40, 427 N.E.2d at 278. Pittman also was married, the father of five children, had completed three years of college and was trained as a journeyman pipefitter. Id. at 845, 427 N.E.2d at 281 (Karns, J., dissenting).
266. 93 Ill. 2d at 178, 442 N.E.2d at 840.
267. See supra text accompanying notes 226-32.
268. 93 Ill. App. 3d at 844, 427 N.E.2d at 281. General deterrence is an inappropriate reason to impose a consecutive sentence because the imposition of such a severe penalty should be rooted in the character and background of the particular defendant and the circumstances of the crime. Perhaps for that reason, the General Assembly decided not to allow a general deterrence rationale as a basis for imposing an extended term sentence. See supra note 83. Its use in a consecutive sentence context would be equally invalid.

General deterrence is, of course, a highly desirable attribute of any sentencing system. It is, however, more properly considered as a goal of a sentencing system as a whole rather than of a particular sentence. Consequently, general deterrence should be furthered by fashioning a system of consistently applied, graduated, penalties that most severely punish conduct that is most undesired and also punishes recidivists more harshly than first-time offenders. The sentencing guidelines that this article recommends are believed to achieve those objectives. See infra notes 550-66, 608-38, 754-55, 798-872 and accompanying text; Appendix to text, Part 1, at 396-404; Chart 4, at 405.
270. See Schuwerk, supra note 2, at 686-91.
upon defendants convicted of multiple crimes which, while related tempo-
rally, involve more than one criminal episode or more than one victim.271
Such sentences will be referred to as consecutive sentences for related crimes.
The Act imposes no explicit restrictions on the imposition of consecutive
sentences for related crimes unless the offenses were also committed as part
of a single course of conduct in which there was no substantial change in
the nature of the criminal objective.272

The use of consecutive sentences for related crimes, whether within or
outside of the statutory exceptions, has generated undue sentencing disparity.
The defendants who receive these sentences appear to be indistinguishable
from the many who do not.273 This largely arbitrary selection process is
clearly at odds with the Act’s goals of consistency and proportionality in
sentencing.

The Act’s consecutive sentencing provisions permit a number of sentences,
perhaps appropriate in their own right, to be strung together to create a
sanction of truly draconian proportions.274 Consequently, a judiciary con-
cerned with preventing undue sentencing disparity would subject such a
sentencing decision to particularly intensive review, especially if the resulting
period of incarceration were quite lengthy. Nothing of the sort, however,
has occurred. Instead, cases reviewing consecutive sentencing decisions of
this type have a peculiar, almost abstract, quality in which the focus of
review is whether consecutive sentences were proper at all, not whether the
length of the aggregate term was proper. It seems that if a consecutive

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271. See, e.g., People v. Harris, 123 Ill. App. 3d 899, 463 N.E.2d 1030 (1st Dist. 1984)
(consecutive 57-year sentences for murder, attempted murder and aggravated battery of three
victims); People v. Schlenm, 82 Ill. App. 3d 639, 402 N.E.2d 810 (4th Dist. 1980) (consecutive
ch. 38, § 1005-8-4(a) (1983)).
273. See infra notes 276-316, 519-49 and accompanying text.
274. See, e.g., People v. Harris, 123 Ill. App. 3d 899, 463 N.E.2d 1030 (1st Dist. 1984)
(four consecutive sentences totaling 57 years); People v. Griffin, 113 Ill. App. 3d 184, 446
N.E.2d 1175 (1st Dist. 1982) (four consecutive sentences of five years each for retail theft;
appellate court made them concurrent); People v. Smith, 111 Ill. App. 3d 494, 444 N.E.2d 565
(1st Dist. 1982) (four consecutive sentences totaling 96 years); People v. Schlemm, 82 Ill. App.
3d 639, 402 N.E.2d 810 (4th Dist. 1980) (two consecutive 38-year sentences for double murder),

A number of cases involve the concatenation of sentences in rather inexplicable circumstances.
For example, in People v. Baker, 127 Ill. App. 3d 565, 469 N.E.2d 602 (1st Dist. 1984), the
defendant, acting in a jealous rage, broke into a residence and stabbed a man to death. Id. at
569-70, 469 N.E.2d at 606. A 35-year sentence was deemed a sufficient punishment for the
homicide, but because the defendant had broken into a residence to commit it, he also was
convicted of home invasion. A 25-year sentence imposed for that offense was then made to
run consecutively to that imposed for murder, resulting in a total 60-year sentence. No basis
for the decision to impose consecutive sentences appears in the opinion, though it may be
significant that the defendant did not raise the propriety of the sentences on appeal.
sentence of any length could be sustained on a given set of facts, the consecutive sentence actually imposed will be upheld.\textsuperscript{275}

The careless approach taken in these related-crime cases is exemplified by \textit{People v. Tucker}.\textsuperscript{276} In \textit{Tucker}, the defendant committed an armed robbery and initiated a shootout with police during which two officers were seriously wounded.\textsuperscript{277} The defendant was tried and convicted of two counts of attempted murder, one count of armed robbery, and numerous other crimes growing out of this episode.\textsuperscript{278} The evidence revealed that the defendant had no serious criminal record and a substantial period of steady employment.\textsuperscript{279} The trial judge sentenced the defendant to twenty-five years for the armed robbery, noting that the maximum regular term had not been imposed because of those mitigating factors. The judge then completely undid that act of clemency by imposing two thirty-year sentences for each attempted murder conviction, to run concurrent with each other but \textit{consecutive} to the twenty-five year armed robbery sentence. The trial judge's stated reasons for doing so were that the preconditions for consecutive sentences were "not only met but . . . demanded" by the totality of the circumstances.\textsuperscript{280} Consequently, the defendant was to be incarcerated for a total of fifty-five years.\textsuperscript{281}

A majority of the appellate court found that these brief remarks complied with the reasons requirement of Act.\textsuperscript{282} One judge dissented, however, stating

\textsuperscript{275} People v. Perruquet, 118 Ill. App. 3d 293, 454 N.E.2d 1055 (5th Dist. 1983), provides a good example of this phenomenon. Perruquet received consecutive 60-year sentences for twice raping the same victim within several hours. \textit{Id.} at 294-95, 454 N.E.2d at 1056-57. In a related proceeding, Perruquet received a 20-year sentence for another sex offense, which was affirmed by the appellate court. People v. Perruquet, 118 Ill. App. 3d 339, 454 N.E.2d 1051 (5th Dist. 1983). The consecutive 60-year sentences for the two rapes were to be served consecutively to the 20-year sentence for the other sex offense. 118 Ill. App. 3d at 294, 454 N.E.2d at 1056. Although neither crime was particularly brutal, the use of the maximum extended term sentence for each constituent offense was upheld in an almost off-hand manner. 118 Ill. App. 3d at 299, 454 N.E.2d at 1060.


\textsuperscript{277} \textit{Id.} at 608-09, 425 N.E.2d at 513-14.

\textsuperscript{278} \textit{Id.} at 607-08, 425 N.E.2d at 512-13. In his defense, Tucker attributed his behavior to an "acute brain syndrome" that was "due to cocaine intoxication that had caused an altered mood." \textit{Id.} at 609, 425 N.E.2d at 514. The state's expert said Tucker was not mentally ill at the time of the crime. \textit{Id.}

\textsuperscript{279} \textit{Id.} at 609-10, 425 N.E.2d at 514.

\textsuperscript{280} The appellate court quoted the trial court's explanation of its decision to impose consecutive sentences follows:

"The court can further not impose consecutive sentences unless, having regard to the nature and circumstances, [it] is of the opinion that such terms are required to protect the public from further criminal conduct. It is abundantly clear that in this case the requirements of consecutive sentences are not only met but are demanded. Under the totality of the circumstances, the Court finds this to be the proper case for consecutive sentences; and it is the duty of the Court to impose such."

\textit{Id.} at 612, 425 N.E.2d at 515-16.

\textsuperscript{281} \textit{Id.} at 610, 425 N.E.2d at 514.

\textsuperscript{282} \textit{Id.} at 612, 425 N.E.2d at 516.
that he found nothing in the record to indicate why consecutive sentences were necessary to protect the public from further criminal conduct by the defendant. In his view, the record indicated the trial judge's belief that consecutive sentences were required to serve the ends of general, rather than specific, deterrence. The dissent also noted the apparent inconsistency in the trial judge's simultaneous findings of mitigating circumstances sufficient to support a less-than-maximum regular term for the armed robbery and dangerousness sufficient to justify imposition of consecutive sentences. The dissent would have remanded the case to the trial court for clarification and resentencing.

The Tucker dissent seems to have the better argument. The trial court's purported basis for imposing consecutive sentences suffers from both of the vices condemned in cases like Green and Ferguson: it is conclusory and it is unclear. If conclusory and unclear statements are not sufficient even for cases involving relatively short terms, they certainly should not be found sufficient for more severe sentences, especially when imposed on offenders such as Tucker who do not appear to be hardened criminals.

A decision to impose consecutive sentences in a related crime context should be subject to the same threshold requirement of reasonableness that should prevail in the unrelated crime context: whether, in light of all relevant circumstances and factors, a concurrent sentence equal to the defendant's total period of incarceration under consecutive sentences would have been proper. When the fifty-five years of consecutives sentences in Tucker are

283. Id. at 614-15, 425 N.E.2d at 517-18 (Hopf, J., concurring in part, dissenting in part).
284. Id. at 615, 425 N.E.2d at 518 (Hopf, J., dissenting in part, concurring in part).
285. Id. (Hopf, J., dissenting in part, concurring in part).
286. See Ferguson, 99 Ill. App. 3d at 786, 425 N.E.2d at 586; Green, 83 Ill. App. 3d at 988, 404 N.E.2d at 934.
287. Tucker can be usefully contrasted with People v. Finkey, in which the defendant wounded three police officers in a gun battle. 105 Ill. App. 3d at 230-31, 434 N.E.2d 18-19 (4th Dist. 1982). Although Finkey had a history of emotional problems stemming from alcoholism, the court found that he was in control of his faculties on the occasion in question. Id. at 232-33, 434 N.E.2d at 20-21. Despite the harm he had caused (and despite a criminal history that included a conviction for assault with intent to commit rape) Finkey was deemed sufficiently punished by concurrent 30-year terms for his two attempted murder convictions. Id. at 233, 434 N.E.2d at 21.
Tucker also can be profitably compared with People v. Timmons, 127 Ill. App. 3d 679, 469 N.E.2d 646 (1st Dist. 1984). Timmons' consecutive 25-year sentences for two acts of voluntary manslaughter committed as part of a single criminal episode were modified to run concurrently, even though Timmons had a criminal record that included a prior class 1 felony conviction. Id. at 686-88, 469 N.E.2d at 651-52.

For a discussion of some of these factors and how they would affect the defendant's sentence, see infra notes 551-60, 798-872 and accompanying text; Appendix to text, Part I, at 396-404; Chart 4, at 405.
288. Consecutive sentences can, of course, exceed the longest extended term that may be imposed for any constituent offense. See Ill. Rev. Stat. ch. 38, § 1005-8-4(c)(2) (1983). Where such sentences are involved, the test would have to be framed somewhat differently: whether, in light of all relevant circumstances and factors, the defendant should be punished more
examined from this perspective, they appear to be excessive. The aggravated nature of Tucker's crimes obviously called for sanctions substantially in excess of the minimum terms. By imposing consecutive sentences, however, the trial judge was actually punishing Tucker more severely than over ninety-four percent of the armed robbers and over eighty-eight percent of the attempted murderers convicted in the year his sentence was reviewed. No basis for placing the defendant in such a hard core group is apparent from the appellate court's opinion. Even if the trial judge was right in treating the defendant in this manner, fundamental fairness would require a fuller explanation of the judge's reasoning before affirming the sentence.

The Act's overriding concern for fairness and proportionality in sentencing matters underlies this proposed test. This concern has occasionally motivated appellate courts to subject consecutive sentences to a more exacting scrutiny. For example, in People v. Griffin, a young man used his apparently considerable charm and thespian talents to commit four retail thefts in a two-day period. Finding that the four transactions involved did not constitute a single course of conduct, the trial judge imposed four consecutive five-year terms, the maximum allowable. The trial judge explained that he had imposed this sentence because the defendant was a cunning, intelligent individual of great charm who, among his other questionable qualities, had no compunctions about "taking advantage of people and using people for his own benefit and his own needs and desires, whatever they may be."

severely than others who receive only extended term sentences. For a discussion of questions concerning proportionality and fairness raised by this analysis, see infra notes 330-51 and accompanying text.

290. See POLICY DEVELOPMENT DIVISION, ILLINOIS DEPARTMENT OF CORRECTIONS, 1981 STATISTICAL PRESENTATION Table 6 [hereinafter cited as [Year] STATISTICAL PRESENTATION]. The DOC prepares a similar report each year.

291. See, e.g., People v. Timmons, 127 Ill. App. 3d 679, 469 N.E.2d 646 (1st Dist. 1984) (consecutive 25-year sentences for two acts of voluntary manslaughter committed during single criminal episode modified to run concurrently); People v. Merz, 122 Ill. App. 3d 972, 461 N.E.2d 1380 (2d Dist. 1984) (consecutive sentences vacated where trial judge's finding that defendant was unlikely to commit another crime was incompatible with rationale for consecutive sentences); People v. Gray, 121 Ill. App. 3d 867, 460 N.E.2d 354 (1st Dist. 1984) (defendant with no prior criminal record received consecutive sentences in connection with death of child and efforts to conceal body; modified to run concurrently); People v. Griffin, 113 Ill. App. 3d 184, 446 N.E.2d 1175 (1st Dist. 1982) (four consecutive five-year sentences for retail theft modified to run concurrently); People v. Johnson, 104 Ill. App. 3d 572, 432 N.E.2d 1232 (1st Dist. 1982) (sentence of 100 to 200 years for rape to run consecutively to earlier 50- to 100-year sentence modified to run concurrently); People v. Zadel, 69 Ill. App. 3d 681, 387 N.E.2d 1092 (1st Dist. 1979) (seven-year sentence for armed robbery to run consecutively to sentence for natural life modified to run concurrently).

292. 113 Ill. App. 3d 184, 446 N.E.2d 1175 (1st Dist. 1982).
293. Id. at 187-88, 446 N.E.2d at 1177-78.
294. Id. at 192-93, 446 N.E.2d at 1181.
295. The trial court found that the defendant had circumvented the law all of his life and that he had cleverly planned this series of thefts. Id. at 192-93, 446 N.E.2d at 1181.
296. Id.
The appellate court vacated the defendant’s sentence and imposed concurrent five-year terms instead. It noted that, both before and after the effective date of the Act, Illinois law had provided that consecutive sentences were rarely appropriate and should be imposed sparingly. The Griffin court concluded that, in light of the nonviolent nature of the offenses and the mitigating factors in the defendant's background, the trial court had not explained sufficiently why consecutive sentences were necessary to protect the public from future criminal conduct by the defendant.

The result in Griffin is sound, even though it is inconsistent with the great deference that, according to Pittman, should be shown to sentencing judges’ decisions to impose consecutive sentences. The supreme court’s ready affirmance of the sentence imposed in Pittman was probably influenced by the moderate nature of the consecutive sentences imposed in that case. When such moderation is not clearly apparent, however, a careful review of consecutive sentences from both a reasoned basis viewpoint and a proportionality perspective should be undertaken in order to insure a principled, consistent application of the courts' consecutive sentencing powers. If that review discloses a sentence that is grossly disproportionate to the sentence normally imposed, it should be vacated even though the trial judge had explained his decision fully.

3. Imposition of Consecutive Sentences in “Single Course of Conduct” Cases

Although the Act left the imposition of consecutive sentences for unrelated crimes largely unrestrained, it prohibited consecutive sentences for most

297. Id. at 194, 446 N.E.2d at 1182.
298. The defendant, 21, was pursuing a college education and had no history of violent or dangerous criminal activity; but he was on parole for a Federal Firearms Act violation at the time he committed the offenses at bar. Id.
299. Pittman, 93 Ill. 2d at 178, 442 N.E.2d at 840. The Griffin court sought to come within the Pittman analytical framework by claiming that it could not tell why the trial court imposed such sentences. This claim, however, appears to be a red herring. The trial court explained that it took the action it did because Griffin was an unrepentant, amoral, utterly incorrigible offender. 113 Ill. App. 3d at 192, 446 N.E.2d at 1181. This type of credibility determination would normally be entitled to greater-than-usual deference on appeal. Indeed, the supreme court’s opinions eulogizing the role of trial court judges in sentencing matters greatly rely on that factor. See People v. Cox, 82 Ill. 2d 268, 281, 412 N.E.2d 541, 548 (1980); People v. Perruquet, 68 Ill. 2d 149, 154, 368 N.E.2d 882, 884 (1977).
300. Pittman, convicted of unlawful delivery of a controlled substance, was sentenced to six years imprisonment consecutive to a five-year term imposed in another case. 93 Ill. 2d at 171-72, 442 N.E.2d at 837. The trial record showed that Pittman had several felony convictions, including convictions for unlawful use of weapons, possession of heroin, and unlawful sale of cocaine. Id. at 178, 442 N.E.2d at 840.
301. Griffin’s punishment was twice as severe as any other reported theft sentence. See Table 5 in 1982 Statistical Presentation, supra note 290. Moreover, his total period of incarceration would have been longer than that given to most robbers, armed robbers, and rapists. See Tables 4, 13, 15, 17 in 1982 Statistical Presentation, supra note 290.
302. See supra notes 218-21 and accompanying text.
crimes that "were committed as part of a single course of conduct during which there was no substantial change in the nature of the criminal objective."303 In these "single course of conduct" cases, consecutive sentences are available only if "the defendant inflicted severe bodily injury" in the course of a class X or class I felony.304 These limitations, however, have been ineffective. In virtually every case in which a defendant was convicted of two distinct felonies the court has concluded either that the offenses were not part of a single course of conduct or that there had been a change in the nature of the criminal objective. Thus, this prohibition has been effectively nullified.305 Moreover, the supreme court has erroneously concluded that any codefendant—not just the codefendant who actually inflicted serious bodily injury—may receive consecutive sentences if the Act's other prerequisites are satisfied. Thus, the Act's other intended restriction on consecutive sentences has been invalidated as well.306

a. The "Single Course of Conduct" Limitation

The effect on the availability of consecutive sentences of the Act's "single course of conduct" exception has been minimized by the narrow range of activity that the term is held to embrace. The position established under prior law was that the exception was not "adopted to free a defendant from the consequences of a series of crimes involving separate acts, committed against several individuals."307 This position was adopted in People v. Schlemm,304 which upheld consecutive thirty-eight-year terms for a defendant convicted of murdering two individuals within a short time.309 In the wake of Schlemm, consecutive sentences for crimes committed in the course of a few hours have been approved in a number of cases.310 When multiple victims are involved, defendants do not even try to argue that temporally related crimes come within the "single course of conduct" limitation, apparently realizing that a change in the victim necessarily amounts to a change in the nature of the criminal objective.311

305. See infra notes 307-16 and accompanying text.
306. See infra notes 317-29 and accompanying text.
309. Id. at 648-49, 402 N.E.2d at 817-18 (dictum).
310. See, e.g., People v. Clark, 124 Ill. App. 3d 14, 463 N.E.2d 981 (1st Dist. 1984) (affirming several concurrent sentences to run consecutively to those imposed in connection with other crimes committed earlier in the same evening); People v. Mathes, 101 Ill. App. 3d 205, 427 N.E.2d 1269 (3d Dist. 1981) (consecutive sentences of nine and six years for two armed robberies committed approximately two hours apart, to be served consecutively to existing terms).
311. See, e.g., People v. Edmondson, 106 Ill. App. 3d 716, 435 N.E.2d 870 (2d Dist. 1982)
Consecutive sentences have also been upheld when a defendant committed more than one crime against a single victim. In People v. Perruquet, the defendant abducted and sexually assaulted his victim and, after several hours had elapsed, sexually assaulted her again. The trial judge found that these two attacks were not part of a single course of conduct, so that consecutive sentences could be imposed even though the victim had not suffered serious bodily injury. The sanctions he chose—two consecutive sixty-year terms—were upheld on appeal.

According to these cases, then, virtually any change in a defendant’s conduct sufficient to permit convictions of separate crimes will also be sufficient to take the defendant outside the “single course of conduct” limitation. Under this interpretation, of course, the Act does not narrow the group of defendants eligible for consecutive sentences to any appreciable extent.

b. The Requirement of Serious Bodily Injury

While the “single course of conduct” limitation has not effectively curtailed consecutive sentences, the Act contained another provision that seemed certain to fare better: the requirement that the defendant have inflicted severe bodily injury on the victim. That the General Assembly intended that a defendant personally have inflicted the requisite harm seems clear for three reasons. First, this is the most obvious reading of the language requiring that the “defendant [have] inflicted” the harm. Second, the General Assembly used different language elsewhere in the Act to expose all offenders committing a crime to the possibility of a certain penalty, providing instead that the “offense [be] accompanied by” the requisite behavior. Finally,

(consecutive sentences totaling 36 years for rape and robbery of an elderly woman and severe beating of her husband); People v. Hicks, 101 Ill. App. 3d 238, 427 N.E.2d 1328 (4th Dist. 1981) (consecutive sentences totaling 70 years for execution-style murder and attempted murder committed in connection with armed robbery); cf. People v. Klinkhammer, 105 Ill. App. 3d 747, 434 N.E.2d 835 (3d Dist. 1982) (consecutive sentences totaling 70 years imposed for kidnapping and execution-style murder of armed robbery victim vacated, but with observation that they were not necessarily excessive).

312. 118 Ill. App. 3d 293, 454 N.E.2d 1055 (5th Dist. 1983).
313. Id. at 294-95, 454 N.E.2d at 1056-57.
314. Id. at 296, 454 N.E.2d at 1057-58.
315. Id. at 296-99, 454 N.E.2d at 1057-60.
316. Many courts, however, have imposed concurrent sentences in situations similar to those presented in Perruquet. See, e.g., People v. Sanford, 119 Ill. App. 3d 160, 456 N.E.2d 333 (3d Dist. 1983) (multiple sexual assaults; concurrent 45-year sentences); People v. Medley, 111 Ill. App. 3d 444, 444 N.E.2d 269 (4th Dist. 1983) (multiple sexual assaults; concurrent 45-year sentences). Thus, it is possible that either customary judicial sentencing practices or the Act itself has tended to restrain the pyramiding of sanctions undertaken in Perruquet.
the General Assembly specifically rejected legislation that would have permitted the imposition of consecutive sentences on an accountability rationale.

The Act's consecutive sentence provision derived from alternative proposals contained in two bills introduced in the First 1977 Special Session of the Illinois General Assembly. H.B. 15, called for consecutive sentences when one of the offenses involved was a class 1 felony in which "the defendant inflicted or attempted to inflict serious bodily injury to another." The competing bill, S.B. 11, called for consecutive sentences when at least one class X or class 1 felony was involved and "extreme violence or severe bodily harm occurred." This provision was obviously narrower than that of H.B. 15, insofar as it required that the bodily injury have actually occurred. On the other hand, by providing only that the defendant have been convicted of a class X or class 1 offense in which serious bodily harm was inflicted, but not that the defendant be the one to have inflicted it, S.B. 11 broadened the potential reach of consecutive sentences to embrace passive accomplices. Ultimately, the Act adopted a more restrictive position than that of either of those two bills by combining S.B. 11's actual injury requirement with H.B. 15's requirement that the defendant personally inflict such injury. The clear import of this change was to limit the availability of consecutive sentences to those defendants actually inflicting the harm involved.

The issue of the availability of consecutive sentences for passive accomplices came before the Illinois Supreme Court in People v. Sangster. Sangster reversed an appellate court opinion that had relied solely on a statutory construction argument in concluding that a person convicted of murder, armed robbery, and aggravated kidnapping on an accountability theory could not receive consecutive sentences. The supreme court's reversal was based on a pre-Act decision establishing that the then-existing law permitted consecutive sentences to be imposed on an accountability basis. Because the Sangster court could find no indication that the General Assembly had wished to overturn that earlier construction, it decided that the earlier rule of law had been retained under the Act as well. Sangster's analysis is unconvincing because it is contrary to both the plain

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323. 91 Ill. 2d 260, 437 N.E.2d 625 (1982).
325. Id. at 364-65, 420 N.E.2d at 186-87.
327. 91 Ill. 2d at 265-66, 437 N.E.2d at 628.
meaning of the Act and its legislative history. Furthermore, the sound exercise of judicial discretion would seem to preclude the imposition of consecutive sentences on one defendant because of the injury inflicted by another defendant. Given the potentially staggering severity of consecutive sentences, one would expect that they would be imposed only on those offenders who had demonstrated a personal capacity for dangerousness. Indeed, this is precisely what the Act itself requires, by predicing a consecutive sentence upon a showing that it is necessary "to protect the public from further criminal conduct by the defendant." One can only hope that the supreme court will have occasion to reconsider Sangster.

B. Possible Judicial Guidelines Governing Imposition of Consecutive Sentences

The present system of imposing consecutive sentences is fundamentally flawed and efforts to rationalize it are largely nonexistent. The blame for this situation, however, cannot in fairness be placed solely on the judiciary. The Act itself is responsible, directly or indirectly, for many of the problems that have arisen. While broad legislative measures provide the brightest hope for reform in this area, substantial improvements could be brought about within the existing legislative framework if a few basic guidelines were developed and followed.

Beginning at the greatest level of generality, it should be remembered that the rule developed under prior law disfavoring consecutive sentences remains good law under the Act. Moreover, in imposing consecutive sentences, due consideration must be given to the Act's concerns for fairness and proportionality in sentencing and its adoption of "least restrictive alternative" sentencing principles. Consequently, before imposing lengthy consecutive sentences, a judge should be able to point to objective factors that serve to distinguish the particular defendant from other extremely aggravated offenders who nonetheless were deemed sufficiently punished by concurrent regular or extended term sentences. Additionally, the sentencing judge should be required to treat seriously the Act's requirement that a consecutive sentence is necessary to protect the public from further criminal conduct by the defendant.

328. The supreme court may have been unaware of the provision's evolution, as the court did not discuss its legislative history.
330. See supra notes 77-91 and accompanying text.
332. See supra text accompanying notes 52-68.
333. For these purposes, "lengthy" consecutive sentences are those resulting in a longer aggregate prison term than the maximum extended term for the most serious offense of which the defendant was convicted.
Second, courts generally should restrict the availability of consecutive sentences in all cases involving related crimes—not just in “single course of conduct” cases—to those in which the defendant personally inflicted serious bodily injury during the course of a class X or class I felony. By and large these measures of self-restraint seem to have been adopted tacitly by the judiciary already. Consecutive sentences imposed for nonviolent crimes in related cases, for example, have been routinely reversed on appeal. In addition, consecutive sentences are rarely imposed on defendants who did not personally inflict severe bodily harm. Thus, adoption of the suggested standard would go a long way to rationalize the law of consecutive sentencing while affecting the decisions in just a few aberrant cases.

Finally, in order to promote a greater degree of justice, fairness, and proportionality in sentencing, special guidelines should be developed concerning resort to the lengthier sentences within the Act’s consecutive sentence ranges. To that end, judges should deny themselves the upper one-fourth to one-third of the present consecutive sentencing ranges, even in aggravated cases. While such a proposal obviously runs counter to much current public sentiment, it would be in accord with both explicit and implicit limitations contained in the Act. Moreover, it would alleviate prison overcrowding without jeopardizing public safety in the slightest.

Perhaps the easiest way to see the merits of this proposal is to examine how it would work in a “hard” case—one involving an offender whose conduct and background were unquestionably of the type the General Assembly had in mind when adopting the present longer ranges. People v. DeSimone is a good example. In that case, during the armed robbery of a medical clinic, the defendant shot a doctor in the head at close range, apparently without provocation. The victim was bound hand and foot and left bleeding profusely as the defendant and his confederates ransacked the office. The doctor requested that the offenders summon medical assistance but their only answer was an obscene remark.

DeSimone was tried and convicted of attempted murder, aggravated battery, armed robbery, and armed violence. He was given the “jackpot” of two consecutive sixty-year sentences on the armed robbery and attempted murder counts. The trial judge found no factors in mitigation of the defendant’s conduct, and in aggravation he noted that the defendant had a history of serious prior delinquencies and criminal convictions, including one for murder. The record also revealed that the defendant did not show any

334. See supra text accompanying notes 271-301.
335. See supra text accompanying notes 302-16.
336. See, e.g., People v. Griffin, 113 Ill. App. 3d 184, 446 N.E.2d 1175 (1st Dist. 1982).
337. But see People v. Sangster, 91 Ill. 2d 260, 437 N.E.2d 625 (1982). This is the only case of which the author is aware.
339. Id. at 1017-18, 439 N.E.2d at 1312.
340. Id.
341. Id. at 1019, 439 N.E.2d at 1313.
remorse “but rather demonstrated a deliberate and calculated attitude of contempt for the judicial system.” The appellate court affirmed, concluding that both the extended term and consecutive sentences were appropriate on that record.

What should the appellate court have considered in making that determination? To begin with, DeSimone presented an exceptionally aggravated version of the offense, a particularly egregious prior record, and extremely limited prospects for rehabilitation. Indeed, the defendant's behavior was so aggravated that any "worse" offenders are unlikely to be found. Consequently, it seems clear that DeSimone was the type of offender that the General Assembly had in mind in authorizing consecutive, extended term sentences. Nonetheless, when DeSimone's sentence is examined in light of the Act's goals and purposes, a penalty in the eighty-to-ninety year range seems more than ample.

DeSimone's sentence is questionable in two ways. First, a comparison of DeSimone's sentence to those imposed in closely parallel cases reveals that his 120-year sentence was twice as long as the next most serious sentence imposed on persons convicted of armed robbery or attempted murder in the year he committed his crimes. The Act requires that some reason for this differential appear of record. Even assuming that DeSimone possessed a vileness and despicability in measures not approached by most of his fellow inmates convicted of the same crimes, it seems improbable that he was sixty-years "worse" than the small minority of similar offenders receiving extended term sentences.

Second, DeSimone's sentence was substantially more severe than that of seventy-nine percent of all murder sentences imposed in 1982, even though his actions did not result in loss of life. Only the rarest of cases should justify imposition of consecutive sentences for class X felonies that exceed the maximum extended term sentence available for murder. Consequently, a rule of thumb putting an eighty-year "cap" on consecutive sentences for two class X felonies would be an entirely appropriate and prudent limitation on judicial discretion.

342. Id.
343. Id. at 1019-26, 439 N.E.2d at 1313-17.
344. See Table 6 in 1980 Statistical Presentation, supra note 290. Only 4% of armed robbers and 20% of attempted murderers sentenced in 1982 received extended term sentences. Id.
345. In 1982, of the 320 individuals committed to the DOC for murder, 210 received sentences of 40 years or less, an additional 43 received sentences from 40 to 80 years, none received a definite term of more than 80 years, 52 received natural life, and 15 received death. See Tables 11, 12, 25 in 1982 Statistical Presentation, supra note 290.
346. The need to maintain some degree of proportionality between the sentences imposed for murder and those for class X felonies suggests this result even when the aggravating circumstances justify consecutive extended term sentences. For a fuller discussion of this concern, see infra note 349.
347. The sentencing guidelines proposed herein would provide that a defendant in DeSimone's situation receive a maximum sentence of 70 years. See Appendix to text, Chart 4, at 405. Incomplete information concerning DeSimone's prior adult and juvenile record and his parole
Moreover, an eighty-year sentence for DeSimone cannot be criticized from either a "justice" or a "public safety" perspective. Such a sentence would clearly differentiate him from all but a handful of those convicted of similar crimes. As for public safety, releasing DeSimone in forty years, when he is around seventy years old, is unlikely to result in any greater danger to the public than would releasing him twenty years later. Violent crimes simply are not committed with any great frequency by the elderly.\(^{348}\) Moreover, from a broader perspective, keeping DeSimone in prison after he turns seventy actually may decrease public safety by lessening the willingness or the ability of the criminal justice system to impose longer sentences on younger, more dangerous offenders.\(^{349}\)

Judges should also ignore the upper portions of the sentencing ranges for combinations of other felonies. This follows from the above reasoning and from a need to maintain an appropriate differential between the sentences available for class X offenses and those available for lesser felonies.\(^{350}\) In conjunction with the other measures called for above,\(^{351}\) such an exercise of judicial discretion would go a good way toward the development of a more consistent and rational imposition of consecutive sentences within existing law.

status prevents a precise determination of what his sentence would be. Based on the information available, however, he would have a criminal history score of at least 15 because of his prior murder conviction and his exceptionally brutal or heinous behavior in connection with the instant offense. See infra notes 830-33, 847-51 and accompanying text; Appendix to text, § 1a, c, at 396-97, § 2a(2)(a), (b), at 399-401. A score of 15 would involve a presumptive sentence of 45 to 50 years; each one-point increase in that score would add five years to that presumptive sentence. See Appendix to text, Chart 4, at 405.

\(^{348}\) Unfortunately, exceptions to this rule exist. See People v. Smith, 111 Ill. App. 3d 494, 444 N.E.2d 565 (1st Dist. 1982) (62-year-old defendant with a criminal record extending over 40 years shot store clerk in course of armed robbery).

\(^{349}\) There are two other aspects to a complete review of a sentence such as DeSimone's from the perspective of consistency and proportionality; but their proper resolution in DeSimone's case is not clear from the facts available. First, a sentence of 120 years is, under allowable good-time provisions, the equivalent of a life sentence as it will likely keep the defendant incarcerated for 60 years. See ILL. REV. STAT. ch. 38, § 1003-6-3(a) (1983). Before imposing such a sentence, the record should clearly demonstrate that no reasonable basis exists for concluding that the defendant would be rehabilitated in the foreseeable future. At the very least, it seems likely that condition was satisfied in DeSimone's case.

Second, the sentences in DeSimone should be subject to additional scrutiny because they were imposed for offenses not resulting in death. The General Assembly has required the commission of at least three class X or greater class offenses on separate occasions for imposition of natural life sentences in noncapital cases. See ILL. REV. STAT. ch. 38, § 33B (1983). The sanctions against DeSimone were equivalent to a natural life sentence, which normally should not be imposed on an offender whose criminal record does not show the requisite aggravating factors. However, that three offense condition may also have been met here. See DeSimone, 108 Ill. App. 3d at 1019, 439 N.E.2d at 1313 (defendant "had a history of serious prior delinquencies and criminal activities, including a prior murder conviction").

\(^{350}\) See Schuwerk, supra note 2, at 686-91.

\(^{351}\) See supra notes 214-16 and accompanying text.
IV. Extended Term Sentences

In addition to the natural life and consecutive sentences already discussed, the Act authorized extended terms of imprisonment in certain circumstances. Extended term sentences double the maximum sanction that can be imposed on a felony offender. They could be imposed on convicted felons who were seventeen years old when the offense was committed, if either of two factors were present: (1) the defendant had been previously convicted in Illinois of the same or greater class felony within ten years, excluding time spent in custody, if charges had been separately brought and tried and had arisen out of different series of acts; or (2) the instant felony had been accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty. Since the Act’s passage, the General Assembly has made extended terms available for some gang-rapists and felons whose victims were under twelve, over sixty, or physically disabled.

All of these qualifying factors function as direct limitations on the availability of extended term sanctions: they must be "found to be present" before an extended term sentence may be imposed. Both the language and the legislative history of the Act, however, show that judges were not expected to impose extended term sentences as a matter of course whenever the factors were present. Rather, such sentences were to be imposed only when it would be consistent with the Act’s overriding sentencing reform objectives to do so. The legislature’s expectation was that the Act’s provisions structuring the imposition and review of sentences would result in stringent judicial limitations on their use.

By and large, this expectation has not been borne out. Although there are numerous instances in which extended term sentences seem to have been

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355. See supra note 114.
357. See supra text accompanying notes 85-91.
358. See supra notes 91-92 and accompanying text.
359. See supra text accompanying notes 32-34.
properly and sensibly imposed, the outright invalidation or crimped constructions of the Act's various structural sentencing reforms have greatly hindered the development of a rational approach to extended term sentencing.

There are two principal conceptual problems concerning the use of extended term sentences: what additional nonstatutory factors should be present before extended terms are imposed, and how to determine the length of the sentence, once a judge decides that some extended term sentence is appropriate. These two concerns have been completely ignored by the Illinois reviewing courts. Instead, two erroneous notions have taken root that thus far have undermined any efforts to bring about a minimal degree of consistency and rationality in sentencing. The first mistaken view is that extended term sentences are appropriate whenever a reason for which they may be imposed exists and that it is only a matter of mercy when one is not selected. The second erroneous view is that there are no explicit statutory restraints on selecting a sentence from within the lawful range.

A. Extended Term Sentences Based Solely on a Prior Criminal Record

As noted, the Act permits imposition of an extended term sentence on a felony offender based solely on a sufficiently recent prior felony conviction if that prior conviction was for the same or greater class of felony.

360. See, e.g., People v. Robinson, 122 Ill. App. 3d 362, 461 N.E.2d 493 (1st Dist. 1984) (60-year maximum extended term for attempted murder and armed robbery; defendant, who had five prior felony convictions, beat victim with claw hammer); People v. Woods, 122 Ill. App. 3d 176, 460 N.E.2d 880 (1st Dist. 1984) (60-year maximum extended term sentence for rape; defendant, who had prior armed robbery conviction, tried to put a contract out on victim's life); People v. Shepard, 114 Ill. App. 3d 598, 449 N.E.2d 222 (1st Dist. 1983) (60-year maximum extended term sentences for rape, armed robbery and home invasion affirmed; defendant, who had prior convictions for rape and deviate sexual assault, nearly killed arresting officer); People v. Freeman, 104 Ill. App. 3d 980, 433 N.E.2d 974 (1st Dist. 1982) (40-year extended term sentence for armed robbery affirmed; extensive, extremely brutal torture of victim by defendant).

361. See Schuwerk, supra note 2, at 645-57, 675-86, 691-707.


363. See infra notes 494-518 and accompanying text.

364. Pub. Act No. 80-1099, § 3, 1977 Ill. Laws 3264, 3301 (codified at Ill. Rev. Stat. ch. 38, § 1005-5-3.2(b)(1) (1983)). This language arguably left open the possibility that a defendant with a prior felony record could commit a misdemeanor that could be enhanced to a felony by virtue of the prior conviction(s), and then have the sentence for that latter crime enhanced to an extended term because of that same prior felony. The early appellate court opinions split on the propriety of this double enhancement; but in People v. Hobbs, 86 Ill. 2d 242, 427 N.E.2d 558 (1981), the supreme court put the issue to rest in holding that a prior felony conviction could not be used both to enhance a charge from a misdemeanor to a felony and to enhance the penalty. Id. at 246, 427 N.E.2d at 559-60.

An interesting issue that the Hobbs court commented on but did not resolve was whether a defendant having multiple prior convictions and then convicted of a misdemeanor enhanceable
Although this limitation serves a salutary purpose, it also creates an anomaly: The lower the class of felony a defendant has committed, the more likely it is that any prior criminal record qualifies the defendant for an extended term sentence. A wooden application of this provision would thus result in the imposition of extended term sentences at a greater frequency for minor offenses than for major ones.

Happily enough, this peculiarity has received widespread but tacit recognition. As a general rule, judges have generally exercised their discretion in favor of not considering a prior record as a sufficient basis to impose an extended term sentence for less serious felonies. Even for crimes as serious to a felony by virtue of more than one of these prior offenses, could be sentenced to an extended term by using one of those offenses to enhance the misdemeanor to a felony and another to extend the sentence for that felony. In Hobbs, the defendant had a prior misdemeanor conviction, which could have been used to enhance the instant conviction to a felony, leaving his prior felony conviction to enhance his sentence. The court described this as “irrelevant,” apparently only because it was clear that the prior felony conviction had in fact been used to enhance the grade of offense. 86 Ill. 2d at 246, 427 N.E.2d at 560.

Although this language suggests that the court would have approved of splitting the prior convictions, elsewhere the court seems to rule out that possibility in concluding that a crime that a misdemeanor until a prior conviction is established is “simply not [that] at which section 5-5-3.2(b) is aimed.” Id. Picking up on that language, the court in People v. Spearman, 108 Ill. App. 3d 237, 438 N.E.2d 1320 (3d Dist. 1982), read Hobbs as precluding enhancement under § 5-5-3.2(b)(1) if the instant offense, exclusive of any enhancement provisions due to a defendant’s prior criminal record, constitutes only a misdemeanor. Id. at 240, 438 N.E.2d at 1321-22. The court noted rather tartly that that section “should not be interpreted to authorize imposing up to six years’ imprisonment for shoplifting three pieces of meat, unless the General Assembly clearly expresses itself to the contrary.” Id. at 240, 438 N.E.2d at 1322.

The result in Spearman is sound on its facts, but the reasoning is questionable. By providing for the enhancement of misdemeanors to felonies in certain circumstances, the General Assembly was clearly manifesting its intention to allow recidivists to be punished more severely solely because they are recidivists, rather than because of their instant crime. At least where these offenders had more than the minimal prior record necessary to enhance their misdemeanors to felonies, it seems reasonable to assume that the General Assembly intended to allow them to receive the same punishment that felons of that class would receive. The issue of proper sentencing should not turn on whether the particular felony was an enhanced misdemeanor, but rather whether the sanction levied is an appropriate one considering all of the facts. The vice of the approach taken in Spearman is that it does not merely overturn excessive sentences. Instead, it denies sentencing judges the power to impose lengthy terms in all cases of a given class, even though these sentences might well be appropriate.

Yet, given the alternatives, the rule in Spearman should be supported on a utilitarian rationale—as doing the greatest good in the greatest number of cases. The problem with the sentences levied in Hobbs, Spearman, and similar cases is easily described: Even taking the defendant’s prior records into account, those sentences were clearly excessive both in their own right and in comparison to sentences imposed on those similarly situated. Ideally, these sentences would simply be struck down one at a time by utilizing the probing appellate review process contemplated by the Act. See Schuwerk, supra note 2, at 685-91. Ironically, however, the supreme court's enshrinement of trial judges' sentencing decisions has made a conservative case-by-case approach utterly impractical. Id. Faced with either allowing sentencing judges to impose disproportionally severe sentences without providing effective checks or banning those sentences altogether, it is difficult to fault the Spearman court's choice of the latter course.

365. The provision’s apparent intent was to prevent substantial increases in an offender’s sentence because the offender had a relatively minor criminal record.
as class 2 felonies, this generalization seems to hold. For example, extended terms are quite rare for the most common class 2 felonies, robbery and burglary.\(^3\)\(^6\) Reported decisions involving these felonies usually have discussed extended term sentences as a theoretically possible, but rejected, sentencing alternative.\(^3\)\(^6\) When extended terms have been imposed, the defendants' prior criminal records were almost always far in excess of the minimum number and severity of convictions required by the Act.\(^3\)\(^6\)

Regarding more serious felonies such as rape and armed robbery, however, there is much less consistency in the use of prior records to justify imposing extended term sentences. A substantial and growing body of cases has viewed a defendant's prior felony record not merely as a necessary precondition to imposing an extended term, but as a sufficient basis for such a disposition.\(^3\)\(^6\) Concern for the appropriateness of an extended term, in light of the legislative goals of consistency and proportionality, is nonexistent in many of these cases. Also missing is any sense of the weighty nature of the sentences involved or any consideration of the defendant's personal circumstances.

366. Extended term sentences for robbery and burglary comprised only four to six percent and three to five percent, respectively, of all prison sentences for such offenses from 1978 to 1982. See Table 5 in 1982 Statistical Presentation, supra note 290. There was, however, a somewhat higher use of extended term sentences for voluntary manslaughter, then a class 2 felony, with as many as 22% of all offenders receiving such sentences. See Table 5 in 1982 Statistical Presentation, supra note 290. Additionally, a catch-all “other class 2” category had a rather high use of extended term sentences, ranging from a low of 20% in 1978 to a high of 36% in 1980 and 1982. See Table 5 in 1982 Statistical Presentation, supra note 290.


The situation is less clear, however, with respect to class 3 and class 4 felonies. Of the four separately reported class 3 felonies, only forgery has shown a consistently low imposition of extended term sentences, ranging from one to three percent of all sentences imposed between 1978 and 1982. See Table 5 in 1982 Statistical Presentation, supra note 290. While theft showed only a two percent extended term sentence rate in 1982, in prior years that rate had ranged from 10% to 16%, while aggravated battery ranged from 9% to 13% and unlawful use of weapons ranged from 7% to 11%. See Table 5 in 1982 Statistical Presentation, supra note 290. Class 4 offenses, which are reported only in the aggregate, had ranged higher still, from 9% to 17% of all sentences for such offenses from 1978 to 1982 were extended terms. See Table 5 in 1982 Statistical Presentation, supra note 290.

The cause of this higher usage of extended term sentences is not entirely clear. Possibly, it reflects a misapplication of the Act—equating the power to impose extended term sentences with the propriety of doing so. See supra text accompanying notes 85-91. It is equally possible, however, that these sentences represent particularly aggravated cases—perhaps bargained down from more serious charges—which could not have been punished appropriately with the shorter regular term sentences available for these offenses.


369. See People v. Cohoon, 120 Ill. App. 3d 62, 457 N.E.2d 998 (5th Dist. 1983) (affirming
A case exemplifying this attitude is *People v. Nance,* in which the defendant was tried and convicted of a garden-variety armed robbery. The defendant had pled guilty to another armed robbery a few years prior to the instant offense. Based solely on that earlier conviction, he received an extended term sentence of forty-five years. The opinion did not mention the defendant's personal situation, nor did it explain why the defendant should receive a sentence more severe than almost all of the sentences imposed on armed robbers in the year his sentence was reviewed.

The *Nance* court erred in equating the power of the sentencing judge to select an extended term for a person having the defendant's criminal history with the appropriateness of the sentence selected. The extended term provisions of the Act were intended to be applied only if the totality of the circumstances surrounding the offense and a careful review of the defendant's background indicated that such a term was appropriate. Moreover, the particular sentence selected was to be commensurate with that imposed on similarly situated offenders.

Nance's sentence failed both aspects of this test. Nance's prior criminal history was the minimum necessary to qualify him for an extended term, and there were no other aggravating circumstances to justify an increase in his sentence. The treatment of similarly situated offenders also demon-


In a number of cases, extended term sentences were ostensibly based on the defendants' prior records, but they were almost certainly imposed because of some other factors. See, e.g., *People v. Woods,* 122 Ill. App. 3d 176, 460 N.E.2d 880 (1st Dist. 1984) (defendant with prior armed robbery conviction sentenced to 60 years for rape, where record reflected that he attempted to put a contract out on rape victim after he was apprehended); *People v. Eddington,* 117 Ill. App. 3d 953, 453 N.E.2d 1383 (1st Dist. 1983) (defendant sentenced to 12 years for kidnapping while on probation for aggravated battery and burglary; he was clearly interrupted in the process of preparing to sexually assault his victim); *People v. Martin,* 101 Ill. App. 3d 480, 428 N.E.2d 591 (1st Dist. 1981) (defendant given 10-year sentence on conviction of involuntary manslaughter in connection with shooting of robbery victim). Cases in which a defendant convicted of one crime is confronted at the sentencing hearing with other purported victims of his criminal activity also could fall into this category. For a discussion of these types of cases, see infra notes 783-88 and accompanying text.


371. Nance and a companion stopped the victim on the street at gunpoint and demanded money and drugs. When he said he had neither, they took his wallet and departed. No threats or brutality were involved. *Id.* at 1119, 427 N.E.2d at 631.

372. *Id.* at 1125, 427 N.E.2d at 633.

373. See Table 6 in 1981 *Statistical Presentation,* *supra* note 290.


375. See *supra* note 371.
strates that Nance’s sentence was excessive. Although comprehensive state-
wide sentencing data on persons in Nance’s situation have never been compiled,
a recent study of sentencing practices in the Chicago area noted that armed
robbers with previous armed robbery convictions received average sentences
of only eight years.376 And apart from statistical evidence suggesting the
anomalous nature of Nance’s forty-five year sentence, numerous cases exist
in which defendants who had more serious criminal records377 or who com-
mitted more aggravated armed robberies378 received substantially shorter
sentences than Nance received. In short, the trial court’s willingness to group
Nance with the most culpable or dangerous of armed robbers379 was unsub-
stantiated. Consequently, affirming that court’s extended term sentence was
erroneous.

A related error frequently occurs in extended term sentencing cases based
solely on a sufficiently aggravated prior criminal record: equating the power
to impose an extended term at all with the power to select the maximum
extended term available. For example, in People v. Davis,380 the appellate
court upheld sixty-year maximum extended term sentences imposed on two
defendants who were convicted of home invasion and armed robbery.381 Both
had “had a consistent history of legal involvements since 1969,” as well as
prior convictions for armed robbery and aggravated battery for which they
were then on parole.382 The reported facts revealed no threats, brutality, or
other aggravating conduct by the defendants.383 These sentences were af-
fermed on the theory that the defendants’ lengthy records alone would
support the sentences imposed,384 even though the trial judge may have had an erroneous view of how aggravated the defendants’ conduct had been.385

376. See Chicago Crime Comm’n, Armed Robbery in Chicago: The Response of the
Cook County Justice System 11-15, 27-35 (1984) [hereinafter cited as CCC Armed Robbery
Study].
377. See, e.g., People v. Worthen, 105 Ill. App. 3d 386, 434 N.E.2d 423 (1st Dist. 1982)
(concurrent sentences of 15 years for attempted murder and 20 years for armed robbery; de-
defendant had two prior convictions for armed robbery); People v. Rogers, 101 Ill. App. 3d
614, 428 N.E.2d 547 (5th Dist. 1981) (30-year sentence for rape of stranded motorist; de-
defendant had prior convictions for rape and robbery).
378. See, e.g., People v. Worthen, 105 Ill. App. 3d 386, 434 N.E.2d 423 (1st Dist. 1982)
(defendant failed in an attempt to kill victim). For a representative sample of brutal rapes in
which defendants received shorter sentences than Nance, despite obviously doing far more harm
to the victim, see cases discussed infra notes 529-31.
379. Only six percent of armed robbers entering the DOC in 1981 received extended term
sentences. See Table 6 in 1981 Statistical Presentation, supra note 290.
381. Id. at 816, 464 N.E.2d at 1152.
382. Id. at 824, 464 N.E.2d at 1154.
383. The victims’ testified that the defendants appeared in their home brandishing weapons
and ransacked the house. After they had obtained cash and other valuables, they left without
further incident. Id. at 817, 464 N.E.2d at 1153.
384. Id. at 822-24, 464 N.E.2d at 1157-58.
385. The court appeared to believe that the victims had been bound and possibly terrorized.
Id. at 823-24, 464 N.E.2d at 1157.
The attitude revealed in *Davis* is clearly inconsistent with the legislature's goals of fairness and proportionality in sentencing. While the presence of a single qualifying factor can give rise to an extended term sentence, it does not follow that a single factor can justify a *maximum* extended term sentence. The Act's principal extended term factors can, and frequently do, occur in combination. Under the standards set by the General Assembly, offenders with multiple aggravating factors merit more severe punishments than those whose crimes involved only one qualifying factor. Criminal sentences should be imposed to honor that intent.

386. Two other cases involving the same armed robbery, *People v. Sanford*, 116 Ill. App. 3d 834, 452 N.E.2d 710 (1st Dist. 1983), and *People v. Poree*, 119 Ill. App. 3d 590, 456 N.E.2d 950 (1st Dist. 1983), also seem to manifest the same questionable tendency as *Nance* and *Davis*. In those cases, four defendants held up a gas station at gunpoint. Although the victims were threatened, no efforts were made to harm them. The defendants escaped, possibly exchanging shots with pursuing police officers in the process. No one was injured, and the defendants were not apprehended until some time later. *Sanford*, 116 Ill. App. 3d at 836-37, 452 N.E.2d at 712-15.

Each defendant was tried and convicted of armed robbery and received a 60-year sentence. *Sanford*, 116 Ill. App. 3d at 836, 452 N.E.2d at 712; *Poree*, 119 Ill. App. 3d at 595, 456 N.E.2d at 953. Apparently each defendant had at least one prior class X felony conviction upon which a lengthy sentence could be based. The trial judge in each case also concluded that the statute's "exceptionally brutal or heinous behavior" provision was applicable. *Sanford*, 116 Ill. App. 3d at 844-45, 452 N.E.2d at 718; *Poree*, 119 Ill. App. 3d at 599-600, 456 N.E.2d at 958.

On appeal, these sentences were affirmed under the deferential abuse of discretion standard, even though each court expressed doubt that the "exceptionally brutal or heinous behavior" proviso was applicable. *Sanford*, 116 Ill. App. 3d at 844-45, 452 N.E.2d at 718; *Poree*, 119 Ill. App. 3d at 599-600, 456 N.E.2d at 958. Both courts concluded that because each defendant had at least one prior class X or greater felony conviction, any error in the trial judges' perceptions of the nature of the defendants' behavior was immaterial. *Sanford*, 116 Ill. App. 3d at 844-45, 452 N.E.2d at 718; *Poree*, 119 Ill. App. 3d at 599-600, 456 N.E.2d at 958.


388. *See*, e.g., *People v. Robinson*, 122 Ill. App. 3d 362, 461 N.E.2d 493 (1st Dist. 1984) (defendant's 60-year sentences for attempted murder and armed robbery affirmed where defendant, who beat victim with claw hammer, had five prior felony convictions and was on parole at time of offense); *People v. DeSimone*, 108 Ill. App. 3d 1015, 439 N.E.2d 1311 (2d Dist. 1982) (120 years of consecutive sentences affirmed for brutal attempted murder and armed robbery where defendant had extensive criminal record including murder conviction); *People v. Mitchell*, 98 Ill. App. 3d 398, 424 N.E.2d 658 (3d Dist. 1981) (45-year sentence for attempted murder affirmed where defendant had two prior murder convictions).

Such appalling records, however, do not always result in lengthy sentences. *See* *People v. Surges*, 101 Ill. App. 3d 962, 428 N.E.2d 1012 (1st Dist. 1981) (defendant Banks received concurrent eight-year sentences for a vicious armed robbery and series of brutal sexual assaults on victim's wife and young daughter, despite prior murder conviction). Conversely, not all offenders receiving lengthy sentences have such aggravating factors. *See infra* notes 440-58, 476-93 and accompanying text.

389. In at least some cases, that concern could be accommodated by imposing consecutive sentences, which in the aggregate would exceed any extended term sentences that would be available. *See* Ill. Rev. Stat. ch. 38, § 1005-8-4(c)(2) (1983). For a variety of reasons, however, this author recommends that concerns regarding proportionality not be accommodated in that
B. Extended Term Sentences Based Solely on Exceptionally Brutal or Heinous Behavior

Apparently unjustified lengthy sentences based on a prior felony record are troubling. Those based on the exceptionally brutal or heinous behavior rationale, however, are even more so. This latter provision is used far more frequently as a basis for extended term sentences and its use, at present, is almost totally devoid of any meaningful standards or guidelines.

It seems obvious and straightforward that persons who commit crimes accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty should be eligible to receive extended terms of imprisonment. Yet, efforts to apply this statutory provision in a rational and consistent manner have run into almost insuperable difficulties. Problems in definition and applicability have, in turn, brought the constitutionality of this provision into question.

1. Constitutionality

The Act's provision allowing extended terms to be imposed for exceptionally brutal or heinous behavior indicative of wanton cruelty has been challenged as unconstitutionally vague. This issue has been raised and uniformly rejected in a large number of cases that have expressed confidence that the provision could be given a clear and consistent interpretation.\textsuperscript{390} Because the provision supposedly used readily understandable words in their ordinary senses, these authorities concluded that it is sufficiently precise to withstand a vagueness challenge.\textsuperscript{391}

Despite the confidence expressed in these opinions that courts would give a rational and consistent construction to the operative phrase, no such process has occurred. To begin with, there has been no real effort to clarify the meaning of the phrase or to delimit its applicability.\textsuperscript{392} Moreover, the appellate courts have not discussed, much less quantified, the additional factors that should lead a court to impose or withhold extended terms.\textsuperscript{393} A few isolated instances exist in which courts have found particular conduct not to involve the requisite aggravated behavior at all.\textsuperscript{394} In the vast run of cases,


\textsuperscript{391} See cases cited supra note 390.

\textsuperscript{392} See infra notes 406-13, 425-39 and accompanying text.

\textsuperscript{393} See cases cited infra notes 519-49. Perhaps these courts were unaware that the presence of the necessary egregious behavior was not deemed sufficient to warrant application of the Act's extended term provisions in every instance. See supra text accompanying notes 85-91.

\textsuperscript{394} See People v. Reynolds, 116 Ill. App. 3d 328, 332, 451 N.E.2d 1003, 1007 (2d Dist. 1983) (not exceptionally brutal or heinous behavior to commit armed robbery in which handgun was placed to victim's head and money demanded); People v. Fieberg, 108 Ill. App. 3d 665, 671, 439 N.E.2d 543, 548 (1st Dist. 1982) (defendant, convicted of aggravated battery,
however, appellate courts, hobbled by the limitations imposed by the abuse-of-discretion standard of review, have rubber-stamped the extended terms imposed by trial courts.

2. **Applicability to Brutal or Heinous Crimes**

One of the few issues that has been resolved in a manner consistent with the intent of the General Assembly concerns the effect of this provision on sentences for crimes such as murder and rape that, even in their unadorned forms, might be thought of as inherently involving exceptionally brutal or heinous behavior. The General Assembly had already provided for substantially enhanced minimum penalties for most of these severe offenses. It was not entirely clear, however, whether extended term sentences should be imposed routinely for these crimes or, instead, be reserved for particularly distasteful instances of them.

The general response to this issue has been to conclude that extended term sentences were not intended to be routinely available. Some cases, typified by *People v. Merchel*, reached this result by noting that the Act did not impose extended terms for the commission of exceptionally brutal offenses, but rather for exceptionally brutal behavior accompanying a given offense. Thus, the mere commission of an appalling crime was not intended to trigger this provision. Other cases noted that, because the statute authorizes extended terms only for exceptionally brutal or heinous behavior, the General Assembly did not intend to make extended terms available automatically for the bulk of inherently aggravated offenses. Both of these observations are entirely sound but, as the succeeding sections show, they have not always been remembered.

3. **Efforts to Define or Limit Key Terms**

The salutary judicial interpretations just referred to have been undermined by the constructions given to the various operative terms of the phrase

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395. See ILL. REV. STAT. ch. 38, § 1005-8-1(a)(1) (1983) (mandatory minimum prison sentence of 20 years for murder); id. § 1005-8-1(a)(3) (mandatory minimum prison sentence of six years for class X felonies). Many class 1 felonies, which carry minimum prison sentences of four years, are also nonprobable. Id. § 1005-8-1(a)(4).

396. 91 Ill. App. 3d 285, 414 N.E.2d 804 (5th Dist. 1980).

397. Id. at 293, 414 N.E.2d at 811.

398. Id. at 294, 414 N.E.2d at 811-13.

“accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty.” While a number of these interpretations are defensible, their cumulative impact has been to increase undue sentencing disparity. Courts have given broad readings to elements of this factor that tend to expand its applicability and narrow readings to those that tend to narrow its scope. Thus, courts have applied this aggravating factor well beyond the small group of cases for which it is justified.

a. “Accompanied By”

The Act requires only that the requisite egregious behavior accompany the offense at issue before an extended term is permitted.\(^400\) Case law has made it clear that the qualifying behavior may occur before,\(^401\) during,\(^402\) or after\(^403\) an offense for which an extended sentence is imposed. These cases seem to be sensible and consistent with the Act, even though they temporally expand the range of behavior that will qualify a defendant for an extended term sentence. As long as the aggravated behavior is “inseparably linked” to the underlying offense,\(^404\) imposing an extended term sentence seems entirely proper no matter when that behavior occurred in relation to the offense.\(^405\)


\(^402\) See, e.g., People v. Rosenberger, 125 Ill. App. 3d 749, 466 N.E.2d 608 (4th Dist. 1984); People v. Green, 118 Ill. App. 3d 227, 454 N.E.2d 792 (1st Dist. 1983) (both cases involving brutal beating of child resulting in death).


\(^404\) This was the test adopted by the supreme court in Smallwood. Id. at 196, 464 N.E.2d at 1052.

\(^405\) The law has taken one peculiar turn in this area. In People v. Evans, 87 Ill. 2d 77, 429 N.E.2d 520 (1981), the supreme court construed the Act as authorizing an extended term sentence only where “the most serious offense of which the offender is convicted [is] accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty.” Id. at 87, 429 N.E.2d at 525. A number of lower courts have read this language as precluding imposition of an extended term sentence for any crimes except the most serious one of which the defendant was convicted, even if all were accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty. See People v. Freeman, 104 Ill. App. 3d 980, 433 N.E.2d 974 (1st Dist. 1982); People v. Walsh, 101 Ill. App. 3d 1146, 428 N.E.2d 937 (1st Dist. 1981).

Other later cases, however, have concluded that extended term sentences are available for all offenses accompanied by the requisite exceptionally brutal or heinous behavior. See People v. Jordan, 114 Ill. App. 3d 16, 448 N.E.2d 237 (3d Dist. 1983), aff'd in part, rev'd in part, 103 Ill. 2d 192, 469 N.E.2d 569 (1984); People v. Mims, 111 Ill. App. 3d 814, 444 N.E.2d 684 (1st Dist. 1983). These later cases appear correct. The language of § 5-8-2 of the Act relied on in Evans prohibits imposition of “a term of imprisonment in excess of the maximum [regular term] sentence authorized by Section 5-8-1 for the class of the most serious offense of which
b. “Exceptionally” Offensive Behavior

Some cases have recognized the theoretical importance of the word “exceptionally” as limiting the applicability of the “exceptionally brutal or heinous behavior” extended term provision. That word, however, has not been given any operative significance in construing the Act. No cases exist in which behavior was found to be “brutal or heinous” but not “exceptionally brutal or heinous.” In fact, the present trend seems to be quite the opposite: to view “exceptionally” as adding nothing of substance to the degree of brutal or heinous conduct necessary before an extended term sentence is proper. This trend is best illustrated by cases such as People v. Jones in which extended term sentences based merely on a finding of “brutal or heinous behavior” have been affirmed on appeal, the missing qualifier apparently being deemed of no consequence.

Proper consideration for the Act’s overriding goals and purposes requires that the “exceptionally” qualifier be used to limit application of extended term sentences under this provision to particularly atrocious instances of criminal behavior. Perhaps the most promising approach to this issue was the suggestion in Jones that a finding of exceptionally brutal or heinous behavior should depend not only on the nature of the defendant’s conduct, but also on the severity of the sentence that would be imposed if such a finding were made.

The offender was convicted unless the [extended term] factors in aggravation set forth in paragraph (b) of Section 5-5-3.2 were found to be present.” Ill. Rev. Stat. ch. 38, § 1005-8-2 (1983). The clear effect of this provision is to restrict a court to imposition of regular term sentences for each offense, unless an extended term factor in aggravation is present. If such a factor is present, however, its availability in connection with the sentence for a given offense is governed by § 5-5-3.2(b) of the Act. See id. § 1005-5-3.2(b).

The supreme court, however, has recently concluded that the appellate courts in Mims and Jordan were incorrect. In reversing the Jordan appellate court, the supreme court in People v. Jordan, 103 Ill. 2d 192, 469 N.E.2d 569 (1984), concluded that extended term sentences may only be imposed for the most serious offense of which the defendant was convicted, and then only if the sentence were otherwise authorized by the Act. Id. at 203-06, 469 N.E.2d at 574-76. This holding creates an anomalous situation when an offender is convicted of crimes falling into different felony classes. For example, a rapist who murders his victim can receive only a 30-year sentence for his sex offense. On the other hand, a rapist who brutalizes his victim in a way not resulting in death can be sentenced to up to 60 years for that same crime. Hopefully, the General Assembly will address this matter through legislation.

406. See supra text accompanying notes 398-99.
408. See, e.g., id. at 104, 107, 391 N.E.2d at 769, 772; cf. People v. La Pointe, 88 Ill. 2d 482, 495-96, 431 N.E.2d 344, 353 (1982) (defendant’s natural life sentence for murder based on an exceptionally brutal or heinous behavior rationale affirmed, even though court decided only that defendant’s behavior was “brutal” and “heinous” as those terms are ordinarily defined).
409. 73 Ill. App. 3d at 104, 391 N.E.2d at 770. The Jones court appears to not have applied its analysis correctly to the defendant’s situation. See infra notes 427-38 and accompanying text.
An explicit effort to grade brutal or heinous behavior and to relate that gradation to the length of sentence selected is the sort of inquiry that the Act intended would occur. That approach could be quite useful in a variety of contexts. For example, it would allow for distinctions between those exceptionally brutal or heinous murders punishable by terms of years\(^{410}\) and those punishable by natural life sentences.\(^{411}\) It also could be of assistance in selecting appropriate sentences from within the lengthy sentencing ranges available once an extended term had been found appropriate.\(^{412}\) Regrettably, however, there is little indication that the Jones analysis is currently being applied.\(^{413}\)

c. "Brutal Or Heinous" Behavior

The Illinois Supreme Court's opinion in *People v. La Pointe*\(^{414}\) typifies the prevalent approach to defining "brutal or heinous": consult the dictionary and see what the words mean.\(^{415}\) The effect of this technique, whether intended or not, has been to allow trial courts the widest possible latitude to label particular behavior as brutal or heinous, and to confer the narrowest possible latitude on reviewing courts to countermand those determinations. While the dictionary technique is a standard tool of statutory construction,\(^{416}\) its use has hindered the development of a rational, consistent, and proportional system of sentencing. Broadening the range of conduct deemed brutal or heinous makes it less likely that any systematic application of that phrase would develop.

Despite these obstacles, a broad consensus has emerged. There is universal agreement that behavior qualifying a defendant for an extended term has occurred when the defendant has inflicted severe, gratuitous, physical abuse on the victim.\(^{417}\) Similarly, particularly ruthless or cold-blooded murders or


\(^{412}\) Various conduct has been found to constitute "exceptionally brutal or heinous behavior indicative of wanton cruelty." When such conduct exists in multiple or particularly aggravated forms, it would seem appropriate to reflect those circumstances in the sentences selected. The guidelines set out below propose such a system. See Appendix to text, § 2a(2)(a), (b), at 399-401.

\(^{413}\) See *People v. La Pointe*, 85 Ill. App. 3d 215, 407 N.E.2d 196 (2d Dist. 1980), rev'd, 88 Ill. 2d 482, 431 N.E.2d 344 (1982); *supra* notes 204-12 and accompanying text.

\(^{414}\) 88 Ill. 2d 215, 407 N.E.2d 196 (2d Dist. 1980).

\(^{415}\) 88 Ill. 2d at 501, 431 N.E.2d at 353; see *supra* notes 166-72, 204-09 and accompanying text.

\(^{416}\) See, e.g., *Ambassador East, Inc. v. City of Chicago*, 399 Ill. 359, 77 N.E.2d 803 (1948); *Culver v. Waters*, 248 Ill. 163, 93 N.E. 747 (1911).

\(^{417}\) See, e.g., *People v. Wilson*, 124 Ill. App. 3d 831, 464 N.E.2d 1158 (1st Dist. 1984) (concurrent 40- and 20-year sentences for multiple acts of rape and deviate sexual assault accompanied by beatings; defendant had no prior criminal record); *People v. Poe*, 121 Ill.
attempted murders are routinely placed into the exceptionally brutal or heinous category. Clearly, there is no problem, in principle, in treating

App. 3d 457, 459 N.E.2d 667 (2d Dist. 1984) (50-year sentence for defendant who raped victim, strangled her into unconsciousness, slashed her throat and left her for dead); People v. Ely, 107 Ill. App. 3d 102, 106-08, 437 N.E.2d 353, 356 (4th Dist. 1982) (60-year sentence for armed robbery affirmed where trial court had stated that it "could imagine no more heinous or brutal behavior associated with an armed robbery than that which was present in the instant case").


418. There are five general categories of murder or attempted murder that frequently are treated in this manner. The first involves unresisting or particularly blameless or defenseless victims, such as children. See, e.g., People v. Rosenberg, 125 Ill. App. 3d 749, 466 N.E.2d 608 (4th Dist. 1984) (brutal beating of child resulting in death; extended term sentence imposed, even though defendant had no prior record); People v. Green, 118 Ill. App. 3d 227, 454 N.E.2d 792 (1st Dist. 1983) (beating and kicking 13-month-old child resulting in death; extended term sentence for murder upheld; extended term sentence for concealing homicidal death not upheld).

The second major category includes murders or attempted murders undertaken in order to prevent the detection, apprehension, or prosecution of a crime. Cases in which the defendants kill or attempt to kill someone to prevent their identification, see, e.g., People v. La Pointe, 88 Ill. 2d 482, 431 N.E.2d 344 (1981) (murder of armed robbery victim because defendant was previously known by the victim; extended sentence for murder held not to be an abuse of discretion by the sentencing judge), and cases in which they take similar action with respect to police or bystanders seeking to apprehend them, see, e.g., People v. Finkey, 105 Ill. App. 3d 230, 434 N.E.2d 18 (4th Dist. 1982) (police officers wounded when responding to domestic disturbance; maximum sentence imposed for attempted murder); People v. Tucker, 99 Ill. App. 3d 606, 425 N.E.2d 511 (2d Dist. 1981) (police officers were shot while attempting to apprehend suspect after armed robbery; consecutive sentences for two counts of attempted murder imposed), fall within this category. Similarly, cases in which the defendant seeks to prevent his or her own prosecution, see, e.g., People v. Smrekar, 68 Ill. App. 3d 379, 385 N.E.2d 848 (4th Dist. 1979) (murder of husband and wife who were prosecution witnesses against same defendants in a misdemeanor theft case; consecutive 100 to 300 year sentences imposed on each count), and those where the defendant seeks to prevent the prosecution of someone else, see, e.g., People v. Dixon, 122 Ill. App. 3d 141, 460 N.E.2d 858 (1st Dist. 1984) (defendant murdered female who was to be a witness in an unrelated and previous killing; life sentence imposed), are also included. Cf. People v. Woodson, 122 Ill. App. 3d 176, 460 N.E.2d 880 (1st Dist. 1984) (maximum extended term sentence for rape affirmed where defendant unsuccessfully solicited murder of his victim, to prevent her from testifying against him).

A third and closely related category involves murders or attempted murders undertaken in retribution for testimony offered in judicial proceedings. See, e.g., People v. Perez, 113 Ill. App. 3d 143, 446 N.E.2d 1229 (1st Dist. 1983) (victim brutally tortured, mutilated, and killed for testifying against fellow gang member of defendant).

The fourth broad category of such aggravated murders or attempted murders consists of those undertaken for compensation. See, e.g., People v. Coleman, 49 Ill. 2d 565, 276 N.E.2d 721 (1971) (killing motivated by desire to obtain life insurance proceeds); People v. Russell, 51 Ill. App. 3d 646, 366 N.E.2d 1121 (3d Dist. 1977) (killing for hire).

The final such category, which probably is resorted to less consistently than others, includes cases involving multiple victims. See, e.g., People v. Schlemm, 82 Ill. App. 639, 402 N.E.2d 810 (4th Dist. 1980) (finding double murder to be exceptionally brutal or heinous, but imposing
any of these types of aggravated behavior as exceptionally brutal or heinous. The same cannot be said, however, of a growing group of cases finding that exceptionally atrocious or vile threats will also qualify defendants for extended terms under this provision, even though those threats were not carried out. Given the all too common nature of such threats in connection with certain offenses, it seems improbable that they can be deemed exceptionally brutal or heinous behavior. Perhaps for that reason, many other courts have declined to impose extended term sentences under this rationale, even in similarly aggravated cases.

Of these two positions, it seems preferable to relegate all but the most egregious unfulfilled threats to the category of merely brutal or heinous behavior, and not to treat them as justifying extended term sentences. Even the few exceptional cases should not result in the imposition of extended term sentences beyond the lower end of the range. Lengthier extended term sentences would be unduly disparate from the regular term penalties imposed on most equally culpable offenders. Moreover, the Act's emphasis on proportionality requires that even more severe sentences be given to those who


Each of those types of murders or attempted murders would continue to be treated as a form of exceptionally brutal or heinous behavior indicative of wanton cruelty under the sentencing guidelines proposed herein. See Appendix to text, § 2a(2)(a), at 399-400.

Occasionally, however, problems have arisen as to whether or not a particular case was properly placed in one of those categories. For example, La Pointe seems to raise such issues. See supra text accompanying notes 204-12.

See, e.g., People v. Sanford, 119 Ill. App. 3d 160, 163, 456 N.E.2d 333, 335 (3d Dist. 1983) (45-year sentence affirmed based on victim’s “mental anguish” and “strong possibility of harm,” where the defendant “forced the victim to submit to 40 minutes of continuous sexual abuse during which 12 acts of sexual and psychological abuse took place”); People v. Clark, 102 Ill. App. 3d 414, 425-26, 429 N.E.2d 1255, 1263-64 (1st Dist. 1981) (50-year sentences for home invasion, deviate sexual assault, and armed robbery affirmed where defendant threatened to kill victim’s baby, forced husband to watch her repeated violation and otherwise psychologically abused and humiliated family); People v. Turner, 93 Ill. App. 3d 61, 69, 416 N.E.2d 1149, 1155 (1st Dist. 1981) (repeated death threats apparently made because of defendant’s “disposition to inflict...suffering or to enjoy its being inflicted” held to justify extended term sentence); People v. Jones, 73 Ill. App. 3d 99, 102-04, 391 N.E.2d 767, 769-70 (4th Dist. 1979) (defendant’s act of repeatedly firing pistol into the air viewed as wanton cruelty, due in part to “mental anguish to the victims who feared they might be killed”).

Most cases involving atrocious but unfulfilled threats result in regular term sentences. See, e.g., cases cited infra notes 422, 698-702. For a discussion of the unjustified disparity that a finding of “exceptionally brutal or heinous behavior” has from case to case, see infra notes 519-49 and accompanying text.

See, e.g., People v. Lieberman, 107 Ill. App. 3d 949, 959, 438 N.E.2d 516, 524 (1st Dist. 1982) (repeated threats made both during and after rape by knife-wielding defendant to “cut” victim and to kill her if she reported crime to authorities held not to constitute exceptionally brutal or heinous behavior as a matter of law); People v. Killen, 106 Ill. App. 3d 65, 67-68, 435 N.E.2d 789, 790-91 (4th Dist. 1982) (defendant’s action in forcing victim to
actually carry out their threats.\textsuperscript{423} Finally, a rational sentencing system should give a criminal some incentive not to carry out barbaric threats. Reserving the most severe penalties for those who do not show such restraint would fulfill that purpose.\textsuperscript{424}

d. “Indicative of Wanton Cruelty”

Even exceptionally brutal or heinous behavior will not qualify a defendant for an extended term sentence unless that behavior is also “indicative of wanton cruelty.”\textsuperscript{425} To date, however, this latter requirement has not achieved independent significance. No court, after finding that an offense was accompanied by exceptionally brutal or heinous behavior, has concluded that the behavior was not indicative of wanton cruelty. Apparently, there has not been any concerted effort to give a limiting construction to that phrase.\textsuperscript{426} Instead, the broad interpretation given it in People v. Jones\textsuperscript{427} has set the tenor for the case law in this area.

perform two acts of fellatio while he threatened to “cut her” and asked her “questions of a personal nature,” but did not physically harm her, held not to constitute exceptionally brutal or heinous behavior, even though court found that the victim undoubtedly had “suffered deep and permanent emotional scars”). People v. Lieberman, 107 Ill. App. 3d 949, 438 N.E.2d 516 (1st Dist., 1982), is particularly persuasive because the defendant was the so-called “plumber rapist” who was suspected of numerous additional rapes, some of which were then being prosecuted. \textit{Id}. at 952, 438 N.E.2d at 519-20. Thus, the temptation to stretch the phrase “exceptionally brutal or heinous” to fit his conduct was particularly strong. \textit{See also} cases cited \textit{infra} note 698.

\textsuperscript{423} See Schuwerk, supra note 2, at 637-38, 668-707.

\textsuperscript{424} The guidelines proposed below allow particularly aggravated threats to be considered as exceptionally brutal or heinous behavior indicative of wanton cruelty, but only if some other form of such behavior is present. See Appendix to text, § 2a(2)(a)(2), (c), at 399-400, 401.


\textsuperscript{426} The only supreme court case involving a limitation is People v. Evans, 87 Ill. 2d 77, 429 N.E.2d 520 (1981). Because \textit{Evans} presented a unique factual situation, however, that limitation is not likely to have a widespread impact.

In \textit{Evans}, the defendant was convicted of voluntary manslaughter because he fired a pistol at one person and accidentally killed another, in the unreasonable belief that the actions were necessary in self-defense. 87 Ill. 2d at 86, 429 N.E.2d at 524. Although the trial court had concluded that the defendant’s behavior involved wanton cruelty, the supreme court disagreed, holding that “actions committed under a subjective belief, albeit unreasonable, that the actions were in self-defense do not constitute wanton cruelty.” \textit{Id}. at 88, 429 N.E.2d at 525.

The reach of \textit{Evans} in this regard is still undergoing development, but to date it has not been extended beyond comparable factual contexts. Thus, the appellate courts have held that \textit{Evans} does not prohibit a finding that crimes were accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty, even when they were committed under extreme mental distress, People v. Cox, 113 Ill. App. 3d 136, 446 N.E.2d 1280 (1st Dist. 1983), or in the heat of passion, People v. Kalec, 109 Ill. App. 3d 696, 440 N.E.2d 1254 (3d Dist. 1982), as long as the defendant had both realized and intended that the victim would suffer death or serious bodily injury. \textit{See} Cox, 113 Ill. App. 3d at 138-39, 446 N.E.2d at 1281-82; Kalec, 109 Ill. App. 3d at 699-700, 440 N.E.2d at 1255-57.

\textsuperscript{427} 73 Ill. App. 3d 99, 391 N.E.2d 767 (4th Dist. 1979).
In *Jones*, the defendant committed an armed robbery in a crowded restaurant in the course of which he discharged a gun several times.\(^{428}\) The defendant fired all or most of the shots into the air to frighten the victims into complying with his demands.\(^{429}\) Although no one was seriously injured, the trial court concluded that each crime growing out of the episode was accompanied by brutal or heinous behavior indicative of wanton cruelty.\(^{430}\) For that reason, the trial court imposed six concurrent extended term sentences.\(^{431}\)

On appeal, the defendant argued that his behavior should not be deemed "wanton cruelty" within the meaning of the Act because that term should be given a narrow construction limiting it to conduct that was "heinous, atrocious, or cruel."\(^{432}\) The appellate court, however, rejected the defendant's proposal as "entirely too narrow and restrictive."\(^{433}\) Instead, the court defined "wanton cruelty" by combining a dictionary definition of cruelty\(^{434}\) with the supreme court's definition of "wanton" in a civil case: "Ill will is not a necessary element of wanton act. To constitute an act wanton, the party . . . must be conscious of his conduct, and, *though having no intent to injure*, must be conscious . . . that his conduct will naturally and probably result in injury."\(^{435}\) The *Jones* court concluded that the defendant's repeated discharge of his pistol during the course of his crime satisfied the wanton cruelty requirement in large part because of the mental anguish such conduct caused his victims.\(^{436}\)

A definition of wanton cruelty that would permit imposition of an extended

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428. *Id.* at 103, 391 N.E.2d at 770.

429. One shot was fired so close to a deputy sheriff that he suffered powder burns on his face and hands. *Id.* The shot, however, did not strike the deputy, and the court never stated that it was intended to do so. The court might well have believed the defendant had such an intent, though, because it referred to that action as an "extremely brutal act, one which only by the grace of God did not result in a homicide." *Id.* at 101-02, 391 N.E.2d at 769. Later cases construing *Jones*, however, have generally regarded all of the shots that were fired as a way of terrorizing patrons of the establishment rather than as an attempt to kill. See People v. Clark, 102 Ill. App. 3d 414, 425, 429 N.E.2d 1255, 1263 (1st Dist. 1981).


431. *Id.*

432. *Id.* at 103, 391 N.E.2d at 770. The definition the defendant argued for was derived from State v. Dixon, 283 So. 2d 1 (Fla. 1973), and provided as follows:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.

283 So. 2d at 9.

433. 73 Ill. App. 3d at 104, 391 N.E.2d at 770.

434. The court settled upon "something that causes pain of suffering" or as a "disposition to inflict pain or suffering to or to enjoy its being inflicted." *Id.* at 103, 391 N.E.2d at 769.


436. 73 Ill. App. 3d at 103, 391 N.E.2d at 770.
term of imprisonment on a defendant who did not intend to injure anyone seems erroneous. While the definition quoted above makes sense in the civil context in which it arose, it does not provide a sufficiently culpable basis for adding a substantial number of years to a defendant's prison sentence. Before threats should be deemed to rise to the level of "wanton cruelty," they should have the terrorizing of the victim as their direct object. Even then, this type of conduct should seldom result in the imposition of extended term sentences in the absence of other aggravating circumstances.

e. Conclusion

Through the deemphasis of both the "exceptionally" qualifier to "brutal or heinous behavior" and the "indicative of wanton cruelty" requirement, courts, in effect, amended this provision of the Act. Instead of requiring that an offense be "accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty" before imposing an extended term sentence, courts now require merely that the offense was "accompanied by brutal or heinous behavior."

4. Impact of Judicial Amendments

These judicial amendments have had two disturbing consequences for fairness in sentencing. First, they have hopelessly blurred any distinction between defendants whose offenses are accompanied by exceptionally brutal or heinous behavior and those whose offenses merely "cause . . . serious harm" for purposes of receiving a regular term sentence. Moreover, the judicial amendments have permitted extended term sentences to be imposed in two situations in which they are not appropriate: (1) when a crime victim has been unduly affected psychologically by an offender's conduct that, while reprehensible, was well within the normal range of behavior typically accompanying the particular crime; and (2) when the defendant was a minor, passive accomplice in a crime made exceptionally brutal or heinous by the actions of others.

a. Extended Terms Based On Psychological Harm To The Victim

It is not uncommon for courts imposing extended term sentences on the rationale of exceptionally brutal or heinous behavior to focus extensively on

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437. The situation would be different in this case were it to turn out that the defendant actually fired at the deputy sheriff with the intent to cause death or serious bodily harm. See supra note 429. Under the guidelines proposed herein, such conduct committed in the course of a crime, other than some form of homicide, would constitute exceptionally brutal or heinous behavior indicative of wanton cruelty. See Appendix to text, § 2a(2)(a)(3), at 400.


439. See infra notes 519-49 and accompanying text. The sentencing guidelines proposed herein make an effort to bring some order to that situation. See infra notes 754-55 and accompanying text; Appendix to text, § 2a(1), (2), at 397-401; § 2c(2), (3), at 403-04.
the psychological trauma that the defendant's conduct caused the victim.\(^{440}\)

This focus occurs most frequently in cases in which the defendant's conduct was both intended and reasonably calculated to produce psychological trauma. In many of these cases, generating fear or terror appeared to have been an end in itself rather than merely a means of facilitating the commission of the crime.\(^{441}\)

Considering the adverse psychological consequence of the defendant's conduct on the victim in cases of that kind is sensible, because the victim's psychological trauma is a direct outgrowth of the wanton cruelty that is necessary to qualify a defendant for an extended term sentence. Real difficulties arise, however, if a court focuses on the victim's psychological harm in itself. If that harm is not examined from the perspective of what it reveals about the defendant's behavior or state of mind, a defendant may be given an extended term sentence without any showing that the defendant engaged in behavior indicative of the wanton cruelty, as required by the Act.

Such an error occurred in the bizarre case of *People v. Viens*,\(^{442}\) in which the defendant abducted his victim and drove her to his apartment at knifepoint. He told her that she would not be harmed if she did as she was told, and that he had taken her hostage as part of a plan to free his girlfriend from jail. The defendant kept the victim tied up during the ordeal, but on several occasions he removed or loosened her bonds when she complained of discomfort. The defendant also gave her food and drink and even allowed the victim to call her mother and a girlfriend.\(^{443}\) The defendant later forced the victim to disrobe and indicated that he had lied when he said he would not hurt her. Fortunately, the victim managed to escape without being hurt physically. The defendant was apprehended shortly thereafter.\(^{444}\)

The defendant was convicted of aggravated kidnapping and armed violence. At the sentencing hearing, the judge stated that he found no factors in mitigation and that the defendant qualified for an extended term sentence based on exceptionally brutal or heinous behavior.\(^{445}\) The judge imposed the maximum extended terms for each offense: thirty years for aggravated kidnapping and sixty years for armed violence.\(^{446}\)

\(^{440}\) See cases cited supra note 420.

\(^{441}\) See, e.g., *People v. Clark*, 102 Ill. App. 3d 414, 424, 429 N.E.2d 1255, 1262 (1st Dist. 1981) (extended term sentence appropriately imposed for behavior indicative of mental and emotional cruelty where defendant invaded victims' home, held gun to their one-year-old son, and forced wife to commit a deviate sexual act while husband and son watched, before he ransacked their home).


\(^{443}\) Id. at 1020, 441 N.E.2d at 662-63.

\(^{444}\) Id. at 1020-21, 441 N.E.2d at 663.

\(^{445}\) Id. at 1021, 441 N.E.2d at 664.

On appeal, the defendant challenged the propriety of any extended term sentence, arguing that his conduct could not possibly come within the terms of the statute. The appellate court disagreed. The Viens court relied on People v. Piontkowski as upholding the imposition of an extended term sentence without proof of serious injury if there had been "needless additional intrusions upon the physical integrity of the victim." The Viens court concluded that the defendant's actions could "reasonably be said to have terrorized and endangered the victim" whom, the court noted, had "suffered substantial emotional trauma as well as some minor physical injuries" as a result of her ordeal. Citing People v. Clark, the Viens court concluded that it was entirely proper to base an extended term sentence on such mental suffering, which "common experience teaches . . . often exceeds that of physical injury."

Without denigrating the extent of the victim's trauma as a result of the defendant's activities, it is nonetheless clear that this incident hardly resembles the many truly atrocious or brutal crimes for which extended term sentences have been imposed. The Viens court's reliance on Piontkowski only serves to show how radically out of line Viens's sentence was. In Piontkowski, the defendant's comparable aggravating activities were only found sufficient to extend his sentence to two years beyond the minimum rather than fifty-four years as in Viens. The Viens court's reliance on Clark was likewise misplaced. In Clark, the defendant had not only engaged in markedly more vile conduct than Viens did, but also had a lengthy record of brutal sex offenses. Nonetheless, Clark received a substantially shorter sentence than Viens did.

The supreme court, however, has recently invalidated the practice followed in Viens of allowing a defendant to be convicted of armed violence based on the commission of a felony that had itself been enhanced because of the presence of a weapon. People v. Del Percio, 105 Ill. 2d 372, 377, 475 N.E.2d 528, 530-31 (1985). Thus the proper course in Viens would have been to affirm the defendant's conviction for aggravated kidnapping and to vacate the sentence for armed violence. Had that been done, Viens's longest possible sentence would have been 30 years rather than the 60 years he received. See ILL. REV. STAT. ch. 38, §§ 10-2(a)(5), 10-2(b)(2), 1005-8-2(a)(3) (1983).

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447. 109 Ill. App. 3d at 1027-28, 441 N.E.2d at 668.
448. 77 Ill. App. 3d 994, 397 N.E.2d 36 (5th Dist. 1979).
449. Viens, 109 Ill. App. 3d at 1028, 441 N.E.2d at 668 (citing People v. Piontkowski, 77 Ill. App. 3d 994, 397 N.E.2d 36 (5th Dist. 1979)).
450. 109 Ill. App. 3d at 1028, 441 N.E.2d at 668.
451. Id. at 1028, 441 N.E.2d at 669.
454. See cases cited supra notes 417, 418, 420; see also People v. Medley, 111 Ill. App. 3d 444, 444 N.E.2d 269 (4th Dist. 1983) (defendants took turns raping and sodomizing housewife and forcing her to perform acts of fellatio; concurrent 45-year sentences imposed).
455. Piontkowski, 77 Ill. App. 3d at 995, 397 N.E.2d at 37.
456. Clark, 102 Ill. App. 3d at 424-25, 429 N.E.2d at 1263-64.
457. Id. at 419, 429 N.E.2d at 1258-59. Clark had a record of "a variety of sexual perversions, aggression and . . . forcing unknown women to perform sexual acts at knifepoint and gunpoint." Id.
458. Clark's sentence was only 50 years. Id. at 416, 429 N.E.2d at 1256.
Even accepting the Viens court's doubtful characterization of the defendant's behavior as exceptionally brutal or heinous, the extended term sentence was erroneous because the statutory element of wanton cruelty was lacking. By focusing solely on the consequences of the defendant's behavior rather than on his motivation, the Viens court erroneously read the wanton cruelty requirement out of the statute. This error has also infected the manner in which extended term sentences are imposed on passive accomplices in crimes involving exceptionally brutal or heinous behavior.

b. Extended Terms Based on an Accountability Theory

The Act permits extended term sentences to be imposed when an offense is accompanied by the requisite behavior, rather than when an offender has engaged in such conduct.\(^4\)\(^5\)\(^9\) Thus, many courts have concluded that, once an offense of the requisite character has been established, all participants in that crime are subject to extended term sentences.\(^4\)\(^6\) This statement of the law is essentially correct but nevertheless misleading.

The interpretation is correct in the sense that the General Assembly clearly intended to subject some passive accomplices to extended term sentences.\(^4\)\(^6\)\(^1\) The Act's coupling of an extended term sentence with conviction of an offense accompanied by the prohibited behavior appears to have been deliberate, especially in light of the Act's consecutive sentencing provisions, which require the defendant being sentenced to have committed the qualifying behavior.\(^4\)\(^6\)\(^2\) While the General Assembly's intent is obscure, its decision could have resulted from a belief that all perpetrators involved in exceptionally brutal criminal behavior, whether active or passive, frequently have specifically endorsed the brutal aspects of the offense.\(^4\)\(^6\)\(^3\) This does not mean, however, that all passive accomplices in such crimes should be eligible for extended term sentences. Rather, an extended term should not be imposed unless evidence relating to the defendant's own character, background, or participation in the offense suggests that the defendant personally deserves such a sentence.


\(^4\)\(^6\)\(^1\) This construction does conflict with the interpretation given the identical language in the Act providing for a natural life sentence for murder. See Merchel, 91 Ill. App. 3d at 293-94, 414 N.E.2d at 811; Pub. Act No. 80-1099, § 3, 1977 Ill. Laws 3264, 3308 (codified at ILL. REV. STAT. ch. 38, § 1005-8-1(a)(1) (1983)). As argued above, however, the Merchel construction is not correct. See supra text accompanying notes 179-83.

\(^4\)\(^6\)\(^2\) See Pub. Act No. 80-1099, § 3, 1977 Ill. Laws 3264, 3311 (codified at ILL. REV. STAT. ch. 38, § 1005-8-4(a) (1983)). The Act's consecutive sentencing provisions have not been interpreted as incorporating such a limitation. That construction, however, is erroneous. See supra text accompanying notes 317-29.

\(^4\)\(^6\)\(^3\) It frequently is apparent from the facts described in appellate court opinions that trial
There are three reasons why this is so, the first stemming directly from the text of the Act and the other two from a regard for its policies and purposes. To begin with the textual argument, the proposed limitation is necessary because of the Act's requirement that the brutal conduct be "indicative of wanton cruelty." This requirement indicates that the General Assembly wanted the sentencing judge to focus on the defendant's state of mind, not just on the nature of the behavior involved in the offense. Under such a standard, passive defendants may be properly sentenced to extended terms if, for example, they originated the idea of a particular savage act, or ordered it done. Because these defendants have specifically endorsed the brutal behavior they may be punished as if they had committed the brutal acts. But only if such an additional factor is present can it be said that exceptionally brutal or heinous behavior on the part of another is indicative of wanton cruelty on the part of the person being sentenced.

Two broad principles of sentencing implicit in the Act also require the proposed limitation on imposing extended term sentences on passive defendants. The first is the Act's goal of fairness and proportionality in sentencing. The Act intended that a sentence be a measure of the particular defendant's blameworthiness in relation to others. This intent is not implemented by imposing an extended term sentence on a defendant because of the unforeseeable action or unendorsed conduct of another. The second principle is courts have implicitly adopted such a rationale in imposing extended term sentences. See, e.g., People v. Rivera, 126 Ill. App. 3d 197, 199, 466 N.E.2d 1144, 1147-49 (1st Dist. 1984) (defendant's extended term sentence for murder affirmed when he held victim while codefendant repeatedly stabbed him); People v. Reese, 121 Ill. App. 3d 977, 981-82, 460 N.E.2d 446, 449 (1st Dist. 1984) (defendant and his colleagues decided to execute victims of their armed robbery; although defendant shot at one victim he did not kill him, but his extended term sentences for the murders committed by his codefendants were affirmed); see People v. Owens, 99 Ill. App. 3d 730, 425 N.E.2d 527 (2d Dist. 1981); infra notes 468-75 and accompanying text.

464. Arguably, this requirement could be satisfied if a codefendant had behaved in a manner "indicative of wanton cruelty" in committing the crime. That position, however, is unsound. The entire purpose for individualized consideration of each defendant at sentencing runs counter to the notion that the acts of another, beyond the common criminal design, may be attributed to the defendant before the bar.

465. In such circumstances, the sentencing guidelines proposed herein would permit a finding of the requisite behavior by the passive participants. See Appendix to text, § 2a(2)(a), at 399-400.

466. See Schuwerk, supra note 2, at 687. This is, of course, also the bedrock justification for broad, unfettered, judicial sentencing discretion. Proponents of that position inevitably couch their argument in terms of a need to be free to consider all pertinent circumstances of each offender's case in imposing sentence and to follow that process through to its logical conclusion by imposing whatever sentence that that examination seems to require. See People v. Perruquet, 68 Ill. 2d 149, 154, 368 N.E.2d 882, 884 (1977); Aspen, New Class X Sentencing Law: An Analysis, 66 ILL. B.J. 344, 346 n.27 (1978).

While the author has no quarrel with either of those propositions, that concession does not invalidate the argument for the reforms sought by this proposal. Granting the need for such discretion in no way weakens the argument that it should be exercised in a consistent, even-handed manner, so that sentences imposed on offenders are proportionate to their blame worthiness, as assessed in accordance with objective criteria. This is what the Act sought to do and what this proposal seeks to implement.
that sentencing liability, as opposed to criminal liability, is (and should be) strictly personal. Admittedly, the fact that a defendant chose to participate in a particularly sordid criminal episode is frequently relevant to the defendant's blameworthiness and rehabilitative potential. Nonetheless, the defendant's passive participation does not appear to be enough, standing alone, to justify a conclusion that the defendant acted with the "wanton cruelty" necessary to support an extended term sentence. Consequently, before imposing such a sanction, the court should be satisfied by further evidence that the defendant being sentenced shared the wanton cruelty of the actual perpetrator.

People v. Owens demonstrates a proper application of this principle. In Owens, the defendant and his confederates committed a brutal armed robbery and attempted murder. The defendant was convicted of a variety of class X offenses on an accountability theory and, even though he had not personally committed the more sordid aspects of these crimes, he received the maximum extended term sentence of sixty years. The trial court found that the defendant had been the "ring leader and instigator" of the whole episode and that before the series of crimes began, the defendant had personally assented to "get[ting] rid" of the victim in order to prevent their apprehension. Moreover, before deciding that an extended term was appropriate, the trial judge also found that the defendant's potential for rehabilitation was "really very slim" in light of his age and exceptionally aggravated criminal record.

The sentence was affirmed on appeal, despite the defendant's argument that an extended term was inappropriate because he was not directly involved in the brutal aspects of the crime. It is difficult to find fault with this

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467. This principle has not always been acknowledged. The appellate court in People v. Sangster, 95 Ill. App. 3d 357, 420 N.E.2d 181 (4th Dist. 1981), rev'd, 91 Ill. 2d 260, 437 N.E.2d 625 (1982), did recognize it when it distinguished between a defendant's criminal liability for a brutal murder committed by another defendant on an accountability rationale and his liability for consecutive term sentences based on his confederate's infliction of "severe bodily injury" in the course of that episode. 95 Ill. App. 3d at 364, 420 N.E.2d at 186. Unfortunately, the supreme court's reversal of the appellate court's decision has cast a pall over this principle. It appears, however, that a separate line of cases justifying distinctions between the sentences imposed on codefendants based on the nature of their participation in the offense, among other things, support the same result. See, e.g., People v. Kline, 92 Ill. 2d 490, 507-09, 442 N.E.2d 154, 162-63 (1982); People v. Godinez, 91 Ill. 2d 47, 55, 434 N.E.2d 1121, 1125-26 (1982).

469. Id. at 733-34, 425 N.E.2d at 530. The victim was driven to a deserted field, forced to disrobe, struck over the head, stabbed and slashed repeatedly, and then was left for dead. Id.
470. Id. at 739, 425 N.E.2d at 534.
471. Id. at 740, 425 N.E.2d at 535.
472. Id. at 739, 425 N.E.2d at 534.
473. Id. at 740, 425 N.E.2d at 534-35. Owens, 43, had a "past history of violent crime, including rape." Id.
474. Id. at 740, 425 N.E.2d at 535.
decision. The record revealed that the defendant was an older, hardened criminal with a propensity for violence. His passive role in the offense was probably due to his ability to manipulate others into doing his dirty work for him. His status as an “accomplice” was thus more readily viewed as nothing more than a factor in aggravation. Both the language of the Act and common sense suggest that extended term sentences should be available for criminal masterminds like Owens.475

Unfortunately, however, it is more common to ignore the rationale of Owens and impose extended term sentences on passive, peripheral accomplices based on the brutal or heinous behavior of their colleagues. The case of People v. Tibbs,476 provides an excellent illustration of this tendency. In Tibbs, the defendant and two compatriots agreed to steal a vehicle. The unarmed defendant knew that his associates were armed with a shotgun and a pistol.477 Tibbs’s two confederates forcibly abducted the victim, robbed him, and made him lie face down by the side of the road in a deserted area.478 The defendant, who had been following the others in a separate car, joined his accomplices. One of the defendant’s colleagues then fired a shotgun, hitting the victim in the arm and hand.479

The defendant was convicted of attempted murder, armed robbery, and aggravated kidnapping on an accountability theory. He received concurrent prison terms of fifty-five, thirty, and fifteen years, respectively.480 The defendant apparently did not dispute the characterization of this offense as involving exceptionally brutal or heinous behavior, arguing only that his fifty-five-year sentence was excessive.481 Despite the fact that the defendant’s role in the planning and the execution of this criminal episode was entirely passive and clearly the least culpable of the three offenders, the appellate court affirmed his sentence.482 Moreover, it did so without ever alluding to the defendant’s age, personal circumstances, record of prior delinquency or criminal activity, or other factors that might have borne on his rehabilitative potential.483

People v. Rowe484 also involved the imposition of extended term sentences on a passive accomplice in questionable circumstances. In Rowe, the unarmed

475. That conclusion remains true under the sentencing guidelines proposed herein. See Appendix to text, § 2a(2)(a), 2a(2)(a)(4) at 399-400.
477. Id. at 75, 430 N.E.2d at 682.
478. Id.
479. Id.
480. Id. at 74, 430 N.E.2d at 681.
481. Id. at 75-76, 430 N.E.2d at 682.
482. Id. at 77-78, 430 N.E.2d at 683-84.
483. Id. In fairness to the court, it is unclear whether or not Tibbs assented to his codefendant’s attempted murder. Just prior to the shooting, all the defendants had a whispered conference that might well have involved the subsequent shooting of the victim. Id. at 75, 430 N.E.2d at 682. The court, however, did not purport to base Tibbs’ sentence on the theory that he had endorsed efforts to dispatch the victim in that conversation.
defendant and a confederate who was armed with a shotgun robbed a grocery store. For no apparent reason, Rowe's codefendant shot and killed the store owner. The defendant was convicted of murder and armed robbery and received a sixty-year extended term sentence for the murder on the basis of exceptionally brutal or heinous behavior. The appellate court affirmed the sentence without any inquiry into the defendant's personal circumstances, prior criminal history, or rehabilitative potential. The case of People v. Rogers, which involved remarkably similar facts to Rowe, also resulted in a cursory appellate affirmance of the "lookout" defendant's sixty-five-year sentence.

The sentences in these three cases, and others like them, are clearly inconsistent with the Act. Their ready affirmation on appeal is due to the erroneous equation of the power to impose extended term sentences with the propriety of doing so. Clearly, the General Assembly was willing—even eager—to have lengthy extended terms imposed in factually appropriate cases. But, given the legislature's concern about a careful grading of sanctions and a desire to achieve a fairness and proportionality among differently situated offenders, it is not consistent with the legislature's will to punish offenders like Tibbs, Rowe, and Rogers as severely as those resembling Owens.

C. Extended Term Sentences Involving Multiple Factors in Aggravation

Case law has established that an extended term sentence may be imposed when only one of the Act's aggravating factors is present. Yet, cases

485. Id. at 323, 328-29, 450 N.E.2d at 806, 809.
486. Id. at 328-30, 450 N.E.2d at 809-10.
487. Id. (relying on People v. Gray, 87 Ill. App. 3d 142, 153, 408 N.E.2d 1150, 1158 (1st Dist. 1980)). Once again, however, a basis in the record existed for believing that the defendant had affirmatively assented to his codefendant's decision to kill. The evidence on that point was an overheard conversation at a pre-trial hearing in which the defendant supposedly told his confederate, "We should have killed a witness against them too." Id. at 324, 450 N.E.2d at 806. The appellate court, however, did not base its decision on that rationale.
489. Id. at 389-90, 461 N.E.2d at 514-15. Rogers' circumstances were more mitigated than Rowe's, however, because no evidence in the record suggested that Rogers knew of or assented to his codefendant's murderous designs. Id; see supra note 487.
490. 122 Ill. App. 3d at 387, 393, 461 N.E.2d at 512, 519.
491. See, e.g., People v. Clay, 124 Ill. App. 3d 140, 150-57, 463 N.E.2d 929, 938-42 (1st Dist. 1984) (defendant received 60-year sentence for participation in attempted armed robbery in which 10-year-old child was killed; defendant not present at killing; codefendant, who was with actual perpetrator, allowed to plead guilty to only attempted armed robbery, receiving 10-year sentence); People v. Feagans, 119 Ill. App. 3d 941, 944-46, 457 N.E.2d 459, 461-62 (4th Dist. 1983) (60-year sentence imposed for murder committed in course of armed robbery; defendant's role relatively minor and supposedly undertaken under duress).
492. See supra text accompanying notes 85-92.
493. See Schuwerk, supra note 2, at 687.
494. See, e.g., People v. Jones, 119 Ill. App. 3d 615, 630 456 N.E.2d 926, 938 (1st Dist.
frequently occur in which multiple factors exist. The offenders in these latter cases are generally both more culpable and demonstrably less amenable to rehabilitation than offenders in cases presenting only one qualifying factor. Thus, the Act's goal of proportionate sentencing seems to mandate reserving sentences in the upper end of the extended term range for multiply qualified offenders with multiple aggravating factors. To that end, if only one qualifying factor is present the sentence imposed should be in the lowest portion of the extended term range. Similarly, if more than one factor is


495. See cases cited supra note 388. The most frequent combination of factors is a sufficiently aggravated prior criminal record and a current offense accompanied by exceptionally brutal or heinous behavior. In a number of recent cases, however, courts have relied on the fact that the victim was under 12 or over 60 to support an extended term sentence, as authorized by ILL. REV. STAT. ch. 38, § 1005-5-3.2(b)(3) (1983). See, e.g., People v. Rosenberger, 125 Ill. App. 3d 749, 751, 466 N.E.2d 608, 610 (4th Dist. 1984) (murder victim 23 months old); People v. Jones, 119 Ill. App. 3d 615, 631, 456 N.E.2d 926, 938 (1st Dist. 1983) (murder victim 65 years old); People v. Green, 118 Ill. App. 3d 227, 229, 454 N.E.2d 792, 794 (1st Dist. 1983) (murder victim 13 months old).

The defendants' treatment of the victims in these cases, in and of itself, justified extended term sentences. Frequently, however, this will not be so. In these cases, the age of the victim alone should not justify an extended term sentence, because age does not serve to single out offenders who are either more culpable or more dangerous than their fellow criminals with any degree of consistency. Accordingly, the sentencing guidelines proposed herein reduce the importance of the age of the victim. See Appendix to text, § 2a(1)(a)(6), at 398; § 2a(1)(b)(3), at 399.

496. See supra notes 85-92 and accompanying text.

497. There appears to be a dichotomy between the approach to extended term sentences in cases of serious and less serious crimes. In the case of murder or class X felonies, a number of courts may have tacitly recognized a rule to refuse to sentence an offender to more than the median extended term sentence when only one of the Act's two principal extended term factors was present. See People v. Green, 125 Ill. App. 3d 734, 747-48, 466 N.E.2d 630, 639 (4th Dist. 1984) (defendant with no prior record sentenced to 60 years for murder based on the defendant's exceptionally brutal or heinous behavior); People v. Rosenberger, 125 Ill. App. 3d 749, 766, 466 N.E.2d 608, 620 (4th Dist. 1984) (defendant with no prior record sentenced to 60 years for murder of infant based on the defendant's exceptionally brutal or heinous behavior; court considered and rejected sentences of natural life and 80 years); People v. Sanford, 119 Ill. App. 3d 160, 163, 456 N.E.2d 333, 335 (3d Dist. 1983) (defendant sentenced to 45 years for rape and deviate sexual assault; since court failed to mention prior offenses, sentence apparently was based solely on the defendant's exceptionally brutal or heinous behavior); People v. Gallardo, 112 Ill. App. 3d 764, 775-76, 445 N.E.2d 1213, 1222 (1st Dist. 1983) (defendant with no prior record sentenced to 60 years for brutal murder of defenseless victim); People v. Nance, 100 Ill. App. 3d 1117, 1125, 427 N.E.2d 630, 636 (4th Dist. 1981) (45-year sentence for unaggravated armed robbery based on single prior conviction for armed robbery).

When lesser classes of felonies are involved, however, court's have had a tendency to find less serious behavior to be exceptionally brutal or heinous and to impose maximum sentences based on that behavior. The attitude of the court in these situations appears to be that the defendant is fortunate not to have been convicted of a more serious offense. See, e.g., People v. Cox, 113 Ill. App. 3d 136, 137-39, 446 N.E.2d 1280, 1280-82 (1st Dist. 1983) (defendant was convicted of involuntary manslaughter for the death of her own child resulting from
present, but only to some minimal degree,\textsuperscript{498} an extended term sentence that is still substantially less than the maximum is appropriate.\textsuperscript{499}

A review of reported sentencing decisions strongly suggests that present sentencing practices for class 2, 3, and 4 felony offenses follow these precepts. Because class 2, 3, and 4 felonies are rarely accompanied by exceptionally brutal or heinous behavior,\textsuperscript{500} the only common route to an extended term would be a sufficiently aggravated criminal record. For most of these offenses, then, application of the proposed guidelines would render maximum extended term sentences virtually a dead letter.

The cases show that this has occurred. Almost no cases exist in which class 2 felons are given extended terms in excess of ten years, class 3 felons in excess of seven years, or class 4 felons in excess of four years. The exceptions generally involved the unusual cases in which a lesser class felony was accompanied by exceptionally brutal or heinous behavior,\textsuperscript{501} or cases in

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\textsuperscript{498} The possible range of behavior is truly extraordinary. See, e.g., People v. Gacy, 103 Ill. 2d 1, 468 N.E.2d 1171 (1984) (defendant convicted of 33 homosexually motivated torture-slayings); People v. Davis, 95 Ill. 2d 1, 10-16, 36, 447 N.E.2d 353, 357-60, 370 (1983) (defendant convicted of third murder, unrelated to prior murder convictions, and indicted for several more, all apparently committed in cold blood to prevent victims from identifying him); People v. DeSimone, 108 Ill. App. 3d 1015, 1017-18, 439 N.E.2d 1311, 1312-13 (2d Dist. 1982) (defendant with a history of serious delinquencies and criminal convictions, including conviction for murder was convicted of attempted murder, aggravated battery, armed robbery, and armed violence growing out of a single incident); People v. Bryant, 105 Ill. App. 3d 285, 291, 434 N.E.2d 316, 320 (1st Dist. 1982) (defendant with five prior convictions for rape convicted of brutal murder).\textsuperscript{499} Indeed, many defendants whose offenses have involved a minimum degree of exceptionally brutal or heinous behavior and who also have a prior criminal record presently do not receive extended term sentences at all. See infra notes 519-49 and accompanying text.

\textsuperscript{500} The few class 2, 3, or 4 felony offenses that do often involve exceptionally brutal or heinous behavior include voluntary manslaughter, ILL. REV. STAT. ch. 38, § 9-2 (1977) (amended 1981); involuntary manslaughter, ILL. REV. STAT. ch. 38, § 9-3 (1983); and aggravated battery, \textit{id.} § 12-4. Voluntary manslaughter was recently reclassified from a class 2 felony to a class 1 felony. See Act of 1982, Pub. Act No. 82-517, § 1, 1981 Ill. Laws 2618, 2618 (codified at ILL. REV. STAT. ch. 38, § 9-2 (1983)).

\textsuperscript{501} See, e.g., People v. Matthews, 126 Ill. App. 3d 710, 711-12, 716, 467 N.E.2d 996, 998, 1001 (1st Dist. 1984) (defendant sentenced to maximum extended term of 10 years for aggravated battery involving severe beating of two women and a child with a pistol and a baseball bat);
which the extended term sentence imposed for the lesser class felony was rendered a meaningless gesture by the imposition of a longer concurrent sentence for a more serious offense.\textsuperscript{502}

A great deal of injustice would be prevented if the proposed rule of thumb were recognized and consistently applied to the imposition of extended term sentences for the more violent and emotion-laden crimes of murder, class X, and class 1 felonies. Given the breadth and severity of the penalties available for those offenses, the most severe extended terms should not be imposed unless the offender had an exceptionally aggravated prior record and had exhibited exceptionally brutal or heinous behavior in committing the crime.\textsuperscript{503} This two-pronged test could, and should, be implemented

People v. Cox, 113 Ill. App. 3d 136, 137-39, 446 N.E.2d 1280, 1280-82 (1st Dist. 1983) (defendant, who was convicted of involuntary manslaughter for the death of her own child resulting from repeated and extremely severe child abuse, was sentenced to maximum extended term of 10 years); People v. Brown, 104 Ill. App. 3d 1110, 1121-22, 433 N.E.2d 1081, 1084-86 (1st Dist. 1982) (defendant who beat two victims into unconsciousness, and then started fire in which both victims died, sentenced to concurrent 14-year maximum extended terms). But see People v. Baker, 114 Ill. App. 3d 803, 812, 448 N.E.2d 631, 636-37 (2d Dist. 1983) (14-year maximum extended term sentence for burglary based solely upon defendant's extensive nonviolent felony record).

\textsuperscript{502} See, e.g., People v. Adams, 106 Ill. App. 3d 467, 476, 435 N.E.2d 1203, 1210 (1st Dist. 1982) (defendant committed armed robbery in dwelling; sentenced to 35 years for armed robbery and 14 years for burglary). Under the Act, a defendant will earn good conduct credits simultaneously and at the same rate on all outstanding sentences. See Pub. Act No. 80-1099, § 3, 1977 Ill. Laws 3264, 3289-90, 3314 (codified at ILL. REV. STAT. ch. 38, §§ 1003-6-3, 1005-8-7(b) (1983)). Thus, the defendant's release date is determined solely by the longest sentence imposed, frequently called the "controlling" sentence.

In the wake of the supreme court's decision in People v. Jordan, 103 Ill. 2d 192, 469 N.E.2d 569 (1984), defendants convicted of more than one felony should receive extended term sentences for only the most serious felony of which the defendant is convicted. See supra note 405.


Moreover, a number of decisions have implicitly rejected the two prong test by refusing to vacate lengthy extended term sentences that were apparently imposed on the trial judges' mistaken belief that several aggravating factors were present rather than just one. See People v. Rosenberger, 125 Ill. App. 3d 749, 751, 466 N.E.2d 608, 610 (4th Dist. 1984); People v. Jones, 119 Ill. App. 3d 615, 631, 456 N.E.2d 926, 938 (1st Dist. 1983); People v. Poree, 119 Ill. App. 3d 590, 601, 456 N.E.2d 950, 958 (1st Dist. 1983); People v. Green, 118 Ill. App. 3d 227, 229, 454 N.E.2d 792, 794 (1st Dist. 1983); People v. Sanford, 116 Ill. App. 3d 834, 845,
through the unilateral action of the judiciary by adding specific ceilings to the proposed judicial rule of thumb: Absent both an exceptionally brutal offense and an exceptionally aggravated prior record, no murderer should be sentenced to more than sixty years, no class X felon to more than forty years, and no class 1 felon to more than twenty years.

While anyone who proposes sentencing limitations of this magnitude risks the label of misguided reformer, if not worse, the historical records suggest that these measures are entirely supportable. A review of the sentences imposed for serious offenses in recent times demonstrates that those benchmarks would result in reserving sentences for exceptionally aggravated offenders that are harsh enough to satisfy all but the Torquemadas among us.

For example, the proposed sixty-year cutoff figure for murder represents the middle of the extended term range for that crime. In each of the first five years since the Act's passage, seventy-one to eighty-two percent of all murderers sentenced to terms of years received regular term sentences of forty years or less. Even greater numbers received sentences of sixty years or less. Thus, sentences in excess of sixty years are in the distinct minority.

452 N.E.2d 710, 718 (1st Dist. 1983). These decisions are erroneous because they fail to give due consideration to the goals of fairness and proportionality in sentencing. The penalties imposed on offenders in cases where only one aggravating factor is present should not be as severe as the penalties imposed in cases where several factors are present. Instead, each aggravating factor should enhance a defendant's sentence.

504. The supreme court may "prescribe such practices and procedures as will promote a uniformity and parity of sentences . . ." Pub. Act No. 80-1099, § 3, 1977 Ill. Laws 3264, 3302 (codified at Ill. Rev. Stat. ch. 38, § 1005-5-4.2 (1983)); see also Schuwerk, supra note 2, at 713-14 (suggesting steps the supreme court should take).

505. The current extended term maxima for murder, class X and class I felonies are 80 years, 60 years, and 30 years respectively. See Ill. Rev. Stat. ch. 38, § 1005-8-2(a)(1), (2), (3) (1983). The maximum consecutive sentences available for those same felony classes, assuming two felonies of like grade are committed, are twice those figures. See id. § 1005-8-4(c)(2). Certain murders also are punishable by sentences of death or natural life. Id. §§ 9-1(b), 1005-8-1(a)(1)(b), (c).

For a more precise meaning of "exceptionally brutal offense" and "exceptionally aggravated prior record," see infra notes 819-49; Appendix to text, § 1, at 396-97; § 2a(2)(a)(1)-(4) at 400; Chart 4, at 405.

506. See Table 11 in 1982 Statistical Presentation, supra note 290. In addition, a number of murderers received sentences of natural life or death, data for which, however, is available only for 1982. In 1982, 52 murderers received natural life sentences and an additional 16 were sentenced to death. Table 25 in 1982 Statistical Presentation, supra note 290. When those 67 cases are added to the 253 defendants receiving sentences of terms of years for murder in 1982, it appears that approximately 21% of all murderers were punished by longer sentences than those appearing Table 11 in 1982 Statistical Presentation, supra note 290. Assuming that this percentage approximates the percentages of such sentences in other years, then the percentages of all murderers deemed to be sufficiently punished by terms of 40 years or less would decline to between 59% and 68%.

507. Table 11 in 1982 Statistical Presentation, supra note 290. If it is assumed that extended term sentences above the medium 60-year figure approximately equal those below it, a rough calculation of the total percentages of murder sentences below that figure is possible.
Moreover, sentences of sixty years or more would place offenders among the tiny fraction of most severely punished murderers in terms of time actually served. Under present statutory good conduct provisions, a murderer sentenced to sixty years imprisonment must serve at least thirty years. A thirty-year period of incarceration would exceed the longest time served by all murderers released from Illinois prisons during three of the five years since the effective date of the Act. Thirty years is also three to four times the average period of incarceration served for those released during that period. In short, a sixty-year sentence seems well suited to serve as a benchmark for distinguishing the most culpable murderers from the bulk of their fellow offenders.

The same is true for the proposed forty-year cutoff for class X felons. A forty-year sentence would place an offender in a distinct minority of class X felons, because it would be more severe than that imposed on seventy to ninety-three percent of all attempted murderers, eighty-eight to ninety-five percent of all rapists, ninety-four to ninety-six percent of all armed robbers, and seventy-four to ninety-three percent of all those convicted of other class X felonies in the first five years since the Act went into effect. Looking at the issue of severity from the perspective of time served, a forty-year sentence will result in at least twenty years of imprisonment, which would be four to six times as long a period of incarceration as the average sentence served by class X felons released in each year since the Act went into effect. It also would exceed all but a miniscule fraction of the sentences served by class X convicts released during that period. Twenty years imprisonment is, in other words, hardly a trifling penalty.

Finally, adoption of the proposed twenty-year maximum guideline for all but the few most aggravated class 1 felonies would result in the possibility of only the most egregious class 1 offenders being punished as severely as murderers are. This is hardly a startling proposition. Moreover, in the first five years since the Act became effective, seventy-four to ninety-four percent of all rapists and armed robbers receiving regular terms were sentenced to

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Those calculations show that from 80 to 91% of all murderers sentenced to a term of years received sentences of 60 years or less. Adjusting those figures as called for supra note 506 results in figures of from 66 to 75% of all murderers being punished by sentences below that figure.

508. "[The prisoner shall receive one day of good conduct credit for each day of service in prison . . . . Each day of good conduct credit shall reduce by one day the inmate's period of incarceration . . . .]" ILL. REV. STAT. ch. 38, § 1003-6-3(a) (1983).

509. See Table 31 in 1982 Statistical Presentation, supra note 290.

510. See Table 31 in 1982 Statistical Presentation, supra note 290.

511. See Table 4 in 1982 Statistical Presentation, supra note 290.

512. See supra note 508.

513. See Table 31 in 1982 Statistical Presentation, supra note 290.

514. See Table 31 in 1982 Statistical Presentation, supra note 290.

less than twenty years for those class X crimes.\footnote{516} Thus, the proposed twenty-year rule would promote a rational proportionality between the sentences levied on class I and class X felons. A twenty-year sentence would also be more severe than that imposed on eighty-three to ninety-six percent of class I offenders sentenced to prison during those years.\footnote{517} Viewed from the perspective of time served, the ten-year period of incarceration resulting from a twenty-year sentence would be approximately three times the average length of time served by class I felons released over this same five-year period.\footnote{518} By all measures, twenty years seems to be a sufficiently harsh penalty for all but the most aggravated class I felons.

**D. Disparities Resulting from the Inconsistent Application of Aggravating Factors**

Thus far this article has been concerned with undue sentencing disparities that have resulted from sentencing judges' inappropriate applications of aggravating factors. There is, however, another serious problem: a widespread failure to impose severe sentences in cases clearly calling for harsh penalties. While it is difficult to document the full extent of this phenomenon for a variety of reasons,\footnote{519} it appears to be due primarily to plea bargaining.\footnote{520}

\begin{footnotes}
\item[516] See Tables 13, 15 in 1982 \textit{Statistical Presentation}, \textit{supra} note 290. These percentages are approximations, because the data referred to break down class X sentences in only an 11 to 25 year span. In making the calculations referred to in the text, it has been assumed that the sentences within that range are distributed evenly, so that approximately one-third of all sentences in that range are of 20 years or more. That one-third is then added to the percentage of sentences in the 26- to 30-year range to get estimated total regular term class X sentences of 20 years or more.
\item[517] See Table 5 in 1982 \textit{Statistical Presentation}, \textit{supra} note 290 (between 4 and 17\% of class one offenders received extended term sentences—which begin at 15 years—during the first five years after the Act became effective).
\item[518] See Table 31 in 1982 \textit{Statistical Presentation}, \textit{supra} note 290.
\item[519] There are three primary reasons why a review of reported cases understates the frequency of unduly lenient sentences. First, most cases are disposed of by plea bargains and thus are not reported. The sentences imposed in the bargaining process, however, probably have more than their fair share of lenient dispositions. Second, a number of cases disposed of by trial may result in such mild sentences that the defendant elects not to appeal either the conviction or the sentence. Thus, those lenient sentences also would go unreported. Finally, of the remaining cases, a number will result in a sentence in which the defendant elects not to appeal along with the conviction. These cases will seldom contain any information that would permit assessments of the validity of the sentence imposed. As a matter of common sense, those cases also would contain a disproportionate share of unduly lenient sentences; but there is no ready way to establish that fact.

Instances of unduly lenient sentences would come to light more frequently if the state were able to appeal a defendant's sentence. No such appeals are currently provided for by applicable supreme court rule, however, and the Illinois Supreme Court has held that the General Assembly is not free to provide for these appeals through legislation. See \textit{Schuwerk}, \textit{supra} note 2, at 691-94.
\item[520] See \textit{Schuwerk}, \textit{supra} note 2, at 645-57; see also \textit{People v. Clay}, 124 Ill. App. 3d 140, 463 N.E.2d 929 (1st Dist. 1984) (less culpable perpetrators of an attempted armed robbery that
Regardless of its origin, however, this widespread pattern raises an important question regarding the constitutionality of those longer sentences. It appears that their imposition has become so arbitrary and capricious as to be cruel and unusual "in the same way that being struck by lightning is cruel and unusual."221 Quite apart from any constitutional issue, however, this state of affairs seems fundamentally at odds with the Act's broad goals and purposes.

A few examples will serve to illustrate the problem. Turning first to extended term sentences based on the exceptionally brutal or heinous behavior rationale, a number of cases already discussed have shown relatively unaggravated offenders drawing truly draconian sanctions. It is even more common, however, to find cases in which clearly qualifying offenses result in quite lenient sentences.222 The caprice involved in the leniency shown in these cases emerges by comparing them to cases such as People v. Medley,223 in which the defendant did not contend that his concurrent forty-five year sentences for rape and home invasion were excessive. The facts revealed that the defendant and his confederate committed ten acts of sexual assault on a young housewife.224 Taking that sentence as a benchmark for aggravated, multiple sexual assaults,225 it is difficult to justify the consecutive sixty-year sentences imposed for two substantially less aggravated acts of rape in People v. Perruguet.226 Likewise, if a forty-five year sentence was proper in Medley,
what possible justification can there be for imposing concurrent eight-year terms on a convicted murderer in People v. Surges for perpetrating a series of particularly brutal sex crimes? Similar disparities emerge among cases finding exceptionally brutal or heinous behavior based on multiple sexual assaults in which the victims were not seriously physically harmed. No reason other than whim or caprice could explain why the defendant in People v. Sanford received a forty-five year sentence, while the defendants in People v. Hopkins and People v. Best received fifteen-year sentences for equally atrocious offenses.


529. 107 Ill. App. 3d 422, 437 N.E.2d 722 (1st Dist. 1982). In Hopkins, the defendant offered the victim a ride in his van in a snowstorm. When she accepted, he threatened her with a large knife, bound her hand and foot and eventually had intercourse with her three times and also forced her to submit to several acts of deviate sexual intercourse. Id. at 424-25, 437 N.E.2d at 724-25.

530. 97 Ill. App. 3d 1083, 424 N.E.2d 29 (1st Dist. 1981). In Best, the defendant surprised the victim in her apartment, where she lived with her two children. The following activities ensued:

After the victim turned on the light, she asked the defendant what he wanted. He approached her, pulled out a knife, put his hand over her mouth, turned off the light, forced her into the living room, and demanded that she remove her clothes. Defendant then raped her and forced her to commit numerous deviate sexual acts with him, including fellatio, cunnilingus, and sodomy, all described in detail by the victim, which need not be repeated here. Defendant placed the knife to her neck several times and threatened to kill her if she did not submit to his demands. The entire assault lasted one and one-half hours. Afterwards, defendant got dressed and warned that he would kill her if she called the police.

Id. at 1084-85, 424 N.E.2d at 30-31.

531. The recent case of People v. Johnson, 109 Ill. App. 3d 511, 440 N.E.2d 992 (1st Dist. 1982), is also useful for purposes of comparison. In Johnson, the following conduct resulted in the defendant being sentenced to concurrent 20-year terms:

[The victim] was accosted by a man as she stood by her car near her home. The man aimed a gun at her head, threatened her and pulled her back into the car. . . . [The victim] turned on the alarm in her car but switched it off after he threatened to kill her. As they drove defendant asked her if her parents would pay ransom for her. He held the gun to her head and told her to perform oral sex on him. During the next six hours [the defendant] . . . forced her to perform fellatio on him two more times and have sexual intercourse with him twice. He also made her get into the trunk of her car for awhile and threatened to kill her.

Id. at 513, 440 N.E.2d at 993.

For an even more brutal episode, see People v. Levenson, 69 Ill. App. 3d 726, 727-28, 731, 387 N.E.2d 931, 932-34, 936 (1st Dist. 1979). In Levenson, the defendant and his confederates abducted the victim, tied her to the bed, beat her with a wire coat hanger for 20 minutes, and poured cologne into the open wounds. The victim was then forced to submit to deviate sexual acts with the defendant. The defendant was sentenced to 15 to 30 years for deviate sexual assault.
Comparable anomalies emerge among extended sentences based on prior criminal records. For example, the defendant's prior armed robbery conviction in *People v. Nance* resulted in a forty-five-year sentence for a non-aggravated second offense. In contrast, the defendant in *People v. Rogers*, who had prior convictions for both robbery and rape, received only a thirty-year sentence for kidnapping and raping a stranded motorist. In yet another case, an armed robber who attempted to murder his victim received only a twenty-year sentence even though he had two prior convictions for armed robbery. Allowing a single prior class X felony to support a forty-five-year sentence for an offense that neither caused nor threatened physical harm to anyone is also irreconcilable with cases like *People v. Killen*, in which the defendant's prior class 2 and class X felony convictions were found not to justify a thirty-year sentence for deviate sexual assault, and *People v. Carmack*, in which three prior felony convictions were found insufficient for a nine-year sentence for armed robbery.

Finally, those cases involving exceptionally brutal or heinous behavior and a sufficiently aggravated prior felony record to support an extended term sentence are also decided in a hopelessly inconsistent manner. For example, in *People v. Clark*, the defendant, who had a record of violent sexually-motivated attacks on women, received concurrent fifty-year sentences for a brutal armed robbery and deviate sexual assault. In *People v. Mitchell*, the defendant's forty-five-year sentence for the brutal attempted murder of a prison guard seems rather modest in light of his two prior convictions for murder. These two cases might be viewed as representing a middle ground with respect to doubly-aggravated offenders. Assuming that these two

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534. Id. at 615, 619, 428 N.E.2d at 548, 550. *Rogers* is also noteworthy because a codefendant with no prior record received the same sentence as Rogers. *Id.* at 616, 428 N.E.2d at 549.
536. See *Nance*, 100 Ill. App. 3d at 1118-21, 427 N.E.2d at 635-36.
538. Id. at 67-68, 435 N.E.2d at 790.
539. 103 Ill. App. 3d 1027, 432 N.E.2d 282 (3d Dist. 1982).
540. Id. at 1037-38, 432 N.E.2d at 282.
542. Id. at 418-19, 429 N.E.2d at 1258-59.
543. Id. at 416-17, 425-26, 429 N.E.2d at 1256-57, 1262-64.
545. Id. at 404, 424 N.E.2d at 663.
546. Far lengthier penalties are frequently imposed in these types of cases. See, e.g., *People v. Gholston*, 124 Ill. App. 3d 873, 896, 464 N.E.2d 1179, 1196 (1st Dist. 1984) (two consecutive 60-year sentences imposed on leader of vicious gang rape); *People v. Perruquet*, 118 Ill. App. 3d 293, 454 N.E.2d 1055 (5th Dist. 1983) (defendant sentenced to two consecutive 60-year terms for raping same victim twice within several hours); *People v. DeSimone*, 108 Ill. App. 3d 1015, 439 N.E.2d 1311 (2d Dist. 1982) (defendant received two consecutive 60-year terms for
sentences are defensible, there can be no plausible basis for the eight-year sentences negotiated for the armed robbery and brutalization of a family in People v. Surges, nor for the seven-year sentences imposed on a defendant who played a leading role in two vicious gang rapes.

E. Recommended Remedial Legislation

As the cases discussed above illustrate, the present hierarchy of natural life, consecutive, and extended term sentences has not been applied in a consistent manner. Defendants receiving the most severe penalties are frequently indistinguishable from those receiving far less severe sanctions. This state of affairs gives a strong cast of capriciousness to the sentences of those punished most heavily. Just as importantly, the legislature's intent to protect the public from repeat violent offenders by imposing lengthy prison terms is not being followed.

To describe the problem is to suggest the solution. A sentencing mechanism must be developed having three attributes. First, it must be capable of routine and consistent application in all cases, whether they are disposed of by trial or plea bargain. Second, it must be able to pinpoint a presumptive sentence for all defendants within a relatively narrow range. Finally, it should provide a method for selecting defendants who deserve lengthy periods of incarceration. To those ends, a sentencing guideline system is proposed that would not leave these matters entirely to the discretion of the sentencing judge or to the relative bargaining acumen of counsel. Both of the most

armed robbery and attempted murder). For a full discussion of Perruquet, see supra note 275 and notes 312-15 and accompanying text. For a full discussion of DeSimone, see supra notes 338-43 and accompanying text.

547. It is not at all clear that these particular sentences are defensible. Under the guidelines proposed in this article, Clark probably would receive a lighter sentence and Mitchell a heavier one. See infra text accompanying notes 819-68; Appendix to text, Part 1, at 396-404.


549. People v. Utinans, 55 Ill. App. 3d 306, 370 N.E.2d 1080 (1st Dist. 1977); People v. Carroll, 49 Ill. App. 3d 387, 364 N.E.2d 408 (1st Dist. 1977). Michael Briseno was the defendant in both cases. In Carroll, Briseno was shown to have been involved in an abduction and gang rape that occurred September 23, 1971. Id. at 389-90, 364 N.E.2d at 410-11. He pled guilty and received concurrent sentences of seven to 14 and seven to 20 years. In Utinans, Briseno was shown to have been the ringleader and most active participant in a similar but far more vicious and brutal abduction and gang rape that occurred October 16-17, 1971. 55 Ill. App. 3d at 310-12, 370 N.E.2d at 1083-84. Again Briseno was allowed to plead guilty to a variety of offenses and again he received concurrent sentences of either seven to 14 or seven to 20 years. Id. at 309, 370 N.E.2d at 1083; see also People v. Utinans, 105 Ill. App. 3d 452, 434 N.E.2d 500 (1st Dist. 1982) (vacating order of trial judge granting sentence reductions for less culpable participant because reduction exceeded sentencing judge's authority).

550. See supra notes 102-19 and accompanying text.

551. For a brief discussion of the shortcomings of the current statutory scheme, see Schuwerk, supra note 2, at 640-42.
frequently utilized extended term factors called for by existing law—a sufficiently aggravated prior criminal record and behavior that was exceptionally brutal or heinous—have a role to play in determining sentences under the proposed system, assuming that they are applied pursuant to well-defined standards. The following two subsections outline the general features of the proposed system and explore its application to quantifying the effects of exceptionally brutal or heinous behavior. The system is set out in detail in the Appendix.

1. General Considerations

Illinois should adopt a system of sentencing guidelines in which the defendant's prior record of delinquency or criminal behavior is of considerable importance. Rather than being used in the present haphazard manner, a prior record should be used by a sentencing judge pursuant to a standardized scoring system that takes into account the nature, circumstances, and frequency of the earlier adjudications or convictions. This "criminal history score" would be adjusted up or down by a variety of weighted factors in mitigation or aggravation. Finally, each offense would be assigned a range of sentence lengths for each adjusted criminal history score, with the presumption that a sentence would be selected from that range absent compelling circumstances. The present system of regular term, extended term, and consecutive sentences would be abolished, as would natural life sentences in non-murder cases. Instead, defendants' eligibility for particular sentences would initially be determined solely by their adjusted criminal history scores and the offense(s) for which they were convicted.

Judges imposing sentences outside of the presumptive range should be required to explain why they have done so. Defendants' rights to appeal

552. More generally, a defendant's prior history of delinquency or criminal activity and the defendant's propensity for brutalizing or causing physical harm to the victim appear to be the two most important determinants of any sentence imposed. See infra notes 561-67 and 797-849 and accompanying text; Appendix to text, § 1, at 396-97; § 2a(1), (2), at 397-401.

553. See infra notes 797-849, 859-72 and accompanying text; Appendix to text, § 1, at 396-97.

554. See infra notes 850-68 and accompanying text; Appendix to text, § 2, at 397-404.

555. See infra notes 884-96 and accompanying text; Appendix to text, § 3, at 404; Chart 4, at 405.

556. See Ill. Rev. Stat. ch. 38, § 1005-8-1 (1983) (regular term sentencing); id. § 1005-8-1(a)(2) (establishing mandatory natural life sentences for habitual criminals); id. § 1005-8-2 (extended term sentencing); id. § 1005-8-4 (concurrent and consecutive term sentencing). The General Assembly also should consider abolishing mandatory natural life sentences for murders.

557. See infra text accompanying notes 806-83; Appendix to text, Part I, at 396-404; Chart 4, at 405.

558. This feature could not be implemented without the approval of the Illinois Supreme Court because of its decisions in People v. Hicks, 101 Ill. 2d 366, 374, 462 N.E.2d 473, 476 (1984), and People v. Davis, 93 Ill. 2d 155, 161, 442 N.E.2d 855, 858 (1982). In both of these cases, the court concluded that the doctrine of separation of powers precluded the General Assembly from mandating a statement of reasons. The author has argued that these decisions are erroneous. See Schuwerk, supra note 2, at 679-85. Nonetheless, they of course remain the law of the state. See also infra text accompanying notes 884-87 (explaining Minnesota and
their sentences would remain unchanged.\textsuperscript{559} Subject to certain restrictions, however, the new system would also permit the state to appeal any sentence that was admittedly or allegedly less than that called for by the applicable guidelines.\textsuperscript{560}

2. Treatment of Exceptionally Brutal or Heinous Behavior as a Factor in Aggravation

The Act currently recognizes that one of the most important factors aggravating a defendant's sentence is the exceptionally brutal or heinous way in which the offense was committed.\textsuperscript{561} This factor must be applied with a greater degree of consistency and sensitivity than at present. To achieve that goal, three major considerations must be addressed. The first is defining what constitutes exceptionally brutal or heinous behavior\textsuperscript{562} by describing the hard core conduct to which it pertains and excluding that which is merely "serious harm" within the meaning of the Act's regular term factor in aggravation.\textsuperscript{563} The second major consideration is deciding the degree to which the qualifying behavior should aggravate a sentence.\textsuperscript{564} The third is to define what circumstances, if any, should authorize a court to lessen the full aggravating force of such behavior.\textsuperscript{565}

The proposed sentencing guidelines set out in the Appendix provide one way of addressing these issues.\textsuperscript{566} They define "exceptionally brutal or heinous behavior indicative of wanton cruelty" inductively—that is, based on a review Pennsylvania schemes that require a judicial statement explaining a departure from sentencing guidelines).

\textsuperscript{559} See ILL. SUP. CT. R. 615(b)(4) (codified at ILL. REV. STAT. ch. 110A, § 615(b)(4) (1983)) (current rights of defendants to appeal sentence).

\textsuperscript{560} This feature also would require the approval of the Illinois Supreme Court before implementation. See People v. Cox, 82 Ill. 2d 268, 412 N.E.2d 541 (1980). The court in Cox concluded that the General Assembly's purported efforts to vary the manner in which criminal sentences were appealed and reviewed were invalid under the doctrine of separation of powers. Id. at 275-76, 412 N.E.2d at 545. The author has argued that this decision, as the Hicks and Davis decisions, is erroneous. See Schuwerk, supra note 2, at 691-94. Nonetheless, it continues to restrict the powers of the General Assembly in this area. See infra notes 892-96 and accompanying text (explaining why the General Assembly should consider making guideline sentences mandatory).


\textsuperscript{562} See Appendix to text, §§ 2a(2)(a)(1)-(4), at 400.

\textsuperscript{563} A discussion of the "other shoe"—what conduct should be deemed to cause or threaten "serious harm"—is deferred to at this point. See infra notes 754-55 and accompanying text; Appendix to text, § 2a(1)(a), at 397-99.

\textsuperscript{564} See Appendix to text, § 2a(2)(b), at 400-01.

\textsuperscript{565} See Appendix to text, § 2c(2), (3), at 403-04.

\textsuperscript{566} See Appendix to text, § 2a(1), (2), at 397-401; § 2c(2), (3), at 403-04. The whole topic of sentencing is obviously an extremely emotion- and value-laden one, and the approach taken in this article is not put forward as the only defensible one. Moreover, while the proposals made herein are quite detailed, they are not advanced as comprehensive. Hopefully, however,
of a number of cases finding particular behavior meeting that standard. They then limit the circumstances and the extent to which sentences can be aggravated by a finding of this type of behavior. Finally, they lessen the aggravating effect of a finding of exceptionally brutal or heinous behavior when it seems just to do so. This proposal would hopefully eliminate many of the present unjustified sentencing disparities resulting from inconsistent application of the exceptionally brutal or heinous factor.\textsuperscript{567}

V. REGULAR TERM PRISON SENTENCES

The Act set forth seven factors that must weigh in favor of imposing a regular term prison sentence and may serve as reasons for imposing a longer regular term sentence.\textsuperscript{566} Since the Act's passage, the General Assembly has added three factors to that list.\textsuperscript{569} The General Assembly, however, avoided turning these ten factors into a legislative straitjacket by declining to specify the relative weight to be given the statutory factors and the manner in which they would be balanced against mitigating factors.\textsuperscript{570} Nor was the judiciary limited to considering those factors enumerated by the General Assembly.\textsuperscript{571} This flexible, open-ended approach was adopted in the expectation that judicial decisions or guidelines would produce greater specificity and consistency over time.\textsuperscript{572} The only explicit guidance given by the legislature was

\textsuperscript{567} Special problems could arise in implementing a guideline system for this particular group of aggravated felonies within the current sentencing ranges. Adopting a \textit{routinely utilized factor} to enhance sentences based on exceptionally brutal or heinous behavior most probably would reduce the frequency with which certain crimes would be punished by minimum terms of imprisonment or other relatively lenient sentences. Such a reduction in lenient punishment, in turn, would cause an increase in Illinois' already burgeoning prison population. To minimize this increase, present sentencing ranges should be adjusted downward, thus permitting somewhat shorter sentences for less aggravated offenders to offset the longer terms imposed on more brutal offenders. Proposals for legislative adjustments of sentencing ranges within the existing structure of regular term, extended term, and consecutive sentences were made in Schuwerk, \textit{supra} note 2, at 735-37. Alternative proposals calling for comparable self-imposed judicial restraints within the confines of present law also have been advanced. See \textit{supra} text accompanying notes 202-03, 330-51, 504-18. The sentencing guidelines called for in this article also would reduce both minimum and maximum sentences below current levels. See \textit{infra} notes 869-75 and accompanying text; Appendix to text, Chart 4, at 405. While the guideline approach is the most comprehensive, any of these efforts would improve the present state of affairs.


\textsuperscript{569} \textit{ILL. REV. STAT.} ch. 38, § 1005-5-3.2(a)(8)-(10) (1983). For a discussion of these additional factors, see \textit{supra} note 77.

\textsuperscript{570} No effort was made, for example, to preclude probation if one or more factors was present. See \textit{supra} notes 30, 69-92 and accompanying text. Probation was prohibited for a variety of offenses, however, as well as for offenders with sufficiently aggravated prior records. See \textit{supra} notes 106-08 and accompanying text.

\textsuperscript{571} This is true even though the list of regular term factors in aggravation appears to be close-ended. See \textit{infra} notes 578-85 and accompanying text.

\textsuperscript{572} See \textit{supra} text accompanying notes 32-34; Schuwerk, \textit{supra} note 2, at 668-73.
that, once a decision was made not to grant probation, a lesser regular term sentence normally would be imposed. The upper portions of the regular term ranges were reserved for more egregious combinations of aggravating factors.573

Efforts to regularize this area of sentencing have been sporadic and ineffectual. The legislative preference for lesser regular term sentences has gone unrecognized.574 No systematic effort to limit or standardize the application of the Act’s factors in aggravation has been undertaken.575 Instead, with a few noteworthy exceptions,576 appellate courts have routinely approved the interpretation, weight, and balance that trial judges have given to those factors. Efforts to assess the soundness of those decisions in light of the Act’s overarching sentencing concerns have seldom been attempted.577 Moreover, newly-minted judicial factors in aggravation have been indiscriminately endorsed on appeal even though their appropriateness under the Act is doubtful at best. In short, the abuse of discretion standard of review has covered a multitude of sins. An examination of the two principal aggravating factors created by the judiciary and the three most frequently used statutory factors shows the need for substantial reform.

A. Judically-Created Aggravating Factors

The Act’s list of regular term aggravating factors is not open-ended.578 Notwithstanding that fact, the judiciary has created—actually perpetuated from pre-Act case law—a number of factors used either to justify an increase in the sentence imposed or to withhold any mitigation of the sentence that might be indicated by other circumstances in the case.579 The two major

573. See supra text accompanying notes 63-65.
575. For suggestions to standardize application of factors in aggravation, see infra notes 754-55, 806-72 and accompanying text; Appendix to text, § 2a, at 397-402; § 2b, at 402.
576. See People v. Rosa, 111 Ill. App. 3d 384, 391-94, 444 N.E.2d 233, 239-41 (2d Dist. 1982) (22-year sentence for armed robbery reduced over a dissent to 12 years for defendant with minimal prior record); People v. Nelson, 106 Ill. App. 3d 838, 846-48, 436 N.E.2d 655, 661-62 (1st Dist. 1982) (20-year sentences for armed robbery reduced to 10 years for defendants with minor criminal records and substantial rehabilitative potential); People v. Oravis, 81 Ill. App. 3d 717, 718-19, 402 N.E.2d 297, 298-99 (4th Dist. 1980) (six-year sentence for burglary reduced over a dissent to four years for first-time felony offender). These cases, however, did not propose any systematic approach to the imposition or review of sentences.
577. See Schuwerk, supra note 2, at 686-91.
578. Pub. Act No. 80-1099, § 3, 1977 Ill. Laws 3264, 3301 (codified at ILL. REV. STAT. ch. 38, § 1005-5-3.2(a) (1983)), provides that “The following factors shall be accorded weight in favor of imposing a term of imprisonment or may be considered by the court as reasons to impose a more severe [regular term] sentence . . .”
579. The difference between increasing a sentence because of the presence of certain factors and not decreasing it for those same reasons is important in principle. Present law, however, does not permit the pinpointing of what a defendant’s sentence ought to be with sufficient
factors of this sort are a defendant's apparent perjury at trial and a defendant's apparent lack of remorse.

At first glance, the propriety of adding any factors to a closed, legislatively prescribed list might seem questionable. Nevertheless, a fair reading of the Act as a whole indicates that limited judicial augmentation of its regular term factors in aggravation was both contemplated and authorized. The Act permits the sentencing judge to consider, inter alia, any evidence or other information offered in mitigation or aggravation. The Act also provides that the sentencing judge's explanation of the sentence imposed is to include "the particular evidence, information, factors, or other reasons that led to his sentencing determination." The section of the Act setting out regular term sentences states that this statement of reasons may include "any mitigating or aggravating factors specified in this Code, or the lack of any such circumstances, as well as any other such factors as the judge shall set forth on the record that are consistent with the purposes and principles of sentencing set out in this Code." This latter provision clearly contains a grant of power to the judiciary to create new factors in aggravation or mitigation and a limitation on the exercise of that power. The question thus arises whether the judiciary's aggravating factors are consistent with the Act's sentencing principles. It seems unlikely that they are.

precision to tell whether a particular sentence has been enhanced as a punishment for asserting a defendant's behavior or merely not mitigated. Under the sentencing guideline approach called for in this article, it would be possible to answer that question much more readily. See infra notes 806-72 and accompanying text; Appendix to text, Part I, at 396-404.

580. See infra notes 586-618 and accompanying text; see also People v. Surles, 126 Ill. App. 3d 216, 227-28, 466 N.E.2d 1295, 1303 (1st Dist. 1984) (court affirmed 20-year sentence for armed robbery based on perceived perjury; reviewing court viewed basing sentence on perceived perjury as nonprejudicial); People v. Singleton, 124 Ill. App. 3d 386, 399-400, 464 N.E.2d 624, 632-33 (1st Dist. 1984) (court affirmed concurrent 25-year sentences for deviate sexual assault and armed robbery; sentencing judge properly considered perjury committed by defendant during trial).

581. See infra notes 619-38 and accompanying text.

582. Judicial augmentation of statutory factors was not contemplated, however, for either the Act's extended term factors in aggravation or its provisions governing consecutive sentences. Section 5-8-2(a) of the Act specifically prohibits imposition of extended term sentences "unless the factors in aggravation set forth in paragraph (b) of Section 5-5-3.2 were found to be present." See Pub. Act No. 80-1099, § 3, 1977 Ill. Laws 3264, 3310 (codified at ILL. REV. STAT. ch. 38, § 1005-8-2(a) (1983)). Likewise, the Act's consecutive sentencing provisions are governed solely by the provisions of § 5-8-4. Pub. Act No. 80-1099, § 3, 1977 Ill. Laws 3264, 3311-12 (codified at ILL. REV. STAT. ch. 38, § 1005-8-4 (1983)).


1. Perjurious Testimony

Since well before the passage of the Act, Illinois courts have wrestled with the issue of what use, if any, could be made of a sentencing judge's belief that a defendant had lied, or caused others to lie, under oath. At the time the Act became effective, no clear position had emerged. The early case of People v. Moriarty provides a convenient, modern starting point for an analysis of this pre-Act period. In Moriarty, the defendant had been offered a sentence of one year to life if he pled guilty. The defendant nonetheless elected to stand trial. He was convicted and sentenced to ten years to life. In pronouncing sentence, the trial judge made it clear that this longer sentence was imposed in part because the defendant had insisted on his right to trial and in part because the judge believed that the defendant had committed perjury. On appeal, the supreme court found that the trial judge had sentenced the defendant "only in part for the crime for which he was indicted." Making no further reference to the trial judge's finding regarding the defendant's perjury, the court concluded that the defendant should not have been "punished by a heavy sentence merely because he exercises his constitutional right to [trial]."

In the wake of Moriarty, however, People v. White stated that a defendant's purported perjury at trial was an "improper factor" upon which to enhance his sentence. The White majority concluded that allowing sentence enhancement on that basis would, in effect, permit punishment without a trial and would needlessly chill the exercise of a defendant's rights to a trial and to testify on one's own behalf. White quickly attracted a loyal following in the appellate courts, with numerous opinions concluding that suspected perjury simply was not to be given any weight in sentencing.

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587. Id. at 566, 185 N.E.2d at 688.
588. Id. at 566-67, 185 N.E.2d at 688.
589. Id. at 567, 185 N.E.2d at 689.
590. Id.
592. Id. at 778, 267 N.E.2d at 131.
593. Id. (citing Scott v. United States, 419 F.2d 264, 269 (D.C. Cir. 1969)).

Interestingly enough, it was universally acknowledged that the court could consider a defendant's admitted perjury at trial as an aggravating factor. See, e.g., People v. Greenlee, 44 Ill. App. 3d 536, 544, 358 N.E.2d 649, 656-57; People v. Busch, 15 Ill. App. 3d 905, 908, 305 N.E.2d 372, 373 (1st Dist. 1973). Such an admission by the defendant, however, might be a more credible indication of the defendant's rehabilitative potential than, his willingness to plead guilty or profess remorse. See supra notes 578-93 and accompanying text and infra notes 608-18, 624-38 and accompanying text.
The vitality of these decisions was clouded almost from the outset, however, by a parallel line of authority stemming from the Illinois Supreme Court's ruling in *People v. Jones*.

In *Jones*, the defendant was one of six persons charged with armed robbery, the other five having previously pled guilty. Jones supposedly had confessed to the crime and signed a written statement to that effect. At trial, however, he insisted on his innocence and denied having either confessed or signed the statement. A jury disbelieved his testimony and convicted him of armed robbery. At sentencing, the judge characterized Jones's testimony as "incredible" and as a "fantastic and unbelievable story" showing that Jones was "prone to perjury." The judge then gave Jones a substantially more severe sentence than those imposed on his colleagues.

On appeal the defendant contended that the trial judge had tried, convicted, and sentenced him for committing perjury during the course of his armed robbery trial, thus denying him due process of law. The supreme court, without any reference to either *Moriarty* or *White*, rejected the defendant's claim. Stating that it did not read the trial judge's remarks as manifesting his intention to sentence the defendant for perjury, the supreme court concluded that it was neither possible nor desirable for the judge to erase the defendant's testimony from his mind in determining sentence.

That testimony, the court stated, "can hardly be said to be irrelevant to an appraisal of the defendant's character and his prospects of rehabilitation." Thus, the trial judge's consideration of that testimony did not deprive the defendant of due process of law.

Consequently, at the time the Act went into effect, a court could find persuasive authority either supporting or rejecting the notion that a judge could properly enhance a defendant's sentence because of perceived perjury at trial. Predictably, the appellate court districts were divided on this issue.

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595. 52 Ill. 2d 247, 287 N.E.2d 680 (1972).
596. Id. at 248, 287 N.E.2d at 681.
597. Id. at 249, 287 N.E.2d at 681.
598. Defendant was sentenced to a term of from eight to 15 years in prison. Id. at 248, 287 N.E.2d at 680. His pleading confederates received sentences ranging from probation to imprisonment for two to three years. Id. at 249, 287 N.E.2d at 681.
599. Id. at 249, 287 N.E.2d at 681.
600. Id. at 249-50, 287 N.E.2d at 681.
601. Id.
602. Id.
604. The fourth and fifth districts, following *White*, rejected enhanced sentences based on perceived perjury. See *People v. Meeks*, 75 Ill. App. 3d 357, 367, 393 N.E.2d 1190, 1198 (5th Dist. 1979),
The conflict was resolved in *People v. Meeks*, in which the Illinois Supreme Court concluded that a judge could consider perceived perjury at trial in *United States v. Grayson*. The *Meeks* court relied principally on its own prior decision in *Jones* and that of the United States Supreme Court in *United States v. Grayson*. The *Grayson* Court held that the Constitution did not prohibit a sentencing judge from considering a defendant's apparently perjured testimony in evaluating the defendant's prospects for rehabilitation.

Despite that venerable precedent, this particular judicial addition to the Act's factors in aggravation does not meet the Act's requirements that it be "consistent with the purposes and principles of sentencing set out in the Code." *Meeks*, like all other cases approving this practice, failed to note that the General Assembly specifically considered and rejected legislation that designated as an aggravating factor the fact that "the defendant testified untruthfully in his own behalf at trial." The conventional construction given to this type of action by the legislature, of course, is that it did not wish that factor to be considered in aggravation.

Attention to the Act's overriding purposes only serves to confirm this interpretation. The Act was intended to control abuses of judicial and prosecutorial discretion in sentencing. Allowing perceived perjury to enhance a defendant's sentence undermines these goals by making abuses of discretion more difficult to police. For example, it is an obvious abuse of discretion for a judge to enhance a defendant's sentence because the defendant chose a trial rather than accept a plea bargain. This limit on judicial discretion is sapped of much of its vitality by a rule allowing a

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604. 81 Ill. 2d 524, 411 N.E.2d 9 (1980).

605. Id. at 536, 411 N.E.2d at 15.


607. Id. at 52-55.


defendant's perceived perjury to aggravate the sentence, because it provides a legitimate rationale for abusive sentence aggravation in most tried cases.\textsuperscript{613} Similarly, it is clearly an abuse of discretion for a judge to increase a defendant's sentence just to save the state the burden and expense of bringing a subsequent perjury prosecution.\textsuperscript{614} Once again, however, the supposedly legitimate use of perceived perjury as an aggravating factor effectively nullifies that prohibition.

In addition, for an at best marginal improvement in the trial judge's perception of the defendant's character and prospects for rehabilitation,\textsuperscript{615} the use of such a rationale unduly enhances the coercive aspects of plea bargaining. While the Act certainly did not intend to eliminate plea bargaining or the sentencing concessions typically attendant thereto, it did wish to minimize the importance of a willingness to plead on the sentence ultimately imposed.\textsuperscript{616} The "perjured testimony" rationale, however, is at odds with that philosophy, because it provides a virtually reversal-proof basis for routinely enhancing non-pleading offenders' sentences, and hence the credibility of a prosecutor's representation that he or she will seek and obtain such greater punishments if no plea is forthcoming.

For all of these reasons, then, allowing increases in regular term sentences due to a defendant's perceived perjury is erroneous and should be discontinued. The guideline system proposed herein will provide a meaningful way of assuring that appropriate limitations on both prosecutorial and judicial sentencing discretion are honored.\textsuperscript{617} Under the proposal, the only effect of

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  \item \textsuperscript{613} The perception of perjury is a possibility in every case where the defendant testifies. In a broader form—including suborned perjury—the perception of perjury is a possibility in every case where a defendant presents witnesses on his or her behalf.
  \item \textsuperscript{614} The United States Supreme Court in \textit{Grayson} seemed to accept the defendant's argument that increasing a defendant's sentence for that reason without a conviction for perjury would violate defendant's right to due process of law. 438 U.S. at 53.
  \item \textsuperscript{615} The majority in \textit{Grayson} acknowledged the force of the argument that most defendants faced with serious charges would be sorely tempted to lie under "the psychological pressures . . . of the dock." \textit{Id.} at 52. Thus, finding that a defendant yielded to that temptation on a particular occasion does not appear to mark him as appreciably less amenable to rehabilitation than other men. As the dissent in \textit{Grayson} noted:
  
  Indeed, without doubting the sincerity or trial judges one may doubt whether the single incident of a defendant's trial testimony could ever alter the assessment of rehabilitative prospects so drastically as to justify a perceptibly greater sentence. A sentencing judge has before him a presentence report, compiled by trained personnel, that is designed to paint as complete a picture of the defendant's life and character as is possible. If the defendant's suspected perjury is consistent with the evaluation of the report, its impact on the rehabilitative assessment must be minimal. If, on the other hand, it suggests such a markedly different character that different sentencing treatment seems appropriate, the defendant is \textit{effectively} being punished for perjury without even the barest rudiments of due process.
  
  \textit{Id.} at 56 n.3 (Stewart, J., dissenting).
  \item \textsuperscript{616} \textit{See} Schuwerk, \textit{supra} note 2, at 640-42.
  \item \textsuperscript{617} \textit{See infra} notes 806-72 and accompanying text.
\end{itemize}
a defendant’s perceived perjury would be to negate specific factors in mitigation that might otherwise have reduced a defendant’s sentence. 618

2. Lack of Remorse

In addition to using perjured testimony to increase a defendant’s sentence, courts have used a defendant’s purported lack of remorse to enhance a regular term sentence. Cases of this kind fall into three broad categories. In the first group, the defendant’s mere assertion of a right to trial is seen as evidence of the requisite unrepentant spirit. 619 In this category of cases, courts contrast the supposedly remorseful mental state of one who pleads guilty to the prodigal defendant in the case at bar who has had the audacity to insist that the state prove its case at trial. 620 The second category consists of cases in which a defendant has compounded an assertion of innocence at trial with a continued assertion of innocence at sentencing. 621 In these cases, courts observe that the defendant has failed to take even the first step to rehabilitation and thus merits no mercy from the court. 622 The final category is comprised of cases in which the defendant expresses remorse but the trial judge does not believe it. 623

It does not seem troubling in the abstract that a defendant’s lack of remorse should be considered in imposing sentence. Indeed, a number of the Act’s factors in mitigation are premised on the notion that a sentencing judge should endeavor to assess an offender’s remorse. 624 Nonetheless, there

618. See infra note 637; Appendix to text, § 2b, at 402.
619. See, e.g., People v. Rodriguez, 100 Ill. App. 3d 244, 250-51, 426 N.E.2d 586, 590-91 (defendant’s lack of remorse was a proper consideration in assessing defendant’s rehabilitative capacity); People v. Starnes, 88 Ill. App. 3d 1141, 1148-49, 411 N.E.2d 125, 130 (defendant’s lack of veracity in court and his demeanor at trial were indicative of his lack of remorse, a proper indication of defendant’s rehabilitative capacity).
620. See cases cited supra note 619.
621. See, e.g., People v. Watson, 107 Ill. App. 3d 691, 438 N.E.2d 453 (3d Dist. 1982) (trial court properly considered defendant’s lack of remorse at sentencing in imposing 15-year sentence for sexual assault); People v. Oravis, 81 Ill. App. 3d 717, 718-19, 402 N.E.2d 297, 298-99 (4th Dist. 1980) (sentencing judge properly considered defendant’s lack of remorse and unwillingness to make restitution in determining sentence); cf. People v. Tessier, 123 Ill. App. 3d 984, 989-90, 463 N.E.2d 1006, 1010-11 (5th Dist. 1984) (six-year sentence for burglary affirmed where defendant would not cooperate with the court or his probation officer; defendant had no prior record).
622. See, e.g., People v. Watson, 107 Ill. App. 3d at 696-97, 438 N.E.2d at 456-57; People v. Oravis, 81 Ill. App. 3d at 719-20, 402 N.E.2d at 298-99 (court reduced sentence on appeal for other reasons; one judge dissented).
623. See, e.g., People v. La Pointe, 88 Ill. 2d 482, 490, 431 N.E.2d 344, 347 (1982) (the trial court found the killing to be premeditated although defendant claimed that he would not have killed the victim if he was not on drugs), rev’g, 85 Ill. App. 3d 215, 407 N.E.2d 196 (2d Dist. 1980); People v. McGee, 121 Ill. App. 3d 1086, 1090-91, 460 N.E.2d 843, 846-47 (2d remorse and claimed he turned himself in to police and cooperated in apprehension and prosecution of others).
are serious problems with the manner in which this judicially-created aggravating factor has been applied. First, a disturbing tendency exists to equate remorse with a defendant's decision to plead guilty rather than insist on a trial. Such an approach is objectionable for many of the same reasons raised above against the perjurious testimony rationale for sentence enhancement.625 For those reasons alone it should be sharply limited if not abolished.

Moreover, there does not appear to be any offsetting advantage to allowing lack of remorse to enhance a sentence. It is frequently suggested that a pleading defendant is entitled to some consideration because the acknowledgement of guilt is the first step to rehabilitation.626 This suggestion, however, is almost always no more than a pious fiction, an apologia for bargained sentences that usually fail to comport with more important factors bearing on an appropriate punishment for the defendant.627 Moreover, both prosecution and defense counsel acknowledge that a defendant's decision to accept a plea bargain is usually made in light of the defendant's perceptions regarding the lenity of the "deal" offered by the prosecution, the strength of the evidence against the defendant, the gullibility of humankind, and the likely consequences of a prison term.628 These considerations would seem to weigh far more heavily in a defendant's decision to avoid trial than would genuine remorse. It simply cannot be said that only the most culpable defendants insist on trials. Thus, to punish defendants more severely for having done so is, at the very least, unjustified.

Similarly, a distinction cannot be made persuasively between the remorse shown by those defendants who testify on their own behalf and that of

625. See supra notes 608-18 and accompanying text. As with the "perjured testimony" factor, reliance on a defendant's "lack of remorse" at best facilitates the improper practice of imposing a harsher sentence on the defendant for exercising his or her right to trial, and at worst insulates such a practice from review. Moreover, consideration of lack of remorse accentuates the discrepancy between sentences imposed pursuant to plea bargains as opposed to sentences imposed after trials, even though the Act sought to minimize such discrepancies. See Schuwerk, supra note 2, at 640-42.


627. See Schuwerk, supra note 2, at 651-57. In some cases, of course, it is not a fiction that the acknowledgement of guilt is the first step to rehabilitation. See, e.g., People v. Huffman, 78 Ill. App. 3d 525, 527-29, 397 N.E.2d 526, 528-30 (4th Dist. 1979); People v. Thomas, 76 Ill. App. 3d 969, 973-76, 395 N.E.2d 601, 603-06 (5th Dist. 1979); People v. Knowles, 70 Ill. App. 3d 30, 32-34, 388 N.E.2d 261, 263-64 (4th Dist. 1979). Unfortunately, when such occurs it is not always recognized or rewarded. See People v. Roper, 98 Ill. App. 3d 834, 840, 424 N.E.2d 963, 968 (3d Dist. 1981) (defendant's lack of a prior criminal record and universally acknowledged rehabilitation insufficient to override trial judge's decision to impose six-year sentence for robbery); People v. Guthrie, 79 Ill. App. 3d 403, 405-06, 398 N.E.2d 406, 407-08 (4th Dist. 1979) (on remand court reimposed sentence of six to 18 years that had been vacated as possibly being excessive despite fact that the state "[did] not dispute [that] substantial rehabilitation had taken place").

defendants who offer some other form of defense. Defendants' decisions to testify or not are almost never a product of virtue, except perhaps that of their counsel. Rather, those decisions are usually just tactical assessments in which defendants balance their credibility against both the harm likely to accrue if they do not take the stand and the damaging information that might get into evidence if they do. Testifying on one's own behalf is, in short, a very poor way to separate the saved from the damned.

It seems even more questionable to differentiate between defendants on a lack-of-remorse rationale on the basis of whether or not they continue to

629. The obligation of criminal counsel to present a defense that is known or believed to be false has been hotly debated. There is general agreement that a lawyer may not knowingly present perjured testimony whether or not the witness is a client. See, e.g., State v. Lowery, 111 Ariz. 26, 523 P.2d 54 (1974); In re Jones, 5 Cal. 3d 390, 487 P.2d 1016, 96 Cal. Rptr. 448 (1971). There is disagreement, however, concerning the measures to be taken if a client testifies falsely. See, e.g., Frankel, The Search for Truth: An Umpireal View, 123 U. Pa. L. Rev. 1031 (1975) (generally taking the view that our adversary system is not sufficiently concerned with discovering the truth and that perjury never should be countenanced); Freedman, Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions, 64 Mich. L. Rev. 1469 (1966) (generally taking the position that, at least in criminal cases, an attorney should counsel a client against perjury, but if such efforts are unsuccessful, he should put the client on the stand and argue the credibility of the defendant's testimony to the jury); Lefstein, The Criminal Defendant Who Proposes Perjury: Rethinking the Defense Lawyer's Dilemma, 6 Hofstra L. Rev. 665 (1978) (attorney should advise client at the outset of their relationship that an expressed intention to commit perjury will not be treated as a confidential communication, and that the attorney will either withdraw or disclose the perjury, should it occur). A number of cases support a rule that reasonable remedial measures must be taken even if such measures require disclosure of confidential information. See, e.g., People v. Lewis, 75 Ill. App. 3d, 560, 565-66, 393 N.E.2d 1380, 1384 (5th Dist. 1979); In re Carroll, 244 S.W.2d 474 (Ky. 1951). These decisions assume that a client's intention to commit perjury is not protected by an evidentiary privilege or by the lawyer's personal obligation to preserve confidences.

One court has indicated that the lawyer need not disclose the perjury, but must immediately withdraw from the representation. See In re A, 276 Or. 225, 554 P.2d 479 (1979). Another court has held that a lawyer must withdraw from representation when perjury has been committed, but declined to resolve the question whether the lawyer has an additional obligation to disclose the true facts to the court. Committee on Professional Ethics v. Crary, 245 N.W.2d 298 (Iowa 1976). In a few cases, courts have stated that a criminal defendant's sixth amendment right to effective assistance of counsel may limit both the obligation to disclose perjury and the obligation to withdraw. Lowery v. Cardwell, 575 F.2d 727 (9th Cir. 1978); State v. Robinson, 290 N.C. 56, 224 S.E.2d 174 (1976). But see People v. Lewis, 75 Ill. App. 3d 560, 565-66 393 N.E.2d 1380, 1384 (5th Dist. 1979).

630. It is generally recognized that juries are reluctant to afford the presumption of innocence to defendants who exercise their constitutional right not to take the stand on their own behalf, regardless of how the jury is instructed. See Freedman, Perjury: The Lawyer's Trilemma, 1 Litigation 26, 28 (1975).

631. Aside from any inherent improbabilities in defendant's version of events, the principal problem will be the disclosure of defendant's criminal record to the jury for impeachment purposes. If the defendant had given an incriminating statement to the police, which had been suppressed, the statement also would be available for impeachment purposes. See Harris v. New York, 401 U.S. 222 (1971).
assert their innocence at sentencing. Putting aside the possibility that defendants who assert their innocence may actually be so, those who had maintained their innocence earlier would be expected to adhere to that position at sentencing. Defendants, of course, can avoid this dilemma by choosing not to speak on their own behalf at sentencing or by expressing a contrition that they may not feel. Favoring these defendants over those who maintain their innocence to the bitter end, however, is probably a case of visiting lighter punishments on the prudent rather than on the penitent.

In short, the potential exists for a good deal of mischief in allowing courts to treat a defendant's purported lack of remorse as a significant consideration in sentencing. A defendant's remorse is difficult to determine in the best of circumstances. Moreover, as presently administered, a defendant's purported lack of remorse seems to serve primarily as a convenient rationale for allowing judges to engage in otherwise prohibited sentencing practices. Therefore, the use of that factor should be either reformed or abandoned as inconsistent with the Act.

Under a sentencing guideline system, however, it would be possible to give a meaningful and consistent treatment to the concept of lack of remorse. As proposed herein, a defendant's presumptive sentence would be based on a criminal history score. This score is initially calculated on the basis of a defendant's prior juvenile and adult record and any factors in mitigation or aggravation of the instant offense. Thereafter, however, that score (and

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632. See cases cited supra note 621. Taking an assertion of innocence directly into account at sentencing has been prohibited on the theory that the practice would unduly chill a defendant's exercise of the right of appeal or prospects of post-conviction relief. See People v. Speed, 129 Ill. App. 3d 348, 349-50, 472 N.E.2d 572, 573 (2d Dist. 1984); People v. Griffiths, 112 Ill. App. 3d 322, 331, 445 N.E.2d 521, 529 (4th Dist. 1983); People v. Sherman, 52 Ill. App. 3d 857, 859, 368 N.E.2d 205, 207 (3d Dist. 1977). Allowing a judge to use an assertion of innocence at sentencing as a sign of lack of remorse, however, clearly permits the supposedly prohibited result to be reached indirectly.

633. Justice Simon of the Illinois Supreme Court made the following statement concerning defendants who maintain their innocence at sentencing:

    The trial judge took account of the defendant's refusal to admit his guilt in sentencing the defendant to 20 years in prison for armed robbery. We do not require attorneys seeking reinstatement after disbarment to admit their guilt of the crimes that were the basis for their disbarment. . . . This rule is based on the view that "[s]imple fairness and fundamental justice demand that the person who believes he is innocent though convicted should not be required to confess guilt to a criminal act he honestly believes he did not commit." (In re Hiss (1975), 368 Mass. 447, 458, 333 N.E.2d 429, 437.) Otherwise, honest persons, professing their innocence, may receive greater punishment than perjurers who admit to a crime that they did not commit. The same principles apply in the case of a criminal defendant who is compelled to confess at a sentencing hearing. If anything we should take even greater precautions in this situation to avoid jeopardizing the defendant's right to avoid self-incrimination.


634. See infra notes 806-49 and accompanying text.
hence the defendant’s presumptive sentence) can be decreased by up to two points based on a variety of mitigating factors in a defendant’s personal background.\textsuperscript{635} Many of those factors take a defendant’s remorse or rehabilitation into account, either directly or indirectly.\textsuperscript{636} Consequently, a finding of lack of remorse by the sentencing judge could be translated into the judge’s refusal to reduce the defendant’s guideline sentence by the attributable amounts.\textsuperscript{637} This would assure that a defendant’s lack of contrition was given weight but that it was not utilized impermissibly to punish the defendant for insisting on a trial.\textsuperscript{638} This approach seems to be a sensible accommodation of the competing interests involved.

\textbf{B. Statutory Factors In Aggravation}

The Act’s most commonly used regular term aggravating factors are (1) that the defendant received compensation for committing the offense; (2) that the defendant’s conduct caused or threatened serious harm; and (3) that the defendant had a prior history of delinquency or criminal activity.\textsuperscript{639} In

\begin{itemize}
  \item \textsuperscript{635} See infra notes 850-58 and accompanying text.
  \item \textsuperscript{636} See infra notes 855-57 and accompanying text.
  \item \textsuperscript{637} The defendant’s lack of remorse has been incorporated into the proposed sentencing guidelines in this manner, as has perceived perjury. See Appendix to text, § 2b, at 402.
  \item \textsuperscript{638} See People v. Moriarty, 25 Ill. 2d 565, 185 N.E.2d 688 (1962).
  \item \textsuperscript{639} One of the aggravating factors enumerated in the Act permits consideration of general deterrence. Pub. Act No. 80-1099, § 3, 1977 Ill. Laws 3264, 3301 (codified at ILL. REV. STAT. ch. 38, § 1005-5-3.2(a)(7) (1983)). As argued above, however, many decisions apparently have misapplied the deterrence rationale to serve as a reason for imposing consecutive sentences, see supra note 269, or an extended term sentence, see supra note 83. It also has been utilized improperly to deny probation. See cases cited supra note 60. As argued above, a general deterrence rationale rarely should play a decisive role in selecting an individual sentence. See supra note 269.
  \item The Act also contained regular term aggravating factors directed to abuse of office or position. See Pub. Act No. 80-1099, § 3, 1977 Ill. Laws 3264, 3301 (codified at ILL. REV. STAT. ch. 38, § 1005-5-3.2(a)(4), (5) (1983)). Although these factors might have been widely used in official bribery or corruption cases, such use of the factors may have been forestalled by People v. Warwick, 123 Ill. App. 3d 692, 697-98, 463 N.E.2d 206, 209-10 (3d Dist. 1984). In Warwick, the court concluded that these regular term factors could not be applied to aggravate the sentences imposed in such cases. The court reasoned that because abuse of office or position was an an essential feature of such crimes, aggravating factors based on those same considerations could not be utilized to routinely enhance the sentences imposed on those committing them. Id.
  \item The Warwick decision probably is correct as a matter of law, see People v. Conover, 84 Ill. 2d 400, 419 N.E.2d 906 (1981), but it poses a problem for sentencing within this narrow class of crimes. Abuses of office or position, along with white-collar crimes, probably are among the few offenses in which a general deterrence rationale should be a significant sentencing consideration. If so, that rationale, along with the inherent nature of such offenses, might make regular term prison sentences appropriate more frequently. The General Assembly could approach this problem either by increasing the class of those offenses, by explicitly making the abuse of office or position factors applicable to such crimes, or by making those offenses nonprobationable. If the latter course is taken, it is recommended that periodic imprisonment remain available for exceptionally mitigated cases. See ILL. REV. STAT. ch. 38, §§ 1005-7-1 to 1005-7-8 (1983).
\end{itemize}
construing these factors, the judiciary has only occasionally shown a real interest in attempting to fashion a coherent, rational sentencing system. Instead, its principal aim has been to give those factors a broad enough reading to sustain whatever sentence was imposed by the trial judge. Moreover, when a sensible approach to a given factor has arisen, all efforts to generalize that approach have been steadfastly resisted.

1. Compensation for Committing the Offense

The Act provided that the receipt of compensation for committing an offense can aggravate the sentence to be imposed. The legislative history of the Act indicates that the intended targets of this provision were persons who committed crimes for hire—contract killers, "torches," and the like. The literal application of the language was broad enough, however, to include any crime in which the perpetrator received anything of value. Predictably enough, a number of trial courts followed a literal interpretation and supported aggravated sentences imposed on persons convicted of theft, burglary, robbery, and armed robbery on the ground that they had received compensation for committing the offense.

In an all too rare act of judicial self-restraint, the supreme court finally put this matter right in People v. Conover. The Conover court relied principally on its decision in People v. Brownell, which held that the General Assembly had not intended to allow the murder of an eye witness to be a capital crime when the crime to which the victim was an eye witness was his own murder. The Conover court concluded that the most reasonable interpretation of the compensation provision was that it referred to offenses one was hired to commit. The General Assembly, the court noted,

640. See, e.g., People v. Conover, 84 Ill. 2d 400, 404, 419 N.E.2d 906, 908 (1981) (interpreting defendant's receipt of compensation for committing an offense as an aggravating factor).


642. The legislative history of § 5-5-3.2(a)(2) is not extensive. The explanation of S.B.11, in which the provision originated, mentions its existence but does not explain its purpose. Class X Analysis, supra note 48, at 32. The provision, however, appears to have been based on a factor in aggravation contained in Illinois' capital punishment statute related to murders for hire. See ILL. REV. STAT. ch. 38, § 9-1(b)(5) (1977) (current version at ILL. REV. STAT. ch. 38, § 9-1(b)(5) (1983)).


647. 84 Ill. 2d 400, 419 N.E.2d 906 (1981).


649. Id. at 526, 404 N.E.2d at 190.

650. 84 Ill. 2d at 402, 419 N.E.2d at 908-09.
was well aware that the receipt of compensation was implicit in most burglaries and thefts. Thus, the Conover court concluded, it made sense to assume that the legislature had already incorporated that factor into the range of penalties it had established for those crimes. Drawing an analogy to Brownell, the court held that the provision in question applied only to defendants who received renumeration to commit a crime other than the proceeds from the crime itself.

The reasoning of the Conover court is both sensible and far reaching in its implications. The supreme court's position is, apparently, that an aggravating circumstance implicit in the offense itself should not further aggravate the sentence. If followed to its logical conclusion, this position would rein in the routine application of other factors in aggravation to a host of crimes. By and large, however, the appellate courts have not given such a broad reading to Conover. Although a few courts have relied on its rationale to reduce or vacate sentences, the more common reaction by far has been to dismiss that aspect of Conover as "an unfortunately vague piece of dictum."

2. Defendant's Conduct Caused or Threatened Serious Harm

Perhaps the most inconsistently applied regular term factor in aggravation is that the defendant caused or threatened serious harm. While deceptively simple in its phrasing, this factor creates several major definitional problems. For example, must a defendant have personally caused or threatened serious harm or does it suffice that a defendant participated in a crime in which an accomplice caused or threatened serious harm? What is the meaning of

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651. Id. at 405, 419 N.E.2d at 909.
652. Id. at 404, 419 N.E.2d at 908.
653. Id. at 405, 419 N.E.2d at 909.
655. People v. Barney, 111 Ill. App. 3d 669, 679, 444 N.E.2d 518, 524 (1st Dist. 1982). One commentator recently concluded that there has been widespread resistance to Conover by appellate courts, in part because its intended reach is not clear. See Hartmann, Factors in Aggravation and Mitigation: A Trap for the Sentencing Judge?, 33 De Paul L. Rev. 357, 369-70 (1984). That commentator appears to be correct in her assessment, because Barney, along with numerous other cases, did not find Conover to bar the imposition of lengthy sentences based on a serious harm rationale for unexceptional versions of various crimes. See infra notes 698-710 and accompanying text; see also People v. Griffin, 117 Ill. App. 3d 177, 185-86, 453 N.E.2d 55, 60-61 (5th Dist. 1983) (pointing loaded revolver at victim and demanding money was found sufficient to trigger serious harm rationale even though gun was never fired; defendant received 25-year term).
"serious harm"? Is only physical injury within its scope, or are injuries to society at large or psychological damage to the victim also covered? How serious is "serious," especially in the context of offenses such as aggravated battery, rape, attempted murder, and murder, which always cause severe trauma or death to the victim? Is the concept of serious harm limited to some adverse consequences beyond those normally implicit in the offense itself? Finally, what is meant by threatening serious harm? Is a word or menacing gesture sufficient, or must something have occurred akin to an attempt to inflict such harm?

Besides these definitional issues, problems of quantification also have arisen. What effect should a finding of serious harm have on an offender's sentence? And how is one to distinguish serious harm from its more aggravated counterpart, exceptionally brutal or heinous behavior, indicative of wanton cruelty? Each of these questions is discussed below.

a. The Requirement of Personal Conduct

No case has expressly decided whether a defendant must have personally committed the serious harm that was used to aggravate the defendant's sentence. Rather, courts seem to have adopted a de facto rule requiring that aggravation on a serious harm rationale be based on the defendant's personal conduct. Given the language and purposes of the Act, this construction is appropriate. The statutory language referring to the defendant's conduct is most readily construed as requiring personal action on the part of the defendant. Moreover, when the General Assembly wished to subject both active and passive offenders to the possibility of a given sanction, it used the phrase "the offense was accompanied by" the requisite aggravating conduct. Finally, a construction requiring a defendant's personal action is consistent with Illinois's historical preference for sentences tailored to the individual circumstances and conduct of each defendant.

It is not clear, however, that a defendant's personal conduct will continue to be required for aggravation based on serious harm. The problem lies with

656. Occasionally, a person actually engaging in exceptionally brutal behavior will be punished with an extended term sentence, while passive accomplices of that offender will receive longer-than-minimum regular term sentences, most probably on a serious harm rationale. See, e.g., People v. Campbell, 126 Ill. App. 3d 1028, 1033, 1056-58, 467 N.E.2d 1112, 1116, 1133-34 (2d Dist. 1984) (defendant received 60-year sentence for armed robbery in which he shotgunned unresisting victim and left him permanently disabled); People v. Tyler, 128 Ill. App. 3d 1080, 1083, 1102-03, 471 N.E.2d 968, 972-73, 984-85 (2d Dist. 1984) (Campbell's two passive confederates in the foregoing crime given sentences of 20 years for armed robbery; court stressed injury to victim).


659. See supra notes 465-67 and accompanying text.
the supreme court's decision in *People v. Sangster.* The *Sangster* court concluded that a defendant's personal action was not required by the Act's language that "the defendant [had to have] inflicted severe bodily injury" before receiving a consecutive sentence. Although the *Sangster* decision is erroneous, it obviously could serve as persuasive authority for construing the similar language of the serious harm provision.

b. Problems in Definition and Application

Even if *Sangster*’s error is not extended, however, application of the serious harm factor remains gravely flawed. Despite innumerable cases finding that a defendant's conduct caused or threatened serious harm, there nonetheless is uncertainty and inconsistency in both the interpretation and application of that language. Three major categories of difficulties have arisen. The first is a failure to define what is meant by “serious harm.” The second is a failure to pinpoint what is meant by a “threat” of serious harm. The third is a failure to quantify the effect to be given to actual or threatened serious harm.

1. *Definitional Issues.*—One question in defining “serious harm” is whether it is limited to physical harm to the victim or whether it can be extended to other serious harmful consequences of criminal conduct. The appellate courts have divided on this issue. Two districts have concluded that the serious harm aggravating factor parallels the mitigating factor that states that “the defendant’s criminal conduct neither caused nor threatened serious physical harm to another.” Consequently, these courts have held that serious harm is limited to physical injury. Other courts, however, have viewed the aggravating phrase as clearly and unambiguously embracing not only physical injuries, but serious societal or psychological harm as well. The latter courts have used the serious harm rationale to increase sentences imposed on persons whose crimes, while not causing physical harm, were perceived as exceptionally aggravated in other respects.

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660. 91 Ill. 2d 260, 437 N.E.2d 625 (1982).
662. 91 Ill. 2d at 264-66, 437 N.E.2d at 627-28.
663. See supra notes 323-29 and accompanying text.
667. See, e.g., *People v. Bergman,* 121 Ill. App. 3d 100, 110-12, 458 N.E.2d 1370, 1378-80
It seems more likely that serious harm should include more than physical injury. The Act refers to "physical" harm or injury in several other sections of the statute. Under normal rules of statutory construction, the absence of that word from the Act's aggravating factor should be treated as evidence of an intent to give a broader scope to that factor. There is no reason to depart from those rules of construction.

A broad interpretation of serious harm is also consistent with cases such as People v. Burton, which concluded that serious harm encompasses psychological damage as well as physical injuries. In Burton, the defendant was convicted of two counts of aggravated incest with his two stepdaughters. The record revealed that the defendant had abused the children repeatedly since they were five and six years old. The trial judge found the victims to be "very frightened, very insecure and, obviously, damaged children." Concluding that the defendant had inflicted "severe psychological trauma on the victims, . . . which may well be carried with them throughout their lives," the judge imposed concurrent six-year sentences. This inclusion of psychological trauma as a form of serious harm was, sensibly enough, affirmed by the appellate court.

But the fact that a wide range of adverse consequences may be treated as serious harm for purposes of this aggravating factor does not resolve how to treat such consequences where they are not distinguishable from those normally inherent in the offense itself. On the one hand, the logic of Conover dictates that sentences may not be routinely enhanced because of conduct implicit in the offense itself. On the other hand, it is unlikely that the

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669. Cf. Western Nat'l Bank v. Village of Kildeer, 19 Ill. 2d 342, 350-51, 167 N.E.2d 169, 174 (1960) (judge may not add words to a statute to change its meaning); People ex rel. Stocke v. 11 Slot Machines, 80 Ill. App. 3d 109, 115, 399 N.E.2d 305, 309 (5th Dist. 1979) (court is not permitted to add words to a statute to change its meaning, even if such a reading seems desirable as a matter of policy).
671. Id. at 149, 429 N.E.2d at 545.
672. Id. at 153, 429 N.E.2d at 547.
673. Id.
674. Id. at 150, 429 N.E.2d at 544.
675. Id. at 153-55, 429 N.E.2d at 547-48.
676. See supra notes 640-55 and accompanying text.
General Assembly intended to limit the aggravating effect of serious harm to the crimes in which it is least likely to arise. This dilemma has been resolved by requiring that the aggravating serious harm differ from the harm implicit in the crime itself.

Efforts to apply Conover to intrinsically dangerous or harmful offenses have resulted in some rather strange judicial pronouncements. In People v. Carmack, for example, the court solemnly stated that a threat of serious harm is not necessarily implicit in an armed robbery. Likewise, in People v. Johnson, the court determined that "the threat of serious harm is not inherent in the offense of rape." Similar statements have been made regarding attempted murder, murder, and voluntary manslaughter, although it is difficult to imagine any harm more serious than death.

In context, however, many of these statements are defensible as sensible efforts to apply Conover's analytical framework to these exceptionally aggravated crimes. As the Johnson court noted, for example: "There are wide variances in the risk of harm to victims of sexual attacks . . . . It is illogical to argue that the legislature intended to prevent a trial court from recognizing these differences and from imposing sentences accordingly." Thus, the Johnson court's analysis was consistent with Conover in requiring a finding of harm beyond that implicit in the offense itself before allowing sentence enhancement on a serious harm rationale.

In fact, it seems fair to say that in cases involving actual physical harm to a particular victim, Conover has been sensibly applied both as a limitation on and an authorization for sentence aggravation on a serious harm basis.

677. But see People v. Warwick, 123 Ill. App. 3d 692, 695-98, 463 N.E.2d 206, 208-10 (2d Dist. 1984); supra note 639.
681. Id. at 161, 437 N.E.2d at 440.
684. See, e.g., People v. Evans, 87 Ill. 2d 77, 87, 429 N.E.2d 520, 525 (1981); cf. People v. Pitt, 106 Ill. App. 3d 117, 120-21, 435 N.E.2d 801, 804 (5th Dist. 1982) (when defendant was convicted of both armed violence and voluntary manslaughter, the fact that he caused the death of an individual could be used as a form of serious harm to enhance his sentence for armed violence, even though it would have been improper to use as a form of serious harm in connection with voluntary manslaughter).
For example, *People v. Martin*, 686 upheld the enhanced sentences of defendants who gave their victim a prolonged beating, apparently for sheer sport, before he died. 687 That separate act of cruelty was found to constitute serious harm distinct from the murder itself and, thus, a proper basis for sentence enhancement. 688 Likewise, gang rapes consistently result in higher-than-minimum sentences even for first-time offenders, the serious harm involved being the repeated sexual assaults made possible by group activity. 689 If gratuitous physical abuse is also present in a gang rape, even longer sentences are imposed on the perpetrators. 689 Cases in which the victim suffered some unusually severe physical harm, such as permanent paralysis or disfigurement, also normally result in longer sentences under a Conover rationale. 691

2. Threatened Serious Harm.—A tacit consensus has developed in actual serious harm cases limiting sentence enhancement to situations in which the harm differed from that implicit in the offense itself. 692 In the realm of

687. Id. at 502, 445 N.E.2d at 808.
688. Id. at 502, 445 N.E.2d at 808 (sentence of 30 years rather than minimum of 20 years for offender with no prior record); see also People v. Puente, 98 Ill. App. 3d 936, 949, 424 N.E.2d 775, 785 (1st Dist. 1981) (15-year sentence for armed robbery and attempted murder imposed on first offender affirmed where victim was stabbed three times in throat without provocation).
689. See, e.g., People v. Washington, 104 Ill. App. 3d 386, 396, 432 N.E.2d 1020, 1027-28 (1st Dist. 1982) (10-year sentence for 17-year old first offender who played major role in gang rape, rather than six-year minimum); People v. Hasting, 72 Ill. App. 3d 816, 818-20, 826, 390 N.E.2d 1273, 1276-77, 1281 (1st Dist. 1979) (four defendants committed vicious gang rape; defendant Hasting, whose only prior record was one misdemeanor conviction but who perpetrated a number of the more vicious aspects of criminal episode, received concurrent sentences of nine to 27 years).
690. See, e.g., People v. Requena, 105 Ill. App. 3d 831, 838, 435 N.E.2d 125, 130 (1st Dist. 1982) (three defendants maced and beat victim, forced her to submit to numerous acts of fellatio and rape; major participants sentenced to concurrent term of 15 and 20 years; minor participant sentenced to 10 years; none had prior records), cert. denied, 459 U.S. 1204 (1983); People v. Dotson, 99 Ill. App. 3d 117, 119, 125, 424 N.E.2d 1319, 1321, 1326 (1st Dist. 1981) (defendant abducted victim from parking lot, raped her, attempted to carve his name on her body with a broken beer bottle, and threw her out of car in isolated area; court affirmed two concurrent sentences of 25 to 50 years, despite no record of violent crimes); People v. Leverson, 69 Ill. App. 3d 726, 727-28, 731, 387 N.E.2d 931, 933, 936 (1st Dist. 1979) (defendant and confederate abducted victim; codefendant tied her to bed, beat her severely with coat hanger, poured cologne in wounds and ordered her to have sex with defendant, which she did; court affirmed defendant's concurrent 15 to 30 year sentences for aggravated kidnapping and deviate sexual assault, despite his lack of a prior record).
692. The problem of quantifying enhancements to sentences based on the serious harm
threatened harm, however, that qualification is frequently ignored. Instead, defendants will be found to have threatened serious harm within the meaning of the Act for engaging in conduct that is a staple ingredient of the offense.

The precise meaning of the term "threaten" has never been settled. Some cases have interpreted the term literally to include verbal threats to take some action that, if carried out, would result in serious harm. A second group of cases has found a threat of serious harm in the manner in which the offense was committed, even though there had been no overt effort to cause serious harm. Finally, other cases have equated "threat" with "attempt" by finding a threat of serious harm when a defendant con-

rationale is presented by many of the cases discussed supra notes 519-49, 678-91 and accompanying text. The conclusion that those cases correctly applied Conover to authorize some enhancement of a defendant's sentence should not be taken as an endorsement of the particular increase utilized in a specific case.

There has been some uncertainty over whether defendants may have their sentence enhanced by certain harm—usually distinct crimes—that arose in connection with the offenses but for which the defendants either have not been charged or for which they were charged but acquitted. The rule that has emerged is that uncharged conduct can be used for enhancement but conduct which has resulted in an acquittal cannot. Compare People v. Martin, 112 Ill. App. 3d 486, 502-03, 445 N.E.2d 795, 808 (1st Dist. 1983) (murder sentences may be enhanced for the gratuitous savage beating inflicted on victim), and People v. Ely, 107 Ill. App. 3d 102, 107-08, 437 N.E.2d 353, 356-57 (4th Dist. 1982) (armed robbery sentence may be enhanced for the sexual assault of one victim, although the defendant was not charged for the sexual assault) with People v. Cross, 100 Ill. App. 3d 83, 91-92, 426 N.E.2d 623, 630 (3d Dist. 1981) (when defendant has been acquitted of murder, it is improper to consider the death of a victim of an unrelated battery in sentencing a defendant for arson), and People v. Cain, 70 Ill. App. 3d 1, 7-8, 388 N.E.2d 54, 59 (1st Dist. 1979) (where defendant was convicted of armed robbery but acquitted of murder, it would be improper to increase the defendant's sentence for the death of the victim).

Under Conover, a particular consequence of a defendant's criminal conduct might allow enhancement of the sentences imposed for some offenses, but not others. See, e.g., People v. Lampton, 108 Ill. App. 3d 41, 47, 438 N.E.2d 915, 919 (3d Dist. 1982) (fact that defendant shot victim once may be used to enhance his sentence for armed violence based on aggravated battery, even if it could not have been used for the aggravated battery itself); People v. Pitt, 106 Ill. App. 3d 117, 120-21, 435 N.E.2d 801, 804 (5th Dist. 1982) (defendant was convicted of both armed violence and voluntary manslaughter; the death of the victim could be used as a form of serious harm to enhance his sentence for armed violence, but would have been an improper consideration to enhance the sentence for voluntary manslaughter); People v. Bone, 103 Ill. App. 3d 1066, 1070, 432 N.E.2d 329, 332 (3d Dist. 1982) (the degree of harm the defendant caused the victim of his armed robbery—namely, his death—is a proper consideration in sentencing the defendant for armed robbery); cf. People v. Godinez, 91 Ill. 2d 47, 57-58, 434 N.E.2d 1121, 1127 (1982) (Simon, J., concurring) (defendant who committed multiple unrelated crimes on a single day may have sentence for each enhanced because of the presence of the others).


sciously, but unsuccessfully, endeavored to cause serious physical injury other than that necessarily implicit in the offense itself.\footnote{696}

These interpretations, of course, are not mutually exclusive and all of them are at least superficially plausible. In light of Conover and the Act's broader purposes of fairness and proportionality in sentencing, however, not all of them are a proper basis for sentence enhancement. Instead, sentence enhancement based on a threatened serious harm rationale should be limited to those defendants whose conduct has clearly set them apart from others who have committed the same offenses.\footnote{697} The conduct involved should be both atypical of the underlying offense—to meet the requirements of Conover—and either intended or likely to create a significant risk of serious harm apart from that involved in the offense itself. Under this interpretation, verbal threats should seldom result in any enhancement of a defendant's sentence; a more dangerous manner of committing an offense should usually not result in more than a very modest increase in the sentence, and overt attempts to cause serious physical harm should usually result in a substantial sentence increase.

Verbal threats of serious harm are a regrettably commonplace and deplorable aspect of a variety of crimes, particularly sex offenses, home invasion, and armed robbery.\footnote{698} While the temptation to enhance the sentences of such offenders is understandable, routine sentence enhancement based on their conduct would not be consistent with Conover. The use or threat of force is an element of all these offenses.\footnote{699} The General Assembly, therefore, must have realized the role that threats commonly played in these crimes and should be deemed to have taken them into account in setting severe minimum penalties for these offenses.\footnote{700}

Moreover, it would generally be inconsistent with the Act's broader purposes to allow verbal threats to distinguish between offenders in sentencing. In an extreme case, for example, when the verbal threats were employed as


\footnotetext{697}{Courts have not always limited the enhancement of sentences to instances involving atypical criminal conduct. For example, in People v. Spinks, 80 Ill. App. 3d 1096, 400 N.E.2d 634 (3d Dist. 1980), the court imposed concurrent six-year sentences for two burglaries where the defendant's only prior conviction was for forgery. Id. Despite the fact that the two crimes were entirely commonplace, the court reasoned that "burglary is a very serious offense with the potential for serious physical harm," and that unless the defendant could disprove that he intended such harm, the enhancement of his sentence was proper. Id. at 1100, 400 N.E.2d at 636. This approach is clearly interdicted by Conover.}

\footnotetext{698}{See, e.g., People v. Cihlar, 106 Ill. App. 3d 824, 825-26, 436 N.E.2d 1041, 1042 (1st Dist. 1982) (defendant entered victim's home, threatened her with death, had intercourse with her against her will; convicted of rape, home invasion and burglary); People v. Patten, 105 Ill. App. 3d 892, 893, 435 N.E.2d 171, 172 (1st Dist. 1982) (defendant and companion forced victim into a car, threatened her with death, and took her to apartment and raped her; convicted of rape, deviate sexual assault and aggravated kidnapping).}

\footnotetext{699}{See ILL. REV. STAT. ch. 38, § 11-1 (1983) (rape); id. § 11-3 (deviate sexual assault); id. § 12-11 (home invasion); id. § 18-2 (armed robbery).}

\footnotetext{700}{Rape, deviate sexual assault, home invasion, and armed robbery are class X felonies,
gratuitous psychological torture,\textsuperscript{701} verbal threats may amount to actual serious harm. In most cases, however, the use of verbal threats to coerce a victim's compliance may be equated with a resort to minimal force, which merits no additional punishment. Compared to physical conduct, verbal threats are an uncertain guide to a defendant's amenability to rehabilitation. Thus, their presence normally should not play a significant role in selecting the sentence to be imposed.\textsuperscript{702}

Threats of serious harm have also been found in a number of cases in which the offense was committed in a manner that the sentencing judge believed was more dangerous than that generally employed. Frequently, however, the threats posed in these cases seem ephemeral. For example, the murder committed in People \textit{v. Hughes}\textsuperscript{703} was apparently found to have threatened serious harm over and above that implicit in all murders because the defendant fired two shots at his victim rather than one.\textsuperscript{704} Likewise, other courts have found threats of serious harm when a defendant merely cocked a weapon\textsuperscript{705} and when a defendant armed himself with a shotgun rather than a pistol,\textsuperscript{706} although the weapons were not fired in either case nor were the victims otherwise threatened with harm. Accosting a victim in her home has also been held to constitute a threat of serious harm.\textsuperscript{707}

A number of the sentences imposed in these cases appear lenient given all the other circumstances.\textsuperscript{708} Nonetheless, they should have been affirmed on a harmless error rationale rather than on their merits. It simply does not seem appropriate to add a substantial amount of time to a defendant's sentence due to such a subtle parsing of the crime. A defendant's decision to carry a more dangerous weapon, for example, is at most marginally relevant to the defendant's culpability, character, and amenability to rehabilitation, as long as the weapon is not discharged. Like purely verbal threats, this type of "threatened serious harm" is a form of minimal force that is a necessary element of the offense and hence not an appropriate basis for sentence enhancement under \textit{Conover}.\textsuperscript{709} Consequently, it should not result


701. \textit{See} cases cited supra note 420 and supra text accompanying notes 440-41.


703. 109 Ill. App. 3d 352, 440 N.E.2d 432 (5th Dist. 1982).

704. \textit{Id.} at 363, 440 N.E.2d at 440.


707. \textit{Id.}

708. \textit{See}, e.g., People \textit{v. Hughes}, 109 Ill. App. 3d 352, 353, 442 N.E.2d 432, 434 (5th Dist. 1982) (defendant's sentence was only four years above the statutory minimum for murder).

709. For a discussion of \textit{Conover}, see supra notes 647-53 and accompanying text.
in more than a very minimal increase in the sentence otherwise appropriate.\textsuperscript{710}

The final class of threatened serious harm cases consists of those in which a defendant made an unsuccessful attempt to cause actual serious harm.\textsuperscript{711}

In such a case, an enhanced sentence is clearly appropriate under Conover because neither the behavior involved nor the harm threatened is implicit in the offense itself. The Act’s general sentencing principles also support sentence aggravation in these cases. Because the threat was more than mere bluff or posturing, it becomes a far clearer and more significant indicum of the defendant’s character and rehabilitative potential than the other two types of threatened serious harm. As a consequence, an unsuccessful attempt to cause serious harm should normally result in a significant enhancement of the defendant’s sentence.\textsuperscript{712}

3. The Judicial Treatment of Threatened and Actual Serious Harm.—If sentencing practices were operating in a manner consistent with the Act, there would be a hierarchy, more or less, in the degree of sentence enhancement based on the type of a defendant’s threatened or actual serious harm. No such grading of serious harm cases, however, is evident. Instead, the cases are hopelessly jumbled, with many offenders receiving substantially increased sentences due to apparently innocuous aggravating aspects of their crimes, while their colleagues who committed far more aggravated versions of the same crimes received only minimal enhancements.

Although many cases involving only verbal threats of serious harm did not result in sentence enhancements,\textsuperscript{713} a number of courts have relied on verbal threats to lengthen regular term sentences\textsuperscript{714} or to impose extended term sentences.\textsuperscript{715} Those “threatened serious harm” cases predicated on a

\footnotesize
\textsuperscript{710} The proposed sentencing guidelines adopt that position. See Appendix to text, § 2a(1)(a)(2), at 397-99; § 2a(1)(b)(1), at 399.

\textsuperscript{711} See, e.g., People v. Calderon, 101 Ill. App. 3d 469, 470, 471, 428 N.E.2d 571, 572-73, 578 (1st Dist. 1981) (defendant, who had no prior record, properly sentenced to nine-year minimum when he exchanged shots with victim).

\textsuperscript{712} Occasionally there will be mitigating circumstances that offset the defendant’s unsuccessful attempt to cause serious harm. For example, in People v. Calderon, 101 Ill. App. 3d 469, 479, 428 N.E.2d 571, 572 (1st Dist. 1981), the victim initiated an exchange of gunfire with the defendant as the defendant attempted to make his escape. Although the defendant’s willingness to return that fire was held against him, the three-year increase in his sentence almost certainly would have been greater had he initiated or provoked that exchange. The proposed sentencing guidelines provide for such a contingency. See Appendix to text, § 2a(2)(a)(1)-(4), (c), at 400-01; § 2c(2), (3), at 403-04.

\textsuperscript{713} See, e.g., People v. Cihlar, 106 Ill. App. 3d 824, 436 N.E.2d 1041 (1st Dist. 1982); People v. Patten, 105 Ill. App. 3d 1041, 435 N.E.2d 171 (1st Dist. 1982).

\textsuperscript{714} See, e.g., People v. Garza, 125 Ill. App. 3d 182, 184-85, 465 N.E.2d 595, 597 (1st Dist. 1984) (defendant struck victim, threatened her with death; concurrent eight-year sentences for rape and home invasion affirmed); People v. Best, 97 Ill. App. 3d 1083, 1087-88, 424 N.E.2d 29, 30-31 (1st Dist. 1981) (defendant who threatened to kill victim unless she complied with his demand received concurrent sentences of 15 years for various sex offenses).

\textsuperscript{715} See, e.g., People v. Viens, 109 Ill. App. 3d 1017, 1027-29, 441 N.E.2d 660, 668-69 (2d Dist. 1982), cert. denied, 461 U.S. 917 (1983); supra text accompanying notes 442-58. Although
supposedly dangerous manner of committing the offense also are plagued by inconsistency. Many of these cases appear to involve quite modest sentence enhancements. Many other courts, however, have imposed substantial regular term sentences on offenders based on the manner of committing the offense, even though no significant enhancement seemed warranted.

For example, in People v. Reynolds, the trial court imposed a twenty-year sentence for armed robbery based in part on the presence of threatened serious harm. The crime in question appeared to be a garden-variety armed robbery in which no resistance was offered, no shots were fired, and no verbal threats of harm were made. The appellate court, however, summarily rejected the defendant’s argument that Conover would not permit enhancement of his sentence on a threatened serious harm rationale. The Reynolds court did not explain what facts, if any, made the harm threatened in this armed robbery more egregious than that implicit in any other.

The use of a minimally threatening nuance of an offense as a basis for sentence enhancement may have been reined in by the supreme court in People v. Reid. Reid had been convicted of attempted armed robbery for brandishing a walking stick in an effort to get his victim to surrender her purse. The incident had ended happily when the obviously unintimidated victim exclaimed, “You are not going to hit me,” and the defendant obligingly turned and walked away. Although the prosecution had requested only a seven-year sentence, the trial judge imposed a ten-year term, based in part on his conclusion that the defendant’s “effort at intimidation” had threatened serious harm.

the court characterized Viens as a case of actual psychological harm, it is difficult to discern any significantly more egregious harm suffered by the victim in Viens than suffered by many victims in other cases involving unfulfilled verbal threats of serious harm.

716. See, e.g., People v. Moore, 115 Ill. App. 3d 266, 271, 450 N.E.2d 855, 857 (1st Dist. 1983) (defendant robbed victim at gunpoint, forced her into alley, put gun in her mouth and told her he would kill her if she screamed; apparent intended sexual assault interrupted by arrival of police; 11-year sentence for armed robbery affirmed).


719. Id. at 705, 434 N.E.2d at 781.

720. Id. at 701, 434 N.E.2d at 777-78.

721. Id. at 705, 434 N.E.2d at 781. The court, however, vacated the defendant’s sentence on other grounds. Id. at 705, 434 N.E.2d at 780-81.

722. 94 Ill. 2d 88, 445 N.E.2d 329 (1983). The appellate court had affirmed Reid’s sentence summarily by a rule 23 order, and therefore, is not reported. References to the appellate court decision are drawn from the supreme court’s discussion of that unreported opinion.

723. Id. at 89, 445 N.E.2d at 329.

724. Id.

725. Id.

726. Id. at 90, 445 N.E.2d at 329-30.
The appellate court accepted the defendant's argument that, under Conover, it would have been inappropriate for the trial judge to enhance the sentence based on threatened serious harm. Nonetheless, the appellate court affirmed the sentence, concluding that the trial court had either given no weight to that factor or else so little weight that reversal was not warranted. On further appeal, the supreme court concluded that the trial judge's comments "[did] not show that [he] considered the threat of harm an aggravating factor" and that the defendant's sentence was justified for other reasons.

By implication, the supreme court agreed with the appellate court that an enhancement of Reid's sentence on a threat of harm rationale would have been erroneous on the facts of the case. Both Conover and the Act's broader concerns for consistency and proportionality in sentencing support that result. Reid's menacing gesture, terminated at the first sign of resistance, was a minimal threat of force. It would be improper to have such conduct play a significant role in the sentence selected. Hopefully, the Reid opinion will auger a broader and more thoughtful application of Conover to threatened harm cases than has developed to date.

Those threatened serious harm cases involving attempts to inflict actual harm also exhibit inconsistent approaches to sentence enhancement. There is a tendency to treat these threats as more serious matters for sentencing purposes. Nonetheless, numerous cases can be found in which attempted

727. Id. at 90-91, 445 N.E.2d at 330.
728. Id.
729. Id. The supreme court alluded to the defendant's prior criminal record of two burglary convictions and the trial judge's belief that the defendant had perjured himself at trial. Id.

The court's decision to affirm Reid's sentence is troubling for three reasons. First, it appears virtually certain that the trial judge relied to some extent on a ground the appellate court found improper. See supra text accompanying note 726. The reliance on an improper ground seems particularly likely when the sentence imposed exceeded that recommended by the prosecution. Second, the use of a perjured testimony rationale to support a lengthier sentence, while not presently forbidden under Illinois law, should be prohibited. See supra notes 608-18 and accompanying text. Finally, substantial mitigating factors that tended to offset the defendant's prior record seemed not to have been given any appreciable weight. 94 Ill. 2d at 90-91, 445 N.E.2d at 329-30.

730. See supra notes 698-702 and accompanying text.
731. See supra notes 692-721 and accompanying text.
732. See, e.g., People v. Primmer, 111 Ill. App. 3d 1046, 1048, 1053-54, 444 N.E.2d 829, 831, 834 (4th Dist. 1983) (defendant's 15-year sentence for attempted murder affirmed where defendant fired shotgun through window of neighbor's house, even though no injury resulted); People v. Rosa, 111 Ill. App. 3d 384, 386, 394-95, 444 N.E.2d 233, 236, 240-41 (2d Dist. 1982) (22-year sentence for armed robbery imposed on defendants with minimal prior records reduced to 12 years; defendants had engaged in high-speed chase in effort to elude capture; dissenting judge would have affirmed sentence on that basis); People v. Roper, 98 Ill. App. 3d 834, 839-41, 424 N.E.2d 963, 965-68 (3d Dist. 1981) (six-year sentence for robbery imposed on defendant with no prior record and other compelling mitigating factors in his background affirmed; defendant had been armed with a pistol that he had pointed at victim and attempted to fire).
serious harm had little to no effect on the sentence imposed. Because this type of threatened serious harm seems particularly blameworthy, some significant enhancement will hopefully occur in those cases as a matter of course.

With respect to those cases which the defendant actually inflicted harm—whether societal, psychological, or physical—sentences tend to be significantly enhanced with great regularity. Nonetheless, two problem areas remain. First, the proper effect that various types and degrees of serious harm should have on an offender’s sentence has not been addressed. Second efforts have not been undertaken to standardize the imposition of regular and extended term sentences by developing principled distinctions between conduct that causes or threatens serious harm and that which is exceptionally brutal or heinous. Resolution of these problems is necessary to a fair and proportional sentencing system.

No systematic attempt to grade serious harm has ever been made, nor is one in the offing. The supreme court effectively disabled that undertaking by making it clear that judges need not “recite and assign a value to each fact presented in evidence at the sentencing hearing.” As the supreme court almost certainly intended, this pronouncement has been read as eliminating not only the need to weigh each fact but also the need to weigh any fact, however significant it might have been. Without a weighting requirement, however, it is impossible to rely on a case-by-case process to develop a “common law of sentencing,” as the Act intended would occur. The only alternative to that approach, explicit sentencing guidelines, is highly unlikely without action by the General Assembly.

733. See, e.g., People v. Calderon, 101 Ill. App. 3d 469, 478-79, 428 N.E.2d 571, 577-78 (1st Dist. 1981) (nine-year sentence for armed robbery imposed on defendant with no prior criminal record affirmed because defendant had exchanged gunfire with victim on a residential street; no one injured; sentence probably would have been higher had victim not initiated exchanges); People v. Jackson, 100 Ill. App. 3d 1064, 1065, 1070, 427 N.E.2d 994, 995, 998 (1st Dist. 1981) (defendant’s 11-year sentence for armed robbery affirmed where defendant had two prior convictions for robbery, and confederate fired shots at police in attempting to avoid apprehension; no one actually wounded); People v. Grant, 70 Ill. App. 3d 268, 274-75, 387 N.E.2d 1026, 1028-31 (1st Dist. 1979) (defendant’s indeterminate sentence of five to 15 years for armed robbery affirmed as against the contention that he should receive minimum term of four years to four years and a day, where defendant had fired two shots at victim to prevent her from following him; no one actually harmed).

734. The proposed sentencing guidelines adopt such an approach. See Appendix to text, § 2a(1)(a)-(3), at 397-99; § 2a(1)(b)-(4), at 399.

735. As argued above, societal, psychological, or physical harm should be considered as serious harm in an appropriate case. See supra notes 664-77 and accompanying text. The proposed sentencing guidelines would implement that practice. See Appendix to text, § 2a(1)(a)-(9), at 397-99.

736. See, e.g., cases discussed supra notes 679-91 and accompanying text.


738. See supra notes 32-35 and accompanying text; Schuwerk, supra note 2, at 668-73.

739. See Schuwerk, supra note 2, at 713-14 & nn. 504-05.
As might be expected, then, sentence disparities in cases involving actual serious harm are utterly irreconcilable. Even if one controls for pertinent sentencing variables, it is not difficult to find a wide range of sentences imposed for societal harm,\textsuperscript{740} psychological harm,\textsuperscript{741} and physical harm.\textsuperscript{742} The present judicial attitudes towards these disparities seem to range from tolerance to outright approval.\textsuperscript{743} The situation, therefore, seems unlikely to change of its own accord.

Efforts to classify conduct as serious harm on the one hand or as exceptionally brutal or heinous behavior on the other, also are hopelessly inconsistent. Because the two phrases are not mutually exclusive, without a further elaboration and clarification of what conduct comprises each category, that situation cannot be expected to change. Moreover, even if behavior could somehow be pigeon-holed into one category or the other, it is unlikely that classification would improve the situation unless the Act's failure to specify the sentencing effect of either type of behavior is also addressed.\textsuperscript{744}

As a result of these related problems of interpretation and application, this area has become particularly rife with arbitrary and capricious sentencing.

\textsuperscript{740} See, e.g., cases discussed supra note 667.

\textsuperscript{741} See, e.g., cases discussed supra notes 420, 422 and supra notes 698-702 and accompanying text; see also People v. Moore, 115 Ill. App. 3d 266, 271, 450 N.E.2d 855, 857 (1st Dist. 1983) (defendant robbed victim at gunpoint while codefendant fondled her; then forced her into alley and put gun in her mouth, telling her he would shoot if she screamed; apparent sexual assault thwarted by arrival of police; 11-year sentence for armed robbery imposed on first offender affirmed); People v. Viens, 109 Ill. App. 3d 1017, 1018-19, 1029, 441 N.E.2d 660, 662-63, 669 (2d Dist. 1982) (60-year sentence for armed violence imposed on defendant who kidnapped victim as part of bizarre plot to free a friend from jail; sentence based in large part on supposed psychological harm to victim), cert. denied, 461 U.S. 917 (1983).

\textsuperscript{742} For a representative cross section of cases involving physical injury to the victim and resulting in regular term sentences, see cases discussed supra notes 522, 531, 533-35, 537-39, 549 and accompanying text and infra notes 745-53 and accompanying text.

\textsuperscript{743} The supreme court certainly seems to see diversity as a virtue in imposing sentences. See, e.g., People v. La Pointe, 88 Ill. 2d 482, 490-93, 431 N.E.2d 344, 348-51 (1981) (court stressed complexity of tasks facing sentencing court and wide range of factors court should consider in imposing punishment, thereby suggesting that different defendants cannot be compared for sentencing purposes); People v. Perruquet, 68 Ill. 2d 149, 154, 368 N.E.2d 882, 884 (1977) (court stressed how each sentence must be based upon "the particular circumstances of each individual case" and upon "many factors" which the sentencing judge has a superior opportunity to consider, thus implying that there is no ready basis for comparing different offenders for sentencing purposes). For a criticism of this perspective and a proposed alternative, see Schuwerk, supra note 2, at 686-91.

\textsuperscript{744} A court remains free not to impose an extended term prison sentence even when it finds an offense was accompanied by exceptionally brutal or heinous behavior. See supra notes 85-91 and accompanying text. In fact the Act makes certain offenses, such as voluntary manslaughter, involuntary manslaughter, and aggravated battery probationable, even though they could involve "exceptionally brutal or heinous behavior indicative of wanton cruelty." See Ill. Rev. Stat. ch. 38, §§ 9-2, 9-3, 12-4 (1983). This freedom not to extend sentences for reasons of exceptionally brutal or heinous behavior has been exercised rather frequently. See supra notes 522-49. In addition, a finding of serious harm has no specific consequences in terms of sentence enhancement, with probation remaining available despite the presence of such conduct. See supra text accompanying note 570.
decisions. For example, in *People v. Rayford*, the defendant robbed a gas station attendant at gunpoint and then shot the unresisting attendant at point-blank range after he had surrendered the money on hand. The defendant was convicted of attempted murder, armed violence, and armed robbery. Rayford's conduct, which seems to fit comfortably under the rubric of exceptionally brutal or heinous behavior indicative of wanton cruelty, could have subjected him to an extended term of thirty to sixty years if so viewed. The court, however, declined to invoke that provision. Instead, it proceeded mainly on a serious harm rationale and imposed concurrent sentences of twelve years for attempted murder and ten years for the remaining offenses.

In contrast to *Rayford* are several cases involving similar gratuitous acts of violence, and defendants apparently no less amenable to rehabilitation, in which the courts took a very different view of the defendant's conduct. To take just one example, in *People v. Jones*, the defendant discharged a firearm with the apparent intent of merely frightening his prospective robbery victims. Nevertheless, his conduct was found to be exceptionally brutal or heinous behavior sufficient to support concurrent extended term sentences of forty and sixty years, even though no injury resulted. A rational sentencing system simply would not allow such arbitrary and entirely discretionary assessments to have so substantial an effect on offenders' sentences.

A number of cases illustrating these inconsistencies are collected and discussed supra notes 522-49 and accompanying text.

104 Ill. App. 3d at 126, 432 N.E.2d at 1043.

104 III. App. 3d at 126, 127, 432 N.E.2d at 1041, 1043. The defendant's armed violence conviction was vacated on appeal because it was based on the same physical act as the attempted murder conviction, but otherwise the propriety of these sentences was affirmed. Id. at 126, 432 N.E.2d at 1042.


On the other hand, *Rayford* is not alone in its relatively lenient approach to crimes of this type. See *People v. Bryant*, 123 Ill. App. 3d 266, 268, 276-77, 462 N.E.2d 780, 782, 787-88 (1st Dist. 1984) (12-year sentence for double attempted murder affirmed where defendant had no prior record, even though one victim suffered severe permanent injury); People v. Zolidis, 115 Ill. App. 3d 669, 670, 677-78, 450 N.E.2d 1290, 1292, 1297-98 (1st Dist. 1983) (10-year sentence for attempted murder affirmed even though defendant had no prior record; victim stabbed 18 times and severely injured); People v. Castro, 114 Ill. App. 3d 984, 991-92, 449 N.E.2d 886, 891-92 (1st Dist. 1983) (15-year sentence for attempted murder affirmed where defendant shot at rival gang member in crowded restaurant and wounded bystander).
c. Proposed Remedial Measures

The fact that a defendant committed an offense in a manner involving actual or threatened serious harm should often be a significant factor in deciding what sentence should be imposed. To regularize the use of the serious harm factor, however, two measures are necessary. First, the type of conduct that the phrase is intended to embrace should be more precisely defined. That process should not only make clear what conduct is included, but also what conduct is excluded, whether as too trivial to warrant enhancement or as so severe as to constitute exceptionally brutal or heinous behavior indicative of wanton cruelty. Second, the effect of a serious harm finding on an offender's sentence should be spelled out in greater detail.

Essentially, the proposed sentencing guidelines set out in the Appendix adopt a broad definition of serious harm that is based on a review of the conduct that courts have placed within that category. Thus, serious harm would include both psychological and societal harm as well as physical harm. Threats of serious harm may also result in sentence enhancement, but only to a more limited extent than would actual harm. The proposal first limits a finding of serious harm to those situations in which the defendant was personally responsible for the behavior in question, and that behavior was not a common feature of the crime and was not exceptionally brutal or heinous. The provision then lists examples of conduct constituting serious harm and specifies the range of aggravation allowable as a result. Hopefully, adoption of the proposed system will ensure that defendants threatening or causing serious harm are both appropriately and consistently punished for doing so.

3. A History of Prior Delinquency or Criminal Activity

A defendant's "history of prior delinquency or criminal activity" is, in all likelihood, the Act's single most important aggravating factor. The significance of this factor is exemplified by its status as the sole factor upon which a judge must make a finding of record before accepting a plea bargain. This factor is so important because a prior record provides a
highly relevant and probative insight into the defendant's criminal propen-
sities and amenability to rehabilitation. It also has the added virtue of being
a somewhat objective measure of these tendencies.758 Thus, a defendant's
criminal history is an exceptionally valuable way to begin to bring some
sense of order and proportionality out of current sentencing practices.759

Cases interpreting the use of criminal history as an aggravating factor,
however, have not focused on its utility in fashioning a fairer and more
rational sentencing system. Instead, their virtually exclusive concern has been
with issues regarding the proper definition of "a history of prior delinquency
or criminal activity" under the Act. No efforts have been undertaken to
quantify the effects of any given prior record on a defendant's sentence.
Indeed, the judicial tendency has been to deny that any quantification is
appropriate.

Two broad issues have been raised concerning the interpretation of this
aggravating factor. The first is whether a prior history of delinquency or
criminal activity is limited to those acts occurring before the instant crime
was committed or whether it includes all crimes committed before sentence
is imposed. The second issue is whether anything short of a conviction may
constitute criminal activity. Each of these issues is discussed below.760

758. The use of the defendant's prior record is only "somewhat" objective because of
distortions in both the number and nature of the convictions arising from the plea bargaining
process. See Schuwerk, supra note 2, at 645-51.

759. The proposed sentencing guidelines place great weight on this factor. See Appendix to
text, § 1, at 396-97; Chart 4, at 405. The presence of either exceptionally brutal or heinous
behavior, or serious harm are other factors that are very significant. See infra notes 850-52
and accompanying text; Appendix to text, § 2a(1), (2), at 397-401; Chart 4, at 405.

760. A number of cases have arisen in which a defendant's sentence has been enhanced based
on a "history of prior delinquency or criminal activity" that consisted either exclusively or
primarily of adjudications of delinquency. See, e.g., People v. Doris, 110 Ill. App. 3d 660,
667, 442 N.E.2d 951, 957 (4th Dist. 1982) (five-year sentence for burglary affirmed where
defendant was adjudicated a delinquent on four different counts of burglary and had convictions
of felony theft and attempted burglary); People v. Tate, 106 Ill. App. 3d 774, 779, 436 N.E.2d
272, 276 (4th Dist. 1982) (sentences of five and 20 years for aggravated battery and home
invasion upheld where defendant had several adjudication of delinquency for burglary); People
v. Bryant, 79 Ill. App. 3d 501, 504, 398 N.E.2d 941, 945 (3d Dist. 1979) (five-year sentence
for burglary affirmed, in part because of defendant's extensive juvenile record). While such
enhancements are clearly permitted under the Act, the question arises whether such acts of
delinquency should weigh as heavily with the sentencing court as would the comparable felonies
committed by an adult.

This article takes the position that sentence enhancements based on acts of delinquency
should take the youth and immaturity of many juvenile offenders into consideration by weighting
acts of delinquency less heavily than comparable felonies committed by adults. See infra text
accompanying notes 819-26. Admittedly, juveniles are entitled to the special solicitude available
under the Juvenile Court Act, ILL. REV. STAT. ch. 37, §§ 701-1 to 708-4 (1983). Nonetheless,
when an offender with a serious juvenile record has shown that rehabilitative efforts have
failed, it is entirely consistent with public policy to allow prior acts of delinquency to aggravate
a regular term sentence.
a. The Meaning of "Prior"

There is a divergence of opinion as to whether a defendant's acts of delinquency or criminal activity that occurred after commission of the instant crime but before sentencing may be considered as a "prior history" for sentencing purposes.\(^6\) For two reasons, the better rule would be to permit consideration of all properly established\(^7\) acts of delinquency or criminal activity occurring prior to sentencing.\(^8\)

First, the rate of progress of criminal cases through the judicial system is due to a variety of factors, not the least of which is the defendant's attitude toward the speedy resolution of the case.\(^9\) Consequently, a rule allowing consideration of only pre-offense criminal activities for sentencing purposes would encourage an adroit defendant to advance the progress of the case concerning the more recent crime and to delay disposition of the case concerning the earlier offense. Even if convictions eventually resulted in both cases, a defendant who succeeded in being sentenced first on the later crime would be able to artificially prevent both of his or her sentences from being enhanced by a "prior" history of criminal activity.

There is a second reason why post-crime, presentence offenses should be available for sentence enhancement. These more recent crimes are an even

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761. Compare People v. Owen, 102 Ill. 2d 88, 110-12, 464 N.E.2d 261, 271-72 (1984) (court properly received evidence of defendant's post-offense attempts to escape custody and to assist another inmate to do so), and People v. Bankhead, 123 Ill. App. 3d 137, 138-39, 462 N.E.2d 899, 900-01 (4th Dist. 1984) (sentence for felony theft may be enhanced due to fact that defendant subsequently was convicted for burglary) with People v. Kline, 92 Ill. 2d 490, 493, 442 N.E.2d 154, 162 (1982) (sentencing judge refused to consider other convictions for offenses committed in interim between the offense and conviction at bar to enhance defendant's sentence for murder; supreme court affirmed).

762. The "properly established" qualifier is the result of a procedure followed in numerous cases where other alleged victims of the defendant testified at the sentencing hearing concerning other crimes the defendant supposedly committed, the court then considering those matters to determine the sentence. This practice has been approved repeatedly by the supreme court. See, e.g., People v. Owens, 102 Ill. 2d 88, 464 N.E.2d 261 (1984) (death penalty case); People v. La Pointe, 88 Ill. 2d 482, 431 N.E.2d 344 (1982) (natural life sentence). This article, however, recommends that this practice be sharply curtailed and subjected to additional constraints. See infra notes 783-88 and accompanying text.

763. This was the rule prior to passage of the Act. See People v. Dukett, 56 Ill. 2d 432, 452, 308 N.E.2d 590, 601, cert. denied, 419 U.S. 965 (1974); People v. Eisner, 27 Ill. App. 3d 957, 960-61, 327 N.E.2d 592, 594-95 (4th Dist. 1975).

764. Statutory provisions guarantee a trial within 120 days if the accused is in custody, and 160 days if the accused is at large on bail or recognizance. See ILL. REV. STAT. ch. 38, § 103-5(a), (b) (1983). It is an open secret, however, that the average time elapsing from arrest to disposition in major metropolitan jurisdictions, specifically Cook County, far exceeds those figures, despite the fact that the discharge of defendants for failure to meet the statutory timetables is a rare occurrence. There are two reasons why such discharges are a rarity. First, defendants who are at large on bail must demand trial before the 160-day period begins to run. Id. § 103-5(b). Few do so. Second, both the 120-day and 160-day periods are tolled by continuances of the proceedings that are either sought or agreed to by the defendant. See id. §§ 103-5(a), (b), 114-4. Such continuances are a very common occurrence.
more reliable indicator of the defendant's criminal propensities and amenability to rehabilitation than older offenses would be. Thus, the use of postcrime, presentence criminal activity for sentence enhancement is particularly appropriate. For both of these reasons, then, a construction of the Act precluding their consideration should not be adopted.

b. The Meaning of "Criminal Activity"

The principal issue regarding the phrase "criminal activity" has been whether it embraces any conduct short of an actual criminal conviction. A strong case can be made for the proposition that it does. In several places the Act requires conviction of particular offenses before certain sentences can be imposed. Consequently, the fact that the criminal history aggravating factor does not explicitly require convictions indicates that some lesser quantum of proof of a defendant's prior criminal activity should suffice.

Crossing that hurdle, however, does not dispose of what particular indicia of criminal conduct should be considered "criminal activity" for sentence enhancement. Many pre-Act cases recognized that a sentence should not be increased on the basis of activities that the defendant was only suspected of committing. Because one of the Act's principal purposes was to see that defendants were treated fairly at sentencing, both procedurally and substantially, the General Assembly's use of the more inclusive phrase "criminal activity" should not be construed as intending to diminish the protections extended to defendants by those earlier cases.

These precepts set the framework for analyzing the four general categories of events or activities that have been included within the phrase "criminal activity:" (1) arrests or charges not resulting in conviction; (2) offenses for which the defendant's probation or parole was revoked; (3) testimony of other crimes with which the defendant had not been charged; and (4) acknowledged other crimes, typically illicit drug use, usually introduced by the defendant in an effort to mitigate the sentence. The correctness of utilizing each of these categories as a form of criminal activity is taken up below.


766. The supreme court has taken this position in a number of cases. See, e.g., People v. La Pointe, 88 Ill. 2d 482, 498-99, 431 N.E.2d 344, 354 (1982); People v. Meeks, 81 Ill. 2d 524, 530-31, 411 N.E.2d 9, 14 (1980).

767. See, e.g., People v. Crews, 38 Ill. 2d 331, 335-36, 231 N.E.2d 451, 454-55 (1967) (defendant's murder sentence vacated because based in part on report of other serious misconduct on defendant's part that he denied committing, and author of report did not testify; court imposed obligation on sentencing judge to determine accuracy of such allegations and to avoid being prejudiced by inflammatory but unreliable information in imposing sentence); People v. Ramsey, 24 Ill. App. 3d 1038, 1041, 322 N.E.2d 547, 549 (2d Dist. 1975) (described sentencing as "affect[ing] substantial rights of a criminal accused to whom the fundamental rights of due process are extended" and vacated sentence based in part on ex parte investigation of defendant by sentencing judge).

768. See Schuwerk, supra note 2, at 640-42, 668-73.
1. Mere Arrests or Charges.—Prior to the Act's passage, numerous cases held that arrests or charges not resulting in convictions could be used to deny an offender probation but not to increase a prison sentence. Many post-Act cases have confirmed these earlier opinions, insofar as they preclude the use of arrests or charges to enhance prison terms. These newer decisions are sound. Arrests or charges alone are not sufficiently reliable to serve as a basis for sentence enhancement under the Act.

Unfortunately, several post-Act cases also have perpetuated the notion that mere arrests can serve as a valid basis for denying probation. These cases have been decided erroneously. The pre-Act authorities on which they are based involved statutes under which probation was either not available or, if available, was not the preferred disposition. The Act's elevation of probation to a preferred status vitiates the underpinnings of those authorities. Probation is no longer a matter of judicial grace in Illinois; something more than unsubstantiated allegations of misconduct should be required before probation is withheld.

2. Criminal Activity Resulting in Parole or Probation Revocation.—But what of a more substantially documented history of criminal activity, such as a defendant's prior probation revocation for an alleged rape? Assuming that the defendant is later before the court on yet another charge, would it

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775. See supra notes 55-60 and accompanying text.

776. Rare cases arise in which a defendant acknowledges commission of crimes for which the defendant has not been prosecuted. See, e.g., People v. Makes, 103 Ill. App. 3d 232, 234-35, 241, 431 N.E.2d 20, 22, 26-27 (2d Dist. 1981). It would seem to be proper to take such acknowledged criminal activity into account. For a more detailed treatment of this subject, see infra notes 789-96 and accompanying text.

777. Cf. People v. Devine, 101 Ill. App. 3d 158, 165-66, 427 N.E.2d 1277, 1283 (3d Dist. 1981) (in imposing current sentences for deviate sexual assault and indecent liberties with a child, court may consider not only defendant's prior robbery conviction but also the fact that defendant's probation for that offense was revoked for an alleged rape).
be proper under the Act for the sentencing judge to include the rape in the defendant's history of criminal activity? The better policy would be to allow sentence enhancement on the basis of the alleged rape.\textsuperscript{778}

Before probation could be revoked for the commission of an offense, the state is required to show by a preponderance of the evidence that the defendant has committed an offense.\textsuperscript{779} This proceeding has many of the attributes of a criminal trial, including the defendant's rights to counsel and to call or cross-examine witnesses.\textsuperscript{780} In such circumstances, a finding at the revocation hearing that the defendant committed an offense should become part of the defendant's criminal history for the purposes of sentencing in future cases. The reliability of that finding is the same as that of any fact determined in a civil case. Moreover, allowing a defendant's sentence to be affected by a fact established by a preponderance of the evidence is consistent with the Act, which uses that same standard of proof for all other aggravating factors in noncapital cases.\textsuperscript{781} The defendant, having had a full and fair opportunity to refute the charge at the revocation hearing, should not be deemed unfairly treated if the charge is later used for sentence enhancement.\textsuperscript{782}

3. \textit{Evidence of Other Crimes at Sentencing Hearings}.—Quite a different situation is presented, however, by the prevalent and approved practice of allowing testimony of a defendant's other uncharged crimes to be introduced

\textsuperscript{778} It would be error, however, to view the defendant as "convicted" of rape for purposes of utilizing any of the Act's sentencing provisions based on prior convictions. See supra note 765 and accompanying text.


\textsuperscript{780} See id.

\textsuperscript{781} The presence of factors in aggravation need only be found by a preponderance of the evidence. See, e.g., People v. Perez, 101 Ill. App. 3d 64, 74, 427 N.E.2d 820, 829 (1st Dist. 1981). The factors in aggravation necessary to trigger the death penalty, however, must be found to be present beyond a reasonable doubt. See Ill. Rev. Stat. ch. 38, § 9-1(f) (1983).


The discussion of probation revocation hearings raises the question whether sentencing guidelines developed for initial sentences following conviction should be applied to sentences imposed upon revocation of probation. Comparable guidelines developed for use in Pennsylvania specifically exclude the latter type of sentences from their scope. 204 Pa. Admin. Code § 303-1(f) (Shephard's 1982).

Notwithstanding the Pennsylvania position, however, it seems that sentencing guidelines should apply to sentences imposed upon revocation of probation. It is not entirely clear, however, the exact manner in which the guidelines should apply. Initially, it seems clear that the starting point for determining what sentence to impose should be the guideline sentence for incarceration that was the alternative to probation at the time of the initial sentencing, as "[t]he sentence given [upon revocation of probation] must be imposed on the basis of the crime for which [the] defendant was convicted" rather than on the basis of the crime for which parole is being revoked. People v. Hoga, 109 Ill. App. 3d 258, 264, 440 N.E.2d 411, 415 (5th Dist. 1982); People v. Strickland, 24 Ill. App. 3d 560, 562-63, 321 N.E.2d 309, 311 (4th Dist. 1974).

The question remains, however, whether that original criminal history score should be adjusted upward in any way by virtue of the established violation of probation. Three possible adjustments
at a sentencing hearing. The use of this testimony as evidence of "criminal activity" should usually be disallowed because of fundamental unfairness to the defendant. Courts have condoned sentence enhancement based on testimony of other crimes on the theory that the presence of a witness whom the defendant may cross-examine makes such testimony a sufficiently reliable way to establish the underlying criminal behavior. This view, however, does not give due consideration to all of the interests involved. An accused should not be forced to refute these additional charges on a piecemeal basis. Typically, the allegations of other crimes are entirely collateral to the issues raised in the defendant's trial and, as such, they are difficult if not impossible to rebut in the context of a sentencing hearing. Unlike criminal activity

suggest themselves. The first would be to eliminate any reduction originally made in the defendant's criminal history score based on the defendant's apparent but now discredited amenability to rehabilitation. See infra notes 855-58 and accompanying text. The second would be an upward adjustment (either one or two scoring points under the guidelines) for the violation of probation itself. See infra notes 853-54 and accompanying text. The third would be a further upward adjustment based on the nature of the activity forming the basis of the defendant's probation violation.

Of these three possible adjustments, only the first two seem supported by existing decisions, although arguably the third should be as well. The law appears to be well settled that a sentence imposed after the revocation of probation "may not be supported by testimony of the acts leading to revocation except as those acts reflect on defendant's potential for rehabilitation." People v. Hoga, 109 Ill. App. 3d 258, 264, 440 N.E.2d 411, 415 (5th Dist. 1982). It is difficult to believe, however, that sentencing judges are not in fact directly influenced by the nature of the defendant's subsequent violation in their selection of an appropriate sentence, irrespective of what the law may require; and it is not clear why they shouldn't be so influenced. Surely it is fairer to allow a defendant's sentence to be affected by a finding of "criminal activity" made in a probation revocation hearing on the original charge than it is to permit such matters to be raised in a sentencing hearing as is presently done. See infra notes 783-88 and accompanying text; Appendix to text, § 1d, at 397.

783. See, e.g., People v. La Pointe, 88 Ill. 2d 482, 497, 431 N.E.2d 344, 346-47 (1981) (testimony that defendant had participated in an unrelated burglary and had attempted to have drugs smuggled to him while in jail awaiting trial); People v. Alexander, 118 Ill. App. 3d 33, 37-38, 454 N.E.2d 691, 694 (1st Dist. 1983) (evidence of other armed robbery supposedly committed by defendant); People v. Perez, 101 Ill. App. 3d 64, 67, 427 N.E.2d 820, 824 (1st Dist. 1981) (two women testified that defendant raped them some years prior to the offense at bar).

784. Normally, of course, allegations of other criminal activity would be the subject of separate trials in which the state would be required to establish the defendant's guilt beyond a reasonable doubt. Allowing such matters to be established and used at sentencing for a different offense circumvents both of those safeguards. Moreover, it does so in a setting which is most likely to be prejudicial to the defendant—soon after a determination that the defendant is guilty of another crime. This, of course, heightens the likelihood that the defendant's supposed "other victims" will be believed.

785. See, e.g., People v. Hoga, 109 Ill. App. 3d 258, 264, 440 N.E.2d 411, 415 (5th Dist. 1982) (if such evidence is "relevant to a determination of a proper sentence, if it appears trustworthy and if defendant is afforded an opportunity to cross-examine the witnesses, it is admissible").

786. Occasionally, however, the "other crimes" will be closely related to the crimes for which sentence is then being imposed. See People v. Woods, 122 Ill. App. 3d 176, 179, 460 N.E.2d
established through convictions or revocation hearings, evidence of other crimes presented at the sentencing hearing has never been tested in an adversary setting in which it was the principal focus and in which the defendant had a full and fair opportunity to refute it.\textsuperscript{787} Protecting the rights of defendants at sentencing would seem to require that such an opportunity have been extended before allegations of criminal conduct can rise to the level of criminal activity for sentencing purposes.\textsuperscript{788}

4. Defendants' Admitted Criminal Activity.—The final type of conduct that has been labelled criminal activity without a conviction differs from the other three because its reliability is not at issue. Rather, this conduct—most typically the protracted use of illicit drugs—is openly acknowledged by the defendant who offers it as a mitigating factor.\textsuperscript{789} The question then arises as to whether the use of illegal drugs, which literally falls within the ambit of the statute as a factor in aggravation, should nonetheless not be treated as "criminal activity."

\textsuperscript{787} The fact that the complaining witness is available for cross-examination is frequently of little value to a defendant. The defendant will have no real opportunity to effectively investigate the circumstances of the alleged other offense. The defendant will be severely hampered in uncovering possible defects in the witness' perception or recollection. Also, the defendant will be hindered in exposing possible bias on the part of the witness, not an unrealistic possibility in cases where the witness was a former cellmate or alleged confederate of the defendant. Finally, the defendant will be deprived of any opportunity to present an effective defense being left, at best, with his or her own naked denial of events—a denial unlikely to be persuasive in the context in which it is being made.

\textsuperscript{788} One possible alternative to outright abolition of the informal use of other offenses at sentencing would be to devise a procedure by which the defendant could plea bargain to permit such use in return for a guarantee that the defendant could not be prosecuted for those crimes. Such a procedure is currently followed in a number of states. The Texas procedure provides in pertinent part:

Sec. 12.45 Admission of Unadjudicated Offense (a) A person may, with the consent of the attorney for the state, admit during the sentencing hearing his guilt of one or more unadjudicated offenses and request the court to take each into account in determining sentence for the offense or offenses of which he stands adjudged guilty. . . . (c) If a court lawfully takes into account an admitted offense, prosecution is barred for that offense.

\textsuperscript{789} See, e.g., People v. La Pointe, 88 Ill. 2d 482, 490, 431 N.E.2d 344, 347 (1981) (defendant offered extensive use of illicit drugs in mitigation); People v. Hammock, 68 Ill. App. 3d 34, 40-41, 385 N.E.2d 796, 801-02 (5th Dist. 1979) (history of both alcohol and drug abuse offered in mitigation).
Since the Act’s passage, the courts have been hopelessly inconsistent in treating this issue. At one extreme are cases in which the court viewed the defendant’s confessed drug use as a mitigating circumstance of considerable weight.\textsuperscript{790} At the other extreme is \textit{People v. La Pointe},\textsuperscript{791} in which the supreme court affirmed a finding that the defendant’s acknowledged and extensive drug abuse was sufficient to establish a significant history of prior criminal activity that made any leniency in sentencing inappropriate.\textsuperscript{792} Arrayed between those positions are cases concluding that, while illegal drug use should not be viewed as criminal activity, it also should not necessarily entitle the defendant to any significant mitigation of a sentence for a repulsive crime.\textsuperscript{793}

While illicit drug use falls within the literal definition of criminal activity, the proper approach to its treatment as a factor in aggravation is not entirely clear. Prior to the effective date of the Act, histories of either drug or alcohol abuse were frequently given considerable weight in mitigation of the sentence to be imposed.\textsuperscript{794} There is no evidence that the General Assembly intended to alter this treatment of alcohol and drug dependency in sentencing through its creation of prior criminal activity as an aggravating factor. No case has suggested otherwise.\textsuperscript{795} Perhaps in tacit recognition of that fact, the

\textsuperscript{790} See, e.g., \textit{People v. Smith}, 110 Ill. App. 3d 286, 290, 442 N.E.2d 294, 296-97 (2d Dist. 1982) (defendant received only maximum regular term sentence for felony theft, despite having prior record of convictions for 10 thefts, four burglaries and one attempted murder, because “defendant admits to a long and extensive history of drug abuse.”); \textit{People v. Kosanovich}, 69 Ill. App. 3d 748, 751-52, 387 N.E.2d 1061, 1063-64 (1st Dist. 1979) (vacating indeterminate 10 to 15 year sentence for armed robbery as excessive, where defendant was heroin addict and mentally unstable); \textit{People v. Hammock}, 68 Ill. App. 3d 34, 43, 385 N.E.2d 796, 803 (5th Dist. 1979) (reduced indeterminate sentence of six to 18 years for voluntary manslaughter to three to nine years because trial judge had abused his discretion in treating defendant’s history of drug abuse as a form of criminal activity).

\textsuperscript{791} 88 Ill. 2d 482, 431 N.E.2d 344 (1982).

\textsuperscript{792} Id. at 493, 431 N.E.2d at 349.

\textsuperscript{793} See \textit{People v. Hoyer}, 100 Ill. App. 3d 418, 422-23, 426 N.E.2d 1139, 1141-42 (2d Dist. 1981) (25-year sentence imposed on defendant for armed robbery affirmed, despite claim by defendant that he had been under influence of LSD at time of crime; defendant had killed victim, but was not charged with that crime); \textit{People v. Bartik}, 94 Ill. App. 3d 696, 701-02, 418 N.E.2d 1108, 1112-13 (2d Dist. 1981) (refusing to further reduce defendant’s natural life sentence for brutal murder, despite defendant’s long-time abuse of alcohol and drugs; state had sought death penalty but jury had not found the absence of sufficient mitigating circumstances to preclude its imposition).

\textsuperscript{794} See, e.g., \textit{People v. Walcher}, 42 Ill. 2d 159, 166, 246 N.E.2d 256, 260-61 (1969) (sentence of death for murder reduced to indeterminate term of 40 to 65 years; defendant was alcoholic); \textit{People v. Crews}, 42 Ill. 2d 60, 66, 244 N.E.2d 593, 595-96 (1969) (death sentence for murder reduced to indeterminate term of 20 to 35 years; defendant had no prior record and was abusing amphetamines at time of crime).

\textsuperscript{795} Cases that have mitigated sentences on the basis of drug use or drug addiction have not alluded to the presence of the aggravating factor of prior criminal activity as affecting prior law in any way.
overwhelming majority of post-Act cases have continued this sympathetic-to-neutral treatment of drug abuse.\textsuperscript{796}

Consequently, \textit{La Pointe}'s inclusion of drug use as a form of criminal activity meriting sentence aggravation draws no support from the Act itself. Moreover, \textit{La Pointe}'s approach seems inconsistent with the Act's broader sentencing objectives. Imposing a more severe sentence merely because of the defendant's drug abuse could very well have anomalous consequences, such as punishing a murderer whose crime was induced by drugs more severely than a completely cold-blooded killer. Hopefully the \textit{La Pointe} perspective on this matter will not gain currency.

c. Quantifying the Aggravating Effect

The Act required that a defendant's prior history of delinquency or criminal activity be given weight in favor of a regular term prison sentence rather than probation,\textsuperscript{797} and it permitted such a history to justify imposing a longer regular term sentence.\textsuperscript{798} The Act did not, however, explicitly quantify the effect that any given criminal or delinquent act should have on an offender's sentence. While both the supreme court and the Criminal Sentencing Commission (CSC) are authorized to promulgate guidelines on that subject,\textsuperscript{799} neither has elected to do so.

As might be expected in the absence of such guidelines, no discernible pattern of weighing histories of delinquency or criminal activity has emerged. Indeed, no real attention has been paid to the issue. Instead, with rare exceptions,\textsuperscript{800} appellate courts have viewed any such history as sufficient to justify whatever sentence the trial court imposed.\textsuperscript{801} The Act's preference for

\textsuperscript{796} See cases cited supra notes 790, 793.


\textsuperscript{798} See id. A sufficiently aggravated prior criminal history also may serve as a reason to impose an extended term sentence. See Pub. Act. No. 80-1099, § 3, 1977 Ill. Laws 3264, 3301-02 (codified at ILL. REV. STAT. ch. 38, § 1005-5-3.2(b)(1) (1983)).


\textsuperscript{801} See, e.g., People v. Brooks, 124 Ill. App. 3d 222, 228, 463 N.E.2d 326, 331 (3d Dist. 1984) (24-year sentence for garden variety armed robbery summarily affirmed without discussion of prior record); People v. Baker, 114 Ill. App. 3d 803, 812, 448 N.E.2d 631, 637-38 (2d Dist. 1983) (14-year sentence for burglary affirmed based on defendant's "lengthy history of delinquency and criminal activity" which included one prior burglary conviction); People v. Robinson, 68 Ill. App. 3d 687, 693, 386 N.E.2d 165, 170 (4th Dist. 1980) (10 to 30 year sentence for armed robbery based on otherwise unaggravated retaking of gambling losses to which defendant believed himself entitled affirmed, based on prior convictions for arson and misdemeanor theft).
shorter regular term sentences\textsuperscript{802} and its broader considerations of consistency, fairness, and proportionality\textsuperscript{803} have apparently gone unnoticed.

Some degree of standardization of this aggravating factor is clearly desirable. While it should not be of controlling importance in every case,\textsuperscript{804} a great deal of undue sentencing disparity would probably be eliminated if a weighting system were devised that suggested the proper effect of various criminal histories on the minimal sentence for which the offender is eligible. Guideline "grids" have already been developed in Minnesota and Pennsylvania.\textsuperscript{805} A grid for Illinois is proposed in the Appendix. The principal considerations pertinent to its construction are outlined in the next section.

VI. A PROPOSED SENTENCING GUIDELINE SYSTEM

A. General Characteristics

In structuring a fair, proportional sentencing guideline system, four steps are necessary, each of which in turn generates a myriad of complexities.

\textsuperscript{802} See \textit{supra} notes 63-65 and accompanying text. There are a large number of cases in which defendants with either no prior records or only very minor records have received sentences well above the statutory minimum. Some of these cases can be explained in part as involving exceptionally aggravating versions of the offenses charged. \textit{See} cases discussed \textit{supra} notes 665-69 and accompanying text. Others involve crimes accompanied by exceptionally brutal or heinous behavior. \textit{See} cases discussed \textit{supra} note 497 and accompanying text. Still other cases involve defendants whose first serious conviction implicates them in a large number of crimes. \textit{See}, \textit{e.g.}, People v. Dawson, 116 Ill. App. 3d 672, 675-76, 452 N.E.2d 385, 387 (4th Dist. 1983) (defendant, an adult, headed a juvenile burglary ring, and was convicted of three counts of residential burglary, four counts of burglary, and two counts of felony theft growing out of his first serious brush with the law).

Many cases, however, appear entirely innocuous. \textit{See}, \textit{e.g.}, People v. Cortes, 123 Ill. App. 3d 816, 822, 463 N.E.2d 885, 889 (1st Dist. 1984) (15-year sentences for delivery of heroin affirmed; one prior misdemeanor conviction; defendant sentenced in \textit{absentia}); People v. Brownstein, 105 Ill. App. 3d 459, 466, 434 N.E.2d 505, 510 (1st Dist. 1982) (sentences well above minima for possession of cocaine, codeine, and marijuana affirmed; defendant had no prior record).

\textsuperscript{803} See \textit{Schuwerk}, \textit{supra} note 2, at 686-91. There are many cases in which a defendant's aggravated prior record has resulted in a longer regular term sentence as the Act intended. \textit{See}, \textit{e.g.}, People v. Jenkins, 128 Ill. App. 3d 853, 858, 471 N.E.2d 647, 649-51 (1st Dist. 1984) (concurrent 20-year sentences for rape, deviate sexual assault and a variety of other crimes affirmed where defendant had severely abused victim and also had "numerous arrests and several convictions for violent crimes beginning in 1959"); People v. Alexander, 127 Ill. App. 3d 1007, 1008-09, 1018-19, 470 N.E.2d 1071, 1073-74, 1979-80 (1st Dist. 1984) (concurrent sentences of 30 years for rape and 15 years for indecent liberties with a child affirmed where defendant had repeatedly sexually assaulted 13-year-old stepdaughter; defendant's prior record included multiple convictions for robbery, burglary and theft). Even more aggravated records, however, have resulted in only regular term sentences. \textit{See}, \textit{e.g.}, People v. Akins, 128 Ill. App. 3d 1009, 1016, 471 N.E.2d 1003, 1007-08 (4th Dist. 1984) (25-year sentence for unaggravated armed robbery affirmed where defendant had prior convictions for attempted theft, robbery, aggravated battery and murder); \textit{see} supra notes 364-89, 532-40 and accompanying text.

\textsuperscript{804} For the factors in mitigation and aggravation that would alter the effect of a defendant's prior record, see Appendix to text, § 2, at 397-404, and \textit{infra} notes 850-68 and accompanying text.

\textsuperscript{805} \textit{See} MINN. STAT. ANN. ch. 244 app. (West Supp. 1984); 204 PA. ADMIN. CODE §§ 303.1–303.9 (Shephard's 1982).
First, all existing offenses must be classified according to their severity. Thereafter, numbered values must be assigned to adjudications of delinquency and criminal convictions. The sum of these values would comprise a defendant’s initial criminal history score. Next, adjustments to that initial score due to factors in mitigation or aggravation, or perhaps as an accommodation to plea bargaining, must be made. Finally, presumptive types and lengths of sentences for each combination of crime and adjusted criminal history score must be constructed.

Apart from these issues related to sentence severity, the proposed system also must address the limits to be placed on judicial discretion. Questions to be answered include whether the proposed ranges should be mandatory or presumptive, what conditions should be met before a sentencing judge may depart from the appropriate range, and what checks should be imposed on the appellate review of sentencing decisions. The guidelines proposed here take the position that judicial discretion should be built into the guideline system so that it remains flexible, as long as satisfactory assurances of accountability can be obtained. Even with that additional flexibility, the guidelines’ scores and ranges should provide a sentencing system that is much more consistent and fair than current sentencing practices.

B. Characteristics Relating to Sentence Length

1. Offense Classification

Prior to its adoption of a sentencing guideline system, Pennsylvania had a misdemeanor and felony classification system similar to that of Illinois. In order to create a more satisfactory basis of offense classification for sentencing purposes, Pennsylvania broke down its felony classes into a considerably larger number of categories. A number of offenses that had been treated very similarly for sentencing purposes were classified quite differently under the sentencing guidelines eventually adopted.

Illinois should reclassify its felonies in a similar fashion. When the current misdemeanor and felony classification system was enacted in 1972 as part of the Code, the General Assembly deliberately avoided a systematic examination of the grading and relative severity of offenses. Likewise, the drafters of the Act deliberately side-stepped this task. Since the Act’s
passage, there have been a variety of piecemeal changes in felony classifications but no comprehensive review. To enact a comprehensive guideline system, a careful ranking of criminal offenses must be undertaken.

Although a comprehensive reclassification of all criminal offenses is beyond the scope of this article, it is possible to illustrate some of the problems arising under Illinois' present classification system. First, based on the number of cases in which courts have been troubled by the sentences they are required to impose, certain drug offenses, residential burglary, armed robbery, and armed violence seem to be too severely classified. Aggravated assault, on the other hand, may be classified too leniently because judges seem to impose longer prison sentences more frequently for that

811. See supra notes 116, 117, 500.

812. For cases involving judicial efforts to avoid imposing severe sentences for drug offenses, see People ex rel. Daley v. Schreier, 92 Ill. 2d 271, 275, 442 N.E.2d 185, 187 (1982) (overturning grant of new trial by judge who originally found defendants guilty of class X felony in mistaken belief that he could impose sentence for lesser class 2 felony); People ex rel. Daley v. Limperis, 86 Ill. 2d 459, 466, 427 N.E.2d 1212, 1215 (1981) (criticizing trial court for imposing probation on defendant unjustifiably found guilty of class 2 felony rather than class X felony, but upholding sentence as a form of unappealable error; parties had stipulated to amount of drug involved and that amount made offense a class X felony).


814. See ILL. REV. STAT. ch. 38, §§ 18-2(a), 1005-5-3(c)(2)(c) (1983). In one case, for example, an appellate court reduced an armed robbery conviction to robbery because it was dissatisfied with the imposition of a class X sentence. See People v. Coleman, 78 Ill. App. 3d 989, 992-94, 398 N.E.2d 185, 186-88 (3d Dist. 1979) (appellate court reduced conviction to robbery because of dissatisfaction with imposing class X penalty). It should be noted that there appears to be a widespread reluctance to impose severe penalties even on recidivist armed robbers. See supra note 376 and accompanying text.

815. See ILL. REV. STAT. ch. 38, §§ 33A-1, 33A-2 (1983). The Act's armed violence provisions have been a persistent source of sentencing anomalies, although many of them have been corrected by an activist supreme court. Those provisions convert "any felony" committed while armed with a category I weapon (a firearm or other particularly dangerous weapon) into a class X felony. Pub. Act No. 80-1099, § 3, 1977 Ill. Laws 3264, 3268 (codified at ILL. REV. STAT. ch. 38, § 33A (1983)).

One area in which those provisions were particularly disruptive of efforts to achieve an orderly grading of offenses and proportionate imposition of sentences was homicides. See People v. Fernetti, 117 Ill. App. 3d 44, 452 N.E.2d 790 (3d Dist. 1983) (a charge of armed violence used to supplement involuntary manslaughter), rev'd, 104 Ill. 2d 19, 470 N.E.2d 501 (1984); People v. Pitt, 106 Ill. App. 3d 117, 435 N.E.2d 801 (5th Dist. 1982) (a charge of armed violence used to supplement voluntary manslaughter). This practice gave broad discretion to prosecutors to convert most homicides into at least class X felonies. Fortunately, it appears to have been ended by the supreme court's recent decisions in People v. Alejos, 97 Ill. 2d 502, 506-13, 455 N.E.2d 48, 49-52 (1983), which held that the "any felony" referred to in the armed violence statute did not include voluntary manslaughter, and People v. Fernetti, 104 Ill. 2d 19, 23-24, 470 N.E.2d 501, 502-03 (1984), which reached the same conclusion with respect to involuntary manslaughter. In the meantime, however, a considerable number of prosecutions and convictions had occurred under the pre-Alejos precedent. Apparently, the number of such
offense than for other offenses of the same felony class. Finally, the severity of various offenses involving breaches of public duty or public trust probably should be increased as well.

A more rational ranking of offenses is certainly needed. Nevertheless, even under Illinois' present offense classifications, a consistent weighting of crimes will result in greater fairness and consistency in sentencing. The next section discusses the principal concerns in devising such a system.

2. Scoring Prior Delinquency or Criminal Activity

In fashioning the principles for scoring a defendant's prior delinquency or criminal activity, three important issues must be addressed. First, should adjudication of delinquency be treated as severely as prior criminal convictions? Second, how should prior crimes growing out of the same transaction or occurrence be scored? Finally, how much weight should be given to prior misdemeanor or felony convictions? Each of these questions is discussed below.

cases is no greater only because of instances of jury lenity. See People v. Sims, 124 Ill. App. 3d 739, 742-45, 464 N.E.2d 1252, 1255-56 (1st Dist. 1984) (defendant convicted of voluntary manslaughter but acquitted of armed violence based on voluntary manslaughter).

Yet, the supreme court's decisions in Alejos and Fernetti did not reach the pervasive and capricious use of the armed violence statute to greatly increase the severity of otherwise unexceptional crimes. See, e.g., People v. Lenoir, 125 Ill. App. 3d 260, 266-67, 465 N.E.2d 1027, 1031-32 (4th Dist. 1984) (defendant's drug possession offenses allowed to serve as predicate crimes for armed violence because, when awakened from bed and arrested, there was a gun on the nightstand beside him); People v. Paden, 123 Ill. App. 3d 514, 516-20, 462 N.E.2d 989, 991-94 (2d Dist. 1984) (defendant's conviction for attempted armed robbery allowed to serve as predicate offense for armed violence, over contention that General Assembly's policy of punishing such attempts less severely than the completed crime would be thwarted by such an approach). As to the Paden issue, however, the supreme court has recently acted to cure some such abuses by its decision in People v. Del Percio, 105 Ill. 2d 372, 475 N.E.2d 528 (1985). In Del Percio, the supreme court concluded that once an offense has been enhanced by the presence of a category I weapon, that offense could not also serve as a predicate offense for an armed violence charge. Id. at 377, 475 N.E.2d at 530-31. Thus, cases such as Paden are no longer good law.

In view of these sorts of anomalies, the sentencing guidelines proposed in the appendix to this article abolish the present automatic upgrading of all offenses to class X felonies if committed while armed with a category I weapon. Instead, the use of a category I weapon is a factor in aggravation in sentencing, with the weight given to the factor dependant upon a variety of other circumstances. See Appendix to text, § 2a(1)(a)(2), (3), at 398; § 2a(1)(b)(1), (5), at 399.


817. See, e.g., Ill. Rev. Stat. ch. 38, § 33-1(d), (3) (1983) (receipt and solicitation of bribes by public officials); id. § 33-3 (official misconduct).

818. Such an approach is necessary to accommodate People v. Warwick, 123 Ill. App. 3d 692, 696-98, 463 N.E.2d 206, 209-10 (2d Dist. 1984), which concluded that the Act's regular term factors in aggravation that are most directly applicable to such offenses, may not be used to routinely enhance sentences for those crimes. See supra note 639.
a. Prior Delinquency

Minnesota and Pennsylvania have taken very different positions on weighing an adult offender's prior adjudications of delinquency. Minnesota gives substantially less weight to criminal activity resulting in delinquency adjudications than to comparable activities undertaken by adults. Minnesota's sentencing guidelines score only those delinquency adjudications based on felonies committed after the juvenile attained the age of sixteen.\(^{819}\) Those guidelines also sharply limit the effect that a history of delinquency can have on a defendant's criminal history score by weighing countable adjudications only one-half as heavily as their adult felony counterparts.\(^{820}\) Moreover, Minnesota's system places a maximum weight on a defendant's juvenile record equivalent to that of one adult felony conviction.\(^{821}\) Pennsylvania, on the other hand, has treated delinquency adjudications based on felonies very much like adult felony convictions. Pennsylvania's sentencing guidelines score all felony-based delinquency adjudications made on or after the defendant attained the age of fourteen the same as their adult felony counterparts, without any special ceiling.\(^{822}\)

Both of these systems somewhat miss the mark. The Minnesota approach is designed to avoid magnifying the adverse consequences of youthful indiscretions on adult offenders. Nevertheless, given the range of maturity and commitment to criminality that juveniles can exhibit,\(^{823}\) as well as the breadth of conduct that can be embraced by a finding of delinquency,\(^{824}\) a greater degree of flexibility seems desirable. The Pennsylvania approach, however, seems to go too far in the other direction by treating most delinquents as if they were hardened criminals.

The best approach involves features of both the Minnesota and Pennsylvania guidelines. More specifically, Minnesota's half-weight scoring system should be adopted in combination with the no-maximum feature of the Pennsylvania law. This would allow sufficiently aggravated juvenile records to have a significant impact on adult sentencing decisions, while isolated minor acts of delinquency would not have a great influence. As a further

\(^{819}\) See MINN. STAT. ANN. ch. 244 app., § II. B.4.c (West Supp. 1984).

\(^{820}\) See id. § II. B.4.

\(^{821}\) See id.

\(^{822}\) See 204 PA. ADMIN. CODE § 303.7(b)(ii) (Shepard's 1982).

\(^{823}\) See, e.g., People v. Doris, 110 Ill. App. 3d 660, 667, 442 N.E.2d 951, 957 (4th Dist. 1982) (defendant had four separate adjudications of delinquency for burglary); People v. Smrekar, 68 Ill. App. 3d 379, 383, 385 N.E.2d 848, 850 (4th Dist. 1979) (defendant, while still a juvenile, convicted of cold-blooded double murder and suspected of committing other homicides).

\(^{824}\) Until recently, any act that would constitute criminal offenses if committed by adults could be treated instead as merely an act of delinquency. See ILL. REV. STAT. ch. 37, §§ 702-2, 702-7 (1981). In recent years, this discretion has been restricted somewhat by the General Assembly. See id. ch. 37, § 702-7(6)(a) (West. Supp. 1984-85) (requiring that juveniles over the age of 15 accused of committing murder, aggravated criminal sexual assault or armed robbery with a firearm be tried as an adult).
protection against undue sentence enhancement stemming from crimes committed by very young offenders, only those delinquency adjudication incidents occurring on or after a juvenile attained the age of fifteen would be scored. This age limit splits the difference between the Pennsylvania and Minnesota standards. Fifteen is also the age at which certain offenders are automatically tried as adults under Illinois' Juvenile Court Act. Thus, a cut-off at age fifteen is consistent with the General Assembly's judgment that juveniles attaining that age are properly held to a greater measure of responsibility for their actions.

b. Crimes Arising from a Single Transaction or Occurrence

Differences in the charging or plea bargaining policies of prosecutors in connection with a prior criminal episode could generate substantial disparities in the criminal history scores of offenders whose prior criminal activities were quite similar. Therefore, a sentencing guideline system must resolve the issues of which prior convictions should be merged for scoring purposes and how the merged convictions should be weighed. Minnesota's sentencing guideline system treats as a single felony all prior felony convictions that grew out of a single course of conduct in which only one victim was involved. In cases involving multiple victims a maximum of two prior felonies may be scored. Pennsylvania has addressed this issue by providing that convictions for all offenses "arising out of the same criminal transaction" be scored as a single conviction for the most serious offense involved. The approach advocated for Illinois is to assign such multiple crimes a score for the most serious prior felony conviction resulting from a single transaction or occurrence, or from a single indictment or information, whichever is more beneficial to the defendant. A higher criminal history score could attach, however, if a defendant's prior record included either a conviction for murder or attempted murder, or a sentence for two or more crimes growing out of a single transaction or occurrence, if each prior crime and the current one involved the actual or attempted infliction of death

825. See Appendix to text, § 1b, at 396.
828. See id. § II. B.1.b.
829. See 240 Pa. Admin. Code § 303.7(a) (Shepard's 1982).
830. Giving the defendant the benefit of the bargain is designed to discourage efforts to manipulate a defendant's future criminal history score by the choice of offenses to be placed in a particular indictment or information. It also serves certain administrative purposes.
831. The requirement that the defendant have been sentenced for both crimes is necessary to prohibit a double enhancement for two offenses based on the same act, for example, attempted murder and armed violence based on that attempted murder. Under existing law, a defendant can only be sentenced for one of those crimes. See People v. Donaldson, 91 Ill. 2d 164, 170, 435 N.E.2d 477, 479-80 (1982).
or serious bodily harm by the defendant.\textsuperscript{832} This exception would single out for rapidly escalating punishments those offenders who have shown a marked propensity for life-threatening behavior.\textsuperscript{833}

The merger rule proposed here is somewhat broader than similar rules adopted elsewhere. For sentencing purposes, all of a defendant's criminal conduct on a prior occasion should normally be counted as only one prior conviction because the principal purpose of a criminal history score is to assess recidivistic tendencies.\textsuperscript{834} Committing multiple crimes within a single criminal episode is only marginally relevant to a defendant's possible recidivism.\textsuperscript{835}

The proposed system will also be easy to administer. In most cases, all charges against a particular defendant growing out of the same prior transaction or occurrence will be tried together. Thus, it will be easy under the proposal to determine what weight should be given to the prior convictions.\textsuperscript{836} Moreover, the proposed merger rule will tend to minimize the effects of idiosyncratic prosecutorial charging practices. By scoring all offenses growing out of a single transaction or occurrence as a single offense, any exceptional multiplication of charges or charging instruments by the prosecutor will be discounted at sentencing.

\textsuperscript{832} See Appendix to text, § 1c, at 397. Two or more crimes arising out of the same transaction or occurrence would include two or more distinct crimes involving one victim, see People v. Myers, 85 Ill. 2d 281, 288-89, 426 N.E.2d 535, 537-38 (1981), or involving multiple victims, People v. Bryant, 123 Ill. App. 3d 266, 268, 462 N.E.2d 780, 782 (1st Dist. 1984) (double attempted murder); People v. Smrekar, 68 Ill. App. 3d 379, 383, 385 N.E.2d 848, 850 (4th Dist. 1979) (double murder).

\textsuperscript{833} An illustrative case for this scoring system would be the principal defendant in the brutal armed robbery and sexual assaults in People v. Surges, 101 Ill. App. 3d 962, 428 N.E.2d 1012 (1st Dist. 1981). The defendant, Banks, received a series of concurrent eight-year sentences for his crimes, despite a prior conviction for an unrelated murder. \textit{Id.} at 971-72, 428 N.E.2d at 1019. Under the guidelines proposed herein, that prior murder conviction, normally worth six scoring points (Appendix to text, chart 4) would be doubled to 12 scoring points because of the violent nature of that defendant's present crimes. Even if the defendant's score were not enhanced further, the normal sentence for him would be in the range of approximately 33 to 37 years. See Appendix to text, Chart 4, at 405. If the exceptionally brutal or heinous nature of the present offenses also was considered, as they should be, that score would increase to the range of 15 to 18 points. See Appendix to text, § 2a(2)(c), at 401. Sentences for class X felons having such scores range from 45 to 60 years. See Appendix to text, Chart 4, at 405.

\textsuperscript{834} As already noted, a defendant's criminal history score would be adjustable to permit consideration of a number of factors in aggravation of the offense. See Appendix to text, § 2a(1)-(3), at 397-402. As explained below, a number of other factors in either aggravation or mitigation also would affect that score. See infra notes 850-58 and accompanying text; Appendix to text, § 2a(3), at 401-02; § 2b, c at, 402-04. Plea bargaining practices also could affect the sentence selected. See infra notes 860-66 and accompanying text; Appendix to text, § 2d, at 404.

\textsuperscript{835} Such a propensity for multiple crimes in a single episode is relevant under other factors. See Appendix to text, § 2a(1)(a)(1), (7), at 398; § 2a(2)(a)(3)(e), at 400.

\textsuperscript{836} There is some question whether this procedure will be sufficient to protect a defendant who engaged in a large number of crimes in a relatively short period, but not as part of a single transaction or occurrence. It arguably would be unfair to a defendant to include each such crime in the criminal history score, because all of them reflect the criminal tendencies at
c. Weighing Convictions

Prior felony and misdemeanor convictions can be weighted in several different ways. Minnesota sentencing guidelines, for example, score misdemeanors as either one-quarter or one-half of a point, up to a one-point maximum. All felony convictions, regardless of grade or type, are scored as one point each. Once a defendant's criminal history score reaches six points, including all points earned from juvenile adjudications and misdemeanor or felony convictions, no further increases in guideline sentences occur.

Pennsylvania's sentencing guidelines are more complicated. In essence, misdemeanors are scored at one-half or one whole point to a maximum of two points. Prior felony convictions are scored at one to three points depending upon their severity. An overall criminal history score is then compiled that cannot exceed six points.

Illinois should adopt a system similar to the Pennsylvania model. The limit that both Pennsylvania and Minnesota place on the number of criminal history points scored for prior misdemeanor convictions is clearly desirable and, in all probability, is in keeping with current Illinois sentencing practices as well. Pennsylvania's assignment of different scores for various types of felonies is preferable to the unitary weight system used in Minnesota. While the Minnesota approach has the virtue of simplicity, given the wide range of conduct embraced within the felony designation, that simplicity has been achieved at the expense of a desirable degree of discrimination.

Nevertheless, the Pennsylvania guidelines should be modified in several respects for adoption in Illinois. The first broad area of concern is augmenting a defendant's criminal history score through the accumulation of minor offenses. The Pennsylvania system gives too much weight to prior misdemeanor convictions and sets too high a ceiling on their contribution to a defendant's criminal history score. A history of minor, nonviolent criminal activity—even a fairly extensive one—normally should not be the

roughly the same point in time, and thus overstate his recidivistic tendencies.

While not precluding such considerations in sentencing, these guidelines recommend that such cases be viewed as possible exceptions to the general scoring rule rather than incorporated into the rule itself. As proposed, this guideline already goes beyond existing law by generally scoring multiple prior crimes only once, even if there is a change in the nature of the criminal objective. Any further leniency should be a matter of case-by-case determinations supported by full explanations. See infra notes 884-96 and accompanying text.

838. See id. § II. B.1.
839. See id. § IV (Sentencing Guidelines Grid).
840. See 204 Pa. Admin. Code §§ 303.7(a), 303.7(b)(1)(i) (Shepard's 1982).
841. See id. § 303.7(b)(2).
842. See id. § 303.7(h).
decisive factor in imposing a prison sentence. A better balance has been struck by Minnesota's system, which scores most prior misdemeanor convictions as the equivalent of one-fourth of a prior felony conviction, with higher scores assigned to prior misdemeanor convictions that involve violence or other potentially dangerous conduct. In Illinois, a number of minor nonviolent felonies might also be assigned a scoring ceiling on the same rationale.

The second major area of concern is the modification of Pennsylvania's system of scoring felonies for use in Illinois. Two modifications, both necessitated by a need for a greater degree of discrimination between major and minor felonies, are in order. A wider range of scoring values should be adopted for various felony classes, and the total range of criminal history scores should be increased two to three times. More concretely, subject to the limitations noted below, the following system is proposed:

Chart 3

<table>
<thead>
<tr>
<th>Crime Classification</th>
<th>Misdemeanors</th>
<th>Felonies</th>
</tr>
</thead>
<tbody>
<tr>
<td>Scoring Weight</td>
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<td>or</td>
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</tbody>
</table>

The maximum allowable criminal history score would be twelve for all offenses except for class 1 felonies, which would go as high as fifteen, and class M and X felonies, which would go as high as eighteen. The higher

vacated with directions not to impose sentence in excess of three years, despite the fact that he had an "extensive record" and "a history of constant antisocial conduct"); People v. Odom, 82 Ill. App. 3d 853, 854-56, 403 N.E.2d 297, 298-99 (4th Dist. 1980) (maximum 364-day sentence for criminal damage to property vacated as excessive, despite fact that defendant had 23 prior misdemeanor and traffic convictions, at least nine of which involved physical violence); cf. People v. Smith, 110 Ill. App. 3d 286, 289-90, 442 N.E.2d 294, 296-97 (2d Dist. 1982) (three-year sentence for theft of one bottle of whiskey affirmed where defendant's prior criminal record included 18 prior convictions, including four for burglary, one for robbery and another for attempted murder).

844. The proposed guidelines take this approach. See Appendix to text § la(2), at 396; Chart 4, at 405; § la(2), at 396.


846. Among the nonassaultive minor felonies are otherwise unaggravated thefts of goods or services, other than thefts of weapons, which are punishable as felonies because of prior theft convictions. See Ill. Rev. Stat. ch. 38, §§ 16-1, 16-5, 164-10 (1983).

847. See infra notes 850-58 and accompanying text.

848. See Appendix to text, Chart 4, at 405.
range for those more serious crimes permits even longer sentences for
offenders whose manner of committing the crime and exceptionally aggra-
vated prior records make such sanctions appropriate.  

3. Mitigation And Aggravation

The third step in determining a presumptive sentence is to adjust the
defendant’s criminal history score according to factors presented by the case
at bar. Typically, two broad categories of such considerations will arise. The
first category consists of a variety of individual factors that mitigate or
aggravate the current conviction. The second category consists of systemic
factors, such as whether the case was disposed of by trial or plea.

a. Individualized Factors

Under the proposed guidelines, a defendant’s criminal history score could
be affected by the manner in which the offense was committed and a variety
of factors in the defendant’s background. For example, if the offense for
which the defendant is currently being sentenced involved exceptionally brutal
or heinous behavior indicative of wanton cruelty or actions causing or
threatening serious harm, from one to six points would be added to the
defendant’s score.  

Most other regular term factors in aggravation, however, appear to be less important in determining the type or length of a
defendant’s sentence. Consequently, these lesser aggravating factors are re-
tained under the proposed sentencing guidelines, but they are weighted such
that their presence would add no more than one point to the defendant’s
criminal history score. In addition, Illinois should follow Minnesota in
allowing an increase in the criminal history score if the defendant committed
the current crime while on probation or parole for another offense.

849. Allowing different maximum scores for varying classes of felonies is a unique feature
of the proposed system. It is designed to serve two purposes. First, it allows exceptionally harsh
punishments for those whose prior criminal record or propensity for committing particularly reprehensible or brutal crimes mark them as a clear danger to society. Second, it will prevent
prisons from becoming clogged by less dangerous offenders whose recidivist tendencies otherwise
would subject them to rather lengthy periods of incarceration.

850. See Appendix to text, § 2a(1)(b), at 399; § 2a(2)(c), at 401; § 2c(2), (3), at 403-04.


852. See Appendix to text, § 2a(3)(b), at 401-02. Some factors in aggravation are of lesser
importance because, like general deterrence, they presumably apply to all sentences and,
therefore, do not serve as a useful basis for distinguishing between offenders. Others, like those
involving abuse of trust, office, or position, have been rendered less important by judicial
decisions concluding that these factors may not be applied to the offenses that they were
designed to aggravate. See supra note 639.


854. See Appendix to text, § 2a(3)(a)(1), (2), at 401. For a discussion of the effect that
the nature of a probation violation should have on any new sentence imposed for the probated
offense, see supra note 782; Appendix to text, § 1d, at 397.
By the same token, a defendant's criminal history score should be adjusted downward if sufficient mitigating circumstances exist. The Act's present list of mitigating factors seems comprehensive and generally unobjectionable in principle. The mitigating effect of these factors on a defendant's criminal history score, however, should be sharply limited. In particular, the proposed guidelines provide that no more than two scoring points should be deducted from a defendant's criminal history score, with one point being the normal mitigating deduction.

Although this proposed rule may seem harsh, it would not be so in practice. Under the proposed sentencing guidelines, reducing a criminal history score by one or two points would make most minor offenders eligible for either probation or periodic imprisonment, and would substantially reduce the presumptive prison sentences of the remaining offenders. Greater concessions would be inappropriate, especially for major offenses. For example, if an offender with a lengthy criminal record is convicted of rape, the fact that his role in the rape was relatively minor should not be nearly as important a consideration at sentencing as his demonstrated inability to avoid serious criminal activity.

b. Systemic Factors

The final possible adjustment to a defendant's criminal history score would be due to systemic factors. The principal concern is the impact, if any, that plea bargaining should have on a defendant's presumptive sentence. In that regard, the proposal endorses the position taken in other states that sentencing guidelines should be used to measure the appropriateness of all sentences, not merely those imposed after trial. Without that coverage, the proposed reforms would reach only a small fraction of all sentencing decisions. Moreover, application of the guidelines to bargained-for sentences should serve to rationalize any bargain struck and to control potentially abusive or overreaching tactics in bargained cases. Finally, as a matter of

These guidelines also add one or more points to an offender's score for the commission of an offense while at large on bond while awaiting trial or pending appeal. See Appendix to text, § 2a(3)(a)(3), at 401; cf. Minn. Stat. Ann. ch. 244 app., § II. B.2 (West Supp. 1984).

55. See Appendix to text, § 2c, at 402-04; see also infra notes 860-66 and accompanying text (regarding the availability of sentencing concessions due to plea bargaining).

86. See Ill. Rev. Stat. ch. 38, § 1005-5-3.1(a)(1)-(12) (1983). Minnesota, however, has excluded factors similar to certain of these mitigating factors on the grounds that they embody a class bias in favor of wealthier or middle class defendants. See, e.g., Minn. Stat. Ann. ch. 244 app., § II. D.1.c (West Supp. 1984) (occupation, employment history, or employment status); id. § II. D.1.d (educational attainment, living arrangements, or marital status).

57. See Appendix to text, § 2c(1), at 402.

58. See Appendix to text, Chart 4, at 405.


60. Most offenses are disposed of by plea bargain. See Schuwerk, supra note 2, at 643-45.
principle, sentencing is and should be a judicial act, a sanction imposed by a neutral decision maker rather than an adversary.

This conclusion, however, does not resolve whether a defendant's acceptance of a plea bargain should be allowed to affect the defendant's criminal history score. A strong argument can be made for barring sentencing concessions in plea-bargained cases. Pennsylvania's sentencing guidelines make no provisions for any concessions due to plea bargaining, and Minnesota's sentencing guidelines appear to prohibit any reduction of sentence due to plea bargaining. Nonetheless, the guidelines proposed for Illinois take the position that limited concessions should be allowed in bargained cases.

Largely pragmatic reasons support endorsing sentencing concessions in return for guilty pleas under the proposed sentencing guideline system. It is likely that any efforts to abolish such trade-offs will only force those concessions into a different and more uncontrollable form: clandestine bargains as to charge. Consequently, instead of attempting to eradicate sentencing concessions, their validity should be acknowledged while their impact is controlled by instituting a limitation of a two-point reduction in the criminal history score of a plea bargaining defendant. This two-point limit

likely sentence would be upon conviction. This fact alone would have a strong tendency to push offers into a fairly narrow range. It also would tend to mitigate the in terrorem nature of any threatened enhanced penalties should the defendant elect to stand trial.

It should be stressed that this proposal does not promise or guarantee such a concession in return for a plea of guilty. Rather, it sets an outer limit on the concessions that can be obtained in return for a plea of guilty, absent extraordinary circumstances. This distinction is important because any system that offered a defendant a fixed discount from the sentence in return for a guilty plea would in all likelihood be unconstitutional. See Corbitt v. New Jersey, 439 U.S. 212 (1978). In Corbitt, a narrow majority of the Supreme Court upheld a mandatory natural life sentence for defendants convicted of murder in the first degree who had pleaded not guilty, despite the fact that defendants who plead nolo contendere to a charge of first degree murder could, at the discretion of the trial judge, receive a lesser sentence than natural life. Id. at 226. The majority was careful to distinguish this scheme from one offering a fixed discount to defendants who pled guilty, strongly suggesting that a system providing for a fixed discount could fail to pass constitutional muster. Id. at 224 n.14. Four justices writing separately also indicated that a fixed discount scheme would be unconstitutional. Id. at 226-28 (Stewart, J., concurring); id. at 232-33 (Stevens, J., dissenting).

See 204 PA. ADMIN. CODE § 303.1(a) (Shepard's 1982) (making guidelines applicable "in determining the appropriate sentence for felonies and misdemeanors," but not mentioning plea bargains as such).

864. See MINN. STAT. ANN. ch. 244 app., § II. D.1.e (West Supp. 1984) (sentences are not to vary due to the defendant's "exercise of constitutional rights . . . during the adjudication process").

865. See Schuwerk, supra note 2, at 645-51.

866. This author's earlier article also proposed a number of reforms that were designed to keep bargained-for sentences tolerably close to those that would have been imposed after a full trial. See Schuwerk, supra note 2, at 661-68. When those limitations are translated into the proposed sentencing grid system, they correspond rather closely to a maximum plea bargaining concession of two criminal history scoring points. See id. at 664-65; Appendix to text, Chart 4, at 405.
would be enforced by treating as an out-of-guideline sentence any bargained-for sentence that is less severe than the presumptive sentencing range available for an offender with an adjusted criminal history score two points lower than that of the defendant.\textsuperscript{667}

Creation of presumptive sentencing ranges based on a defendant's current offense and adjusted criminal history score does not denigrate other important factors in sentencing. Rather, this approach is designed to start all sentencing decisions involving roughly comparable offenders in approximately the same place.\textsuperscript{668} Thereafter, the factual variants and systemic considerations presented by each case would be permitted to affect that initial score to varying degrees. Consequently, this approach leaves considerable flexibility to adjust a defendant's sentence to the equities and exigencies presented by the particular case.

4. Establishing Sentencing Guideline Ranges

The fourth major task in establishing a sentence guideline system is determining the presumptive type and length of sentences for each combi-

\textsuperscript{667} See \textit{infra} notes 884-96 and accompanying text.

\textsuperscript{668} There are at least three special problems involving the use of criminal history scores as a method to identify supposedly comparable offenders. The first involves a defendant who already has had a prior crime utilized to increase the grade of the current offense. For instance, Pennsylvania has taken the position that the offense should not be counted in a defendant's criminal history score. See 204 PA. ADMIN. CODE § 303.7(f) (Shepard's 1982). Given Illinois' traditional opposition to such double enhancement, that policy probably should be followed here as well. See, e.g., People v. Haron, 85 Ill. 2d 261, 278, 422 N.E.2d 627, 634 (1981) (presence of weapon cannot be used to enhance misdemeanor to felony and then again to enhance that felony to armed violence).

Second, cases will arise in which a defendant's first substantial brush with the law reveals that he or she has been involved in extensive criminal activity. See, e.g., People v. Dawson, 116 Ill. App. 3d 672, 675-76, 452 N.E.2d 385, 387 (4th Dist. 1983) (first serious conviction included three counts of residential burglary, three counts of burglary, and two counts of felony theft); People v. Einstein, 106 Ill. App. 3d 526, 535, 435 N.E.2d 1257, 1264 (1st Dist. 1982) (first serious conviction involved 147 counts of forgery and theft committed over extended period of time). The guidelines address that issue by permitting such conduct to be treated as forms of serious harm. See Appendix to text, § 2c(2), (3), at 403-04. In addition, many cases could be disposed of by plea bargains in which the defendants agreed to let some offenses be taken into account in sentencing them for the crimes to which they were pleading guilty. See \textit{supra} note 788. The remainder, however, probably should be disposed of by out-of-guideline sentences. See \textit{infra} notes 884-96 and accompanying text.

Finally, the issue of whether sentencing guidelines should go beyond the existence of prior offenses and take the circumstances of their commission into consideration as well must be considered. The supreme court has approved this practice. See People v. Owens, 102 Ill. 2d 88, 111-12, 464 N.E.2d 261, 271-72 (1984). Nonetheless, it is recommended that such a practice not be followed. First, factors in mitigation or aggravation of the earlier offense presumably were taken into account in punishing the defendant for the prior crime. If such factors are again present, they should affect the sentence for the current offense, and the circumstances surrounding the prior crime should not be considered. Additionally, such inquiries would immensely complicate administration of the sentencing guideline system by injecting a host of collateral issues into the sentencing decision. Finally, such inquiries into the circumstances of prior crimes are of only marginal relevance to a score which is primarily a measure of recidivism.
nation of offense and criminal history score. These determinations are, of course, highly value-laden and subjective. Debates over who merits incarceration and for how long are both heated and intractable and are likely to remain so. Whatever philosophical perspective one brings to those issues, however, also would profit from greater attention to pragmatic considerations. As Illinois has recently rediscovered, the resources of its correctional system are both finite and taxed to the breaking point. If the state is to give the public adequate protection from criminals in such an environment, it simply must do a better job of selecting who goes to prison and for how long.

Restraint and consistency are the two most important features of a sentencing system capable of achieving those results. Restraint in choosing both who is incarcerated and for how long, even in particularly aggravated cases, is necessary if the system is to function at all. Consistency is needed to provide fairness to defendants and to assure a full measure of protection for the public.

The proposed guideline system would make a significant change in current sentencing practices. Present sentencing practices subject a few of the more aggravated offenders—and a few not-so-aggravated ones—to exceptionally severe penalties, while many equally culpable offenders escape with minor sanctions. Under the proposal, however, while maximum penalties for most offenders would be somewhat below those currently available, the presence of aggravating factors would result in increased sentences far more routinely than at present. The basic premise underlying the new approach is that both specific and general deterrence will be increased by a sentencing scheme that consistently, albeit modestly, penalizes the conduct sought most to be deterred—recidivism, brutality, and crimes involving the most serious harm to the public.

The sentencing grid set out in the Appendix is proposed with the goals of fairness, public protection, and deterrence in mind. The grid is based on existing felony classes, although additional modifications will be needed to redress certain anomalies arising under the present offense classification scheme. In addition to a presumptive sentence length, the grid gives the presumptive type of disposition and any alternative dispositions available for each combination of felony class and adjusted criminal history score. When no alternative is given, the presumptive sentence is imprisonment.

This sentencing guideline schedule, like any other, will undoubtedly generate endless debates about whether it is too lenient or too severe. No useful purpose would be served in pursuing those value-laden issues at any length

869. See Schuwerk, supra note 2, at 720-22.
870. See supra notes 806-66 and accompanying text; Appendix to text, Part I, at 396-404; Chart 4, at 405.
871. See supra notes 806-18 and accompanying text.
872. See Appendix to text, Chart 4, at 405.
The pragmatic consequences of the proposed guideline system, however, should be examined carefully. Before this (or any other) guideline system is implemented, mathematical projections to determine its probable effects should be undertaken. Such a study should compare the actual sanctions imposed on a statistically significant cross-section of inmates receiving both incarcerative and nonincarcerative sentences with their theoretical sentences under the proposed guidelines, so that their likely impact on the Illinois Department of Corrections (DOC) can be determined.874

While that impact should not be treated as a matter of overriding importance, it certainly should be a very significant consideration, especially at the present time. For example, a relatively minor adjustment in guideline sentences for certain types of offenses could result in a significant reduction in the total man-years of sentences to be served in Illinois prisons without any appreciable sacrifice in sentencing fairness or public protection.875 Such an adjustment should certainly be made, but a mathematical model of the proposed system is needed to illustrate any such possible improvements.

Finally, any guidelines adopted should be used to effectuate an orderly reduction in the population of Illinois prisons. This goal, although not an essential component of a sentencing guideline system, would be accomplished by giving a limited number of inmates the opportunity to apply for release dates or executive clemency if their sentences are more severe than sentences they would have received under the proposed guidelines. In essence, if such an inmate were able to show that, with all disputed factors in aggravation or mitigation resolved against him,876 he received (or stood to serve) a more severe sentence than that authorized under the guidelines, he would receive

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873. For a somewhat dated compendium of the literature in this field, see Schuwerk, supra note 2, at 636 & nn. 25-26.

874. The DOC has a fairly sophisticated data base for its own inmates which could provide a useful starting point for this research. Data on probationers, however, probably would have to be generated through hand searches of court files.

875. For example, a substantial portion of the DOC's inmate population consists of armed robbers. See Table 3 in 1982 Statistical Presentation, supra note 290 (1218 inmates with determinate sentences for armed robbery admitted in 1980, with 1130 more in 1981 and 1028 more in 1982). Moreover, in each of the five years from 1978 to 1982, about a third of all armed robbers received the minimum sentence allowed by law. See Table 13 in 1982 Statistical Presentation, supra note 290. In fact, there appears to be a widespread reluctance to punish even repeat offenders as harshly as the law allows, absent some additional aggravating conduct on the offender's part. See supra text accompanying note 376. Were this general perception given effect by converting armed robbery from a class X felony to a nonprobationable class I felony, it would reduce the minimum term for such offenders by two years and their minimum time served by one year. See Appendix to text, Chart 4, at 405. Those reductions could have a significant impact on the DOC's overall population. On the other hand, repeat offenders or those committing aggravated versions of such crimes consistently would receive longer sentences. See Appendix to text, Chart 4, at 405.

876. Presumably, however, disputes concerning the existence of factors in aggravation and mitigation would be resolved in accordance with the definitions given those factors in the
a release date or would have his petition for executive clemency favorably reported to the Governor.\textsuperscript{877}

Under the Act, a comparable procedure for inmates serving indeterminate sentences with a minimum term of twenty years or less has already been implemented.\textsuperscript{878} Consequently, this proposal would be limited to those inmates serving indeterminate sentences who were excluded from the Act's release date program. Likewise, in the interest of efficiency, the only inmates serving determinate sentences who would be eligible for consideration under this proposal would be those whose sentences were at least six years and twice the minimum term that was available.\textsuperscript{879}

Thus, the inmates eligible for this program would include those who, by virtue of the sentences they received, have been singled out as among the more hardened and despicable offenders. Despite that fact, there are three reasons why such inmates deserve the consideration this recommendation offers them. First, the fact that these inmates received harsh sentences does not mean those sentences were appropriate. If a severe sentence were undeserved, there is no reason for compounding that injustice by denying even the possibility of relief. On the other hand, because a presumptive guideline sentence would be lengthened by aggravating circumstances, inmates who deserved their harsh sentences would obtain little, if any, relief.

Second, a release date or recommendation for clemency based on the proposed guidelines would be far more defensible and accurate than one based on the Act's earlier release date program.\textsuperscript{880} The proposed guidelines

sentencing guidelines. For example, if an offender has been found to have engaged in exceptionally brutal or heinous behavior by the sentencing judge but it was clear that the defendant's behavior would not have been found to be of that character under the proposed guidelines, the defendant would be entitled to a release date or clemency recommendation based on behavior being a form of serious harm. If the trial judge's characterization of the defendant's behavior was not clearly erroneous, however, the judge's determination would be utilized. Similarly, no conduct properly classified as a form of exceptionally brutal or heinous behavior under the guidelines would be treated as a form of serious harm merely because the discretionary bases for doing so were shown to be present. See Appendix to text, § 2c(3), at 403-04.

\textsuperscript{877} Inmates serving determinate sentences can not lawfully be released prior to the expiration of their full sentences less good conduct credits absent executive clemency. See Lane v. Sklodowski, 97 Ill. 2d 311, 317-20, 454 N.E.2d 322, 324-26 (1983) (invalidating administrative early release program that awarded additional good-time to inmates above that allowed by the Act).

\textsuperscript{878} See ILL. REV. STAT. ch. 38, §§ 1003-3-2(a)(5), 1003-3-2.1 (1983).

\textsuperscript{879} Inmates serving relatively unenhanced determinate sentences are excluded for two reasons. First many would be released without regard to the program in a relatively short period of time. Thus examination of their cases would be largely futile. Second, a substantial portion of such sentences probably would be justified under the guidelines.

Inmates sentenced to death also would be excluded under this proposal. Such inmates can be expected to file clemency petitions as a matter of course as the date for execution draws near, and that occasion is the most appropriate time to evaluate their situations.

\textsuperscript{880} Release dates set under current law are based in large part on present sentencing practices and are subject to the same vagueness and uncertainties. See ILL. REV. STAT. ch. 38, § 1003-3-2.1
present largely objective criteria for determining if a release date or clemency recommendation would be proper, and subjective criteria would be resolved against the defendant. Thus, only the most obvious and egregious disparities would result in a release date or clemency recommendation.

Finally, reviewing the sentences of those inmates who were sentenced most harshly makes a great deal of sense from the standpoint of the DOC. The early release of those offenders frees up the resources that the DOC would otherwise spend on their care and custody, with the greatest potential benefit to the DOC occurring in the class of cases targeted by this proposal—inmates whose sentences could be reduced by the greatest amount. Moreover, inmates subject to lengthy sentences that cannot be reduced significantly through good behavior are a notorious source of disciplinary problems in prisons. By giving a sense of hope to this segment of the prison population, such an early release program could greatly aid the DOC in its efforts to manage and control inmate behavior.

(1983) (basing release date on current sentencing practices, current statutory factors in mitigation and aggravation, and the intent of the court in imposing sentence, among other things).

881. See supra notes 819-58 and accompanying text; Appendix to text, Part I, at 396-404; Chart 4, at 405.

882. Sentences of natural life are not subject to good conduct credits at all. See Ill. Rev. of release so far into the future that the immediate incentive to conform one's conduct to prison rules is substantially reduced. For example, in the early stages of a 40-year sentence, it is relatively immaterial whether release comes in 20 years, 20 years and 60 days, or 21 years.

883. Although it is not currently fashionable to do so, some effort should be made to consider the effects of long sentences on those serving them. In that regard, the following observation by an inmate of the violence-plagued Texas DOC is instructive:

The full impact of these aggravated sentences cannot be gauged by anyone who has not witnessed their effects firsthand. Consider, for example, that a man with an aggravated life sentence must serve 20 years before parole eligibility. And while this amount of time is considered "light" by some, in view of the seriousness of the possible offense—most likely armed robbery, murder, or rape—those serving the sentences don't consider them light.

But it is not the "rightness" of aggravated sentences that is the point, it is the hopelessness. To get a better grasp of the time involved, recall where you were and what you were doing on the day that John Kennedy was assassinated; then imagine that you had spent each ensuing day in prison—never caressing a loved one, never spending a moment in privacy, and perhaps worst of all, never hoping for a minute that an earlier freedom might be gained through a change in your attitude and/or behavior. Thousands of inmates are faced with this dismal view of their futures. They wake up each morning with the sure knowledge that they will be wading through the same mudhole twenty years from today. They will hear the same shrill work whistle, eat the same tasteless meals, and be treated in the same way they are today, no matter how much they themselves change.

The Texas Observer, Sept. 14, 1984, at 12-13. These comments are not offered as an argument against ever sentencing anyone to such lengthy periods of incarceration, but they are a potent argument for imposing such penalties sparingly and with a full realization of their consequences.
C. Judicial Discretion

The final issue that must be addressed in fashioning a sentencing guideline system is whether the guideline sentence should be mandatory or merely advisory. Both Minnesota and Pennsylvania follow the same approach: the guideline sentence merely sets forth a presumptive disposition from which the judge may depart.\(^{884}\) However, the sentencing laws of both states caution that departures should be relatively rare occurrences.\(^{885}\) Moreover, judges departing from the guideline sentences must give written explanations for doing so that are consistent with the principles embodied in the state’s sentencing guidelines.\(^{886}\) Finally, all sentences are reviewable on appeal by either the defendant or the state.\(^{887}\)

Normally, it would be clear that Illinois should follow this approach as well. A sentencing guideline system can be designed to deal with the great majority of cases, but it cannot anticipate every contingency. Consequently, a system that is sufficiently open-ended to respond to a unique case in a unique way is preferable to a closed system in which guideline sentences are mandatory.\(^{888}\) A serious problem exists, however, that could make the adoption of an open-ended approach in Illinois imprudent. In return for judicial flexibility, the Minnesota and Pennsylvania legislatures have required an explanation for the judge’s departure from the guideline ranges and a thorough review of the sentence on appeal. This quid pro quo has been put beyond the legislative pale in Illinois, however, by the supreme court’s decisions in \textit{People v. Davis}\(^{889}\) and \textit{People v. Cox}.

Without any assurance that sentences deviating from legislative guidelines would be accompanied by appropriate review on appeal, Illinois might well follow the approach of other states.
explanations and subject to careful review on appeal, the General Assembly should seriously consider making its guideline sentences mandatory. Because of the important and highly sensitive nature of this issue, if at all possible, the supreme court and the legislature should work together informally to fashion some mutually acceptable approach. Because of Davis and Cox, such an accommodation would require the supreme court to develop new approaches to providing reasons for sentences and to reviewing those sentences on appeal. In deciding whether such an effort on its part is desirable, the court should consider not only the likely improvements a guideline system would work in bargaining for and imposing sentences, but also the interests of the judiciary that such an effort would further.

In that respect, a guideline system requiring adequate explanations for and review of nonconforming sentences would have several advantages for the judiciary. The present statement of reasons requirement would be unnecessary if the sentence imposed were within the guideline range. Thus, a statement of reasons would not be needed in the vast majority of cases. All that would be required in the normal case would be a statement of the offender's criminal history score, whether there was any dispute regarding that score and, if so, how the court resolved it, and the nature of any scoring concessions made as a result of plea bargaining.

Another probable result of adopting a sentencing guideline system would be to reduce and simplify appeals from sentencing determinations. Defendant-initiated appeals would be reduced because more sharply defined sentencing criteria and narrower sentencing ranges would increase the number of sentences that are reasonable both in fact and in appearance. Moreover, the clarity and objectivity of the sentencing guidelines would make abuses of discretion easier to discern, thus highlighting unduly lenient or excessively severe sentences. For all of these reasons, if a guideline system is instituted, the supreme court should promulgate a rule requiring explanations of departures from guideline sentences and amend its rule governing appellate review of sentences.

Determining exactly what constitutes an adequate explanation—as opposed to merely requiring that there be one—is probably a purely judicial function. The aim of the guidelines should not be to compel judges to utter particular magic words. As long as a reviewing court can determine why a judge imposed a particular sentence, and that the reasons for doing so are consistent with the guidelines, the explanation should be deemed sufficient.

Once again, deciding how careful a review is careful enough is primarily a judicial task. In this area, however, the General Assembly's substantive sentencing requirements necessarily intrude on judicial prerogatives. As the legislature requires more of sentencing judges in terms of fairness, consistency, and proportionality in sentencing, the zone of freedom left to the sentencing judge to exercise personal predilections necessarily decreases. In other words, sentencing becomes more a matter of law and less a matter of discretion. Consequently, no matter what standard of review is employed on appeal—whether it is the present abuse-of-discretion test or something else—reversal of sentences on appeal will necessarily be easier under a guideline system than under present law. See Schuwerk, supra note 2, at 686-91.

Compliance with the guidelines would be self-justifying.

Not even these items would be necessary where the court was imposing a sentence that had been agreed upon by the parties. See Appendix to text, § 1a(1), at 396.

For suggestions in this regard, see Appendix to text, Part II § 1, at 404, 406.

Present Illinois Supreme Court Rule 615 needs to be modified to give the state a qualified
The sentencing reform efforts culminating in the Act were well-intentioned and promised to promote a fairer and more rational system of imposing sentences. But while those measures have achieved some limited success, they have fallen far short of their goal. This is due in part to successful efforts to undermine or invalidate the Act's structural controls on bargaining for, imposing, and serving sentences.897 Judicial failures to perceive the Act's substantive limitations on judicial sentencing discretion are also partly responsible for this limited success. But certain unclear or irrational features of the Act itself have made the implementation of a rational and consistent sentencing system virtually impossible. These statutory problems are perhaps the most significant causes of shortcomings in the sentencing process in Illinois.

Many of the reform proposals put forward in this article and its predecessor could be accomplished without any change in existing statutory law through the adoption of sentencing guidelines promulgated by either the Illinois Supreme Court898 or by the CSC.899 Such initiatives certainly should be encouraged. There are several reasons, however, why legislative action would be preferable. First, neither the court nor the CSC has shown any enthusiasm for such a task. In fact, it seems clear that the supreme court sees its institutional interests, as well as those of the judiciary as a whole, better served by the present system.900 Thus, the General Assembly's deferral to other bodies almost certainly would not result in a solution to the pressing problems documented above.

Second, a number of the key reforms discussed elsewhere—such as the alteration of sentencing ranges and the abolition of certain penalties901—cannot be accomplished without legislative action. Third, the matters requiring the General Assembly's attention span the entire pattern of sentence imposition. All aspects of the use of both incarcerative and non-incarcerative dispositions are in need of fundamental reform.

The final reason for encouraging action by the General Assembly in this area is not directly concerned with the advantages of a legislative rather than a judicial solution. Rather, it is the need to stem the steady, and constitutionally inappropriate, erosion of legitimate legislative authority in sentencing matters as a result of an overly expansive interpretation of the proper scope

right to appeal sentences. For a proposed change in rule 615, see Appendix to text, Part II § 2, at 406-07.
900. See Schuwerk, supra note 2, at 701-02 & n. 427, 713-14 & n. 504-06.
901. See id. at 735-37; supra notes 806-72 and accompanying text; Appendix to text, Part I, at 396-404; Chart 4, at 405.
of judicial powers in that sphere.\textsuperscript{902} The author finds many of the General Assembly's sentencing initiatives deeply troubling.\textsuperscript{903} Nonetheless, it is the General Assembly rather than the judiciary that has the right to establish substantive sentencing policies. Under the current judicial regime, however, that right could well be lost if it is not vigorously asserted.\textsuperscript{904}

There appears to be an urgent need for the promulgation and implementation of a comprehensive sentencing guideline system like the one advocated in this article. Such a system would be new to Illinois, but it would not be new to the nation. Minnesota and Pennsylvania have had favorable experiences with similar systems for some time.\textsuperscript{905} Other states are considering adopting such a system,\textsuperscript{906} and Congress has just committed the United States to doing so.\textsuperscript{907} Illinois should draw on this wealth of experience and implement comparable improvements in its criminal sentencing system.

\textsuperscript{902} See Schuwerk, \textit{supra} note 2, at 681-85, 691-94.
\textsuperscript{903} See \textit{supra} notes 77-119, 130-63 and accompanying text.
\textsuperscript{904} In fact, given the supreme court's view of the proper judicial sphere in sentencing matters, it is at least possible that it would strike down undesired sentencing guidelines implemented by any body other than the General Assembly as an improper delegation of legislative authority and hence violative of the separation of powers.
\textsuperscript{905} Extensive research has been conducted on various sentencing reform activities, including the Minnesota and Pennsylvania guideline procedures, which has been compiled in a two-volume work entitled \textit{Research on Sentencing: The Search for Reform} (1983). An analysis of the Minnesota experience has shown that the shift in sentencing policies intended by the Minnesota guidelines has been carried into effect. \textit{I Research on Sentencing: The Search for Reform} 214-17 (1983). There appears to little complaint that the guidelines are either unfair or unduly confining.
\textsuperscript{906} Washington is in the process of implementing a guideline sentencing system and various jurisdictions in a number of other states are experimenting with such an approach. \textit{Id.} at 135-39.
APPENDIX

I. PRINCIPAL FEATURES OF PROPOSED SENTENCING GUIDELINES

§ 1. CRIMINAL HISTORY SCORE

All sentences imposed in criminal cases must take the history of prior delinquency or criminal activity of the defendant being sentenced into consideration. That is to be done by calculating a criminal history score for that defendant in the manner provided in this section.

a. All convictions of felonies or misdemeanors shall be included. Except as provided elsewhere in this section, the prior convictions of a defendant currently being sentenced will be scored as set out below.

<table>
<thead>
<tr>
<th>Crime Classification</th>
<th>Scoring Weight</th>
</tr>
</thead>
<tbody>
<tr>
<td>Misdemeanors</td>
<td>C 1/4, B 1/4, A 1/2, 4, 3, 2, 1, X 1, M 6</td>
</tr>
<tr>
<td>Felonies</td>
<td>or 1/2, or</td>
</tr>
</tbody>
</table>

Notwithstanding the foregoing:

(1) No prior crime that has been used to increase the class of offense for which the offender currently has been convicted shall be counted in calculating that offender’s criminal history score; and

(2) A defendant’s criminal history score shall not be increased by more than two points because of misdemeanor convictions.

b. Only prior adjudications of delinquency involving acts committed on or after the offender’s fifteenth birthday shall be included. Any such acts shall be scored at one-half the weight that would be given to a prior conviction under section 1a above if the defendant had been an adult, except that multiple adjudications of delinquency arising out of the same transaction or occurrence shall be aggregated and scored as provided for below in section 1c of these guidelines.

908. Any crime that has been reclassified since the time it was committed should be scored as it is currently classified. For simplicity, fractions of a point appearing in a defendant’s final criminal history score should be disregarded. Thus, for example, scores of 2-1/4 or 2-3/4 points each would become two points.
c. Prior multiple convictions for offenses that arose out of the same transaction or occurrence or were prosecuted in a single indictment or information shall be scored as a single conviction of the most serious offense of which the defendant was convicted, unless at least one of the defendant's present offenses involves the actual or attempted infliction of death or serious bodily injury by the defendant and either:

(1) The defendant has been previously convicted of murder or attempted murder, in which case the defendant's most serious such prior conviction shall be given a double weight for scoring purposes; or

(2) The defendant has been sentenced for two or more crimes within the scope of this subsection c, each of which involved the defendant's actual or attempted infliction of serious bodily injury, in which case the defendant's prior criminal episode shall be scored as two convictions equal to the two most serious offenses of which the defendant was convicted;

A defendant may be subjected to the provisions of either subsection c(1) or c(2) above, but not both.

d. In addition to the foregoing convictions and adjudications, a defendant's criminal history score may be increased by the amounts provided for in Chart 3 for any offenses that the defendant was found in probation revocation proceedings to have committed.

§ 2. Adjustments to Criminal History Score

After calculating a defendant's criminal history score as provided for in section 1 of these guidelines, that score is to be adjusted as provided for in this section.

a. Factors in Aggravation

(1) Serious Harm

(a) The following types of behavior constitute serious harm within the meaning of this section, but only if (A) the behavior is not an element or ordinary feature of the offense for which the defendant currently is being sentenced; (B) the behavior was committed personally by the defendant, or at the direction of, or with the active assistance of the defendant; and (C)
the behavior is not appropriately treated as a form of exceptionally brutal or heinous behavior indicative of wanton cruelty within the purview of section 2a(2) of these guidelines: 913
(1) committing an offense that threatened the physical safety of a number of persons other than the actual or intended victim(s);
(2) committing an offense while possessing a category I weapon; 914
(3) committing an offense involving the discharge of a firearm or the utilization or attempted utilization of any other category I weapon so as to physically injure anyone; 915
(4) causing serious bodily injury or death;
(5) causing psychological harm to anyone; 916
(6) committing any forcible felony in which the victim is less that twelve years old, more than sixty years old, or physically handicapped at the time of the offense 917
(7) committing multiple acts of aggravated criminal sexual assault, criminal sexual assault, or aggravated assault; 918
(8) committing any offense not involving the actual or threatened use of physical force in an aggravated manner; 919 or

913. Aggravated versions of some behavior covered by this section are included as species of exceptionally brutal or heinous behavior as well, and normally are to be given the weights called for as exceptionally brutal or heinous behavior by § 2a(2)(b) of these guidelines. See Appendix to text, § 2c(3), at 403-04.
914. See ILL. REV. STAT. ch. 38, § 33A-1(b) (1983).
915. This aggravating factor and that in subparagraph (2) would replace the armed violence statute, id. § 33B, by providing for the enhancement of a defendant’s criminal history score when a category I weapon was possessed or employed in the course of a felony. The present automatic upgrading of all offenses committed while armed with a category I weapon to a class X felony would be abolished. In addition, if a defendant caused or attempted to cause serious bodily injury or death with such a weapon, such conduct would result in additional increase in the criminal history score under either subparagraph (4) or under various provisions of § 2a(2) of these guidelines relating to exceptionally brutal or heinous behavior.
916. Psychological harm may be treated as a form of exceptionally brutal or heinous behavior under § 2a(2)(a)(2) if “gratuitous and severe psychological harm or abuse” is found in conjunction with certain offenses.
917. Age or physical handicap of the victim is a basis for imposing extended term sentences under existing law. See ILL. REV. STAT. ch. 38, § 1005-5-3.2(b)(3) (1983). It was considered but rejected as a basis for a finding of exceptionally brutal or heinous behavior. Under the proposed guidelines, however, age or physical condition of the victim is an appropriate factor for routinely aggravating offenses to a more limited extent.
918. This guideline endorses the view that repeated assaultive acts should be treated as an aggravating factor irrespective of the physical or psychological harm caused.
919. This factor would permit enhancement of sentences imposed on such persons as major drug traffickers, persons who steal exceptionally large amounts of money, or persons who abuse a particularly vulnerable class of victims.
(9) committing an unusually large number of offenses, even if none of the offenses is aggravated in and of itself. 920

(b) If the sentencing court finds that a defendant committed an offense in a manner that caused or threatened serious harm, it shall increase the defendant's criminal history score by from one to three points, depending upon the variety and degree of such behavior that occurred. In addition, the weights to be given the various forms of serious harm in subsection (a) above are subject to the following limitations:

(1) Factor (2) shall not be given a weight of more than one point, and may be disregarded if no other factor in aggravation is present, and it appears to be in the interests of justice to do so. 921

(2) Factor (5) shall not be given a weight of more than one point unless factors (3), (4), (6), or (7) were present. 922

(3) Factor (6) shall not be given a weight of more than one point unless factors (3), (4), (5), or (7) were present. 923

(4) No combination of factors not involving either factor (3), (4) or (7) shall be given a weight of three points. 924

(2) Brutal or Heinous Behavior.

(a) The following types of behavior constitute exceptionally brutal or heinous behavior indicative of wanton cruelty within the meaning of this section, 925 but only if (A) the behavior is not an element or ordinary feature of the offense for which

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920. This factor would permit enhancement of offenders whose first conviction of a serious offense discloses that they had been involved in extensive criminal activity.

921. Although possessing a category I weapon increases the likelihood of violence, in many cases it seems to be a factor which the court should be free to disregard. This guideline grants the court that discretion when it appears to be in the interests of justice to do so.

922. The weight limitation placed on causing psychological harm is designed to protect against a substantial enhancement of the sentence based upon an extreme and unforeseeable reaction of a particular victim to the defendant's criminal conduct. The limitation would be unavailable if the defendant took other actions which clearly should have been foreseen as likely to heighten the trauma of the victim.

923. The weight limitation placed on the age or physical condition of the victim is designed to limit significant enhancement of a sentence because of such factors, absent physical or psychological harm to the victim.

924. This weighing provision implements the policy that directs assaults on the physical integrity of the victim should be dealt with most severely.

925. The list of exceptionally brutal behavior is not intended to be subject to judicial supplementation. This treatment is analogous to that governing current extended term sentences. See Ill. Rev. Stat. ch. 38, §§ 1005-5-3.2(b), 1005-8-2(a) (1983). The list, however, includes most forms of behavior that heretofore have been found to constitute exceptionally brutal or heinous behavior. Not included within this list is a provision based solely upon the age or physical condition of the victim and a provision based solely upon causing psychological harm to the victim.

The age of the victim as a sole factor has been deleted because of the belief that it does not accurately indicate dangerousness, depravity, or incorrigibility. Many crimes involving children,
the defendant is currently being sentenced; and (B) the behavior was committed personally by the defendant, or at the direction of, or with the active assistance of the defendant: (1) subjecting anyone to torture or to gratuitous and severe physical abuse; (2) subjecting anyone to repeated acts of aggravated criminal sexual assault, if accompanied by gratuitous and severe psychological harm or abuse; (3) causing or attempting to cause serious bodily injury or death: (a) when the victim has not resisted; (b) when such actions were undertaken in an order to prevent the detection, apprehension, or prosecution of an offender; (c) when such action was undertaken because of the testimony of the victim or another in a judicial or administrative proceeding; (d) when such actions were undertaken for compensation; or (e) when more than one actual or intended victim was involved; or (4) engaging in a conspiracy to commit, or soliciting the commission of, any offense described in subparagraphs (1)-(3) above.

(b) Except as provided in section 2c(3) of these guidelines, if the sentencing court finds that a defendant who was at least seventeen

elderly, or physically handicapped persons, however, will involve other factors of exceptionally brutal or heinous behavior as defined in this section. In addition, the age of the victim is taken into consideration as a form of serious harm under § 2a(1), and as such also used to further increase sentences aggravated by factors listed under § 2a(2). See Appendix to text, § 2a(2)(c), at 401.

926. For the reasons for this limitation, see supra note 911.
927. For the reason for this limitation, see supra note 913.
928. The "causing or attempting to cause" phraseology is intended to eliminate a finding of exceptionally brutal or heinous behavior merely because a crime was committed in a potentially more dangerous manner, even though that danger did not come to pass. Instead, offenses including potentially dangerous behavior are treated as a variety of serious harm. See Appendix to text, § 2a(1)(a)(1)-(3), at 400.
929. Efforts to prevent the detection, apprehension, or prosecution of either the defendant or someone else are included within this provision.
930. The testimony referred to in this provision need not have been directed against the defendant for this factor to apply.
931. This provision is directed toward murders or attempted murders committed either for hire or to obtain some other monetary benefit resulting from the victim’s death, such as life insurance benefits or an inheritance.
932. The weight given to this factor obviously would vary according to the number of victims involved, and, in an extreme case such as a mass hostage situation or a terrorist bombing, the presence of multiple victims could lead to an out-of-guideline sentence.
years old at the time the crime was committed was convicted of an offense accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty, the defendant's criminal history score shall be increased by from three to six points, depending upon the variety and degree of such behavior that occurred.

(c) If a defendant is found to have caused or threatened serious harm within the meaning of section 2a(1)(a) of these guidelines and that behavior is not of a type included within section 2a(2)(a), any adjustments to the defendant's criminal history score under section 2a(2)(b) may be further increased in accordance with section 2a(1)(b).

(3) Other Factors in Aggravation
(a) The following factors shall be used to increase a defendant's criminal history score by the amounts indicated:
   (1) The offender committed the crime while serving a sentence of probation, conditional discharge, or periodic imprisonment (one point for each such occurrence, up to a maximum of two points);
   (2) The offender committed his crime while serving a period of parole or mandatory supervised release (one point for each such occurrence, up to a maximum of two points); or
   (3) The offender committed the crime while at large on bond, or while awaiting trial, or pending appeal (one point for each such occurrence, up to a maximum of two points).
(b) The following factors may be considered as reasons to impose a lengthier sentence within the guideline range for persons having the defendant's criminal history score or, when otherwise consistent with section 1005-6-1(a) of the Unified Code of Corrections, to impose an incarcerative rather than a nonincarcerative sentence:


934. The three to six point increase in an offender's criminal history score resulting from this finding is the equivalent of treating the offender as having an additional prior conviction for a class I felony (three points), a class X felony (four points), or murder (six points).

935. It is difficult to be more precise in describing how to weigh this type of behavior for sentencing purposes. Both the degree and variety of abuses can vary over such a broad range that it is probably not wise to require that multiple factors be present before heavier weights are available. If more extreme examples of abuses are known to the court, however, it would be inappropriate to utilize the heavier weights of five or six points.

936. Section 1005-6-1(a) of the Unified Code of Corrections, Ill. Rev. Stat. ch. 38, § 1005-6-1(a) (1983), governs the availability of probation under the Code. This provision makes it clear that these guidelines continue the statute's important policy of generally favoring probation.

(1) The defendant, by the duties of his or her office or by his or her position, was obliged to prevent the particular offense committed or to bring the offenders committing it to justice; 
(2) the defendant held a public office or was a public employee at the time of the offense, and the offense was related to the conduct of that office or employment; 
(3) the defendant utilized his or her professional reputation or position in the community to commit the offense, or to afford him or her an easier means of committing it; 
(4) The sentence is necessary to deter others from committing the same crime; or 
(5) The offense took place in a place of worship or on the grounds of a place of worship, immediately prior to, during, or immediately following worship services.

b. Nonaggravating Factors
(1) The following factors shall not be used to increase an offender's sentence: 
(a) The offender exercised a right secured to the offender by law; 
(b) The judge believes that the offender either committed or suborned perjury in connection with the offender's trial or sentencing; or 
(c) The judge believes that the defendant lacks remorse for the crime.
(2) Notwithstanding the foregoing, if the sentencing judge is convinced that the defendant committed perjury or lacks remorse for the crime, the judge may refrain from reducing the defendant's sentence by any amounts allowable pursuant to other provisions of these guidelines.

c. Factors in Mitigation
(1) The following factors may be utilized by the court as reasons to reduce a defendant's criminal history score by either one or two points, depending upon the variety and degree of factors found to be present: 
(a) The defendant's criminal conduct neither caused nor threatened serious physical harm to another; 
(b) The defendant did not contemplate that his or her criminal conduct would cause or threaten serious physical harm to another;

938. Except for factor (g), the mitigating factors listed in subsection (1) of this section are identical to those currently codified at ILL. REV. STAT. ch. 38, § 1005-5-3.1(a)(1)-(12) (1983). As under present law, the defendant would have the burden of establishing the presence of any disputed factor in mitigation by a preponderance of the evidence.
(c) The defendant acted under a strong provocation;
(d) There were substantial grounds tending to excuse or justify the defendant’s criminal conduct, though failing to establish a defense;
(e) The defendant’s criminal conduct was induced or facilitated by someone other than the defendant;
(f) The defendant has compensated or will compensate the victim of his or her criminal conduct for the damage or injury that the victim sustained;
(g) The defendant has no scoreable history of prior delinquency or criminal activity939 or has led a law-abiding life for a substantial period of time before the commission of the present crime;
(h) The defendant’s criminal conduct was the result of circumstances unlikely to recur;
(i) The character and attitudes of the defendant indicate that the defendant is unlikely to commit another crime;
(j) The defendant is particularly likely to comply with the terms of a period of probation;
(k) The imprisonment of the defendant would entail excessive hardship to his or her dependents; or
(l) The imprisonment of the defendant would endanger his or her medical condition.

(2) If any or all of factors (c), (d), (g), (h), and (i) above have been utilized to reduce exceptionally brutal or heinous behavior to a form of serious harm within subsection (3) below, then the factors may not be utilized to effectuate a further reduction in a defendant’s sentence under subsection (1) above.940

(3) Conduct within the scope of section 2a(2) may be treated as a form of serious harm within the meaning of section 2a(1) rather than as a form of exceptionally brutal or heinous behavior if any of the circumstances listed below were present941 and the ends of justice would be served by such treatment.942

939. The word “scoreable” in this factor signifies that the defendant has a criminal history score of less than one point. These scores are to be rounded down to zero. See supra note 908.

940. Under this provision a judge is not free to utilize the presence of the specified factors more than once, so as to give no weight to the fact that a defendant engaged in exceptionally brutal or heinous behavior on the occasion in question. Instead, the judge would give that fact a weight of from one to three points as a form of serious harm.

941. The five factors are derived from factors in mitigation currently codified at ILL. REV. STAT. ch. 38, § 1005-5-3.1(a)(3), (4), (7), (8), (9) (1983). All the proposed factors are identical to the current versions, except that factor (c) has been modified by adding the word “scoreable.” For an explanation of that change, see supra note 939.

942. The “ends of justice” qualifier is designed to clarify that a judge is not required to treat exceptionally brutal or heinous behavior as serious harm merely because one or more of these factors is present. The greater the likelihood of their existence, and the more factors that
(a) The defendant acted under a strong provocation;
(b) There were substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense;
(c) The defendant has no scoreable history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present crime;
(d) The defendant's criminal conduct was the result of circumstances unlikely to recur;
(e) The character and attitudes of the defendant indicate that he is unlikely to commit another crime.

d. Pleas of Guilty
When the defendant has elected to plead guilty to the offenses for which he or she is being sentenced, the court may take that fact into consideration by sentencing the defendant as if his or her criminal history score was either one or two points lower than otherwise called for by these guidelines. The court should not grant such a reduction, however, if it believes that the ends of justice would not be served thereby.

§ 3. PRESumptive SENTENCING RANGE

A defendant's presumptive type and length of sentence is determined by the class of the felony for which the defendant is currently being sentenced and the defendant's adjusted criminal history score, as seen in the chart on the following page.

II. PROPOSED SUPREME COURT RULES

§ 1. A NEW RULE REGARDING REASONS FOR IMPOSING SENTENCE

a. In imposing sentence for a felony, the trial judge shall provide the following information, as appropriate:

(1) Where the sentence being imposed has been agreed to by the parties, a statement that, based upon the judge's independent assessment of pertinent facts and circumstances, the sentence conforms to Illinois' sentencing guidelines or, if it does not, that it is otherwise in the interest of justice. Any such non-guideline sentence is also subject to the provisions of subparagraph b below.
(2) Where the sentence being imposed has not been agreed to by the parties:

(a) a statement that the sentence conforms to Illinois' sentencing guidelines, or, if it does not, that it is otherwise in the interest of justice. Any such non-guideline sentence is also subject to the provisions of subparagraph b below; and
(b) a recitation of the defendant's criminal history score as determined by the court, whether there were any disputes are present, the more willing a judge should be to mitigate the effects of the defendant's behavior in the manner proposed.
Chart 4
Sentencing Ranges (In Months) For Various Combinations
Of Felonies And Criminal History Scores*

<table>
<thead>
<tr>
<th>Criminal History Scores</th>
</tr>
</thead>
<tbody>
<tr>
<td>Felony Class</td>
</tr>
<tr>
<td>----------------------</td>
</tr>
<tr>
<td>M</td>
</tr>
<tr>
<td>X</td>
</tr>
<tr>
<td>1</td>
</tr>
<tr>
<td>2</td>
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<tr>
<td>3</td>
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<td>4</td>
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</tbody>
</table>

*Except as otherwise indicated in notes a through d below, the indicated sentences of imprisonment would have to be imposed. No nonincarcerative alternative would be authorized.

NOTES

a. Imprisonment would be the presumptive sentence for this category. Periodic imprisonment, but not probation, also would be authorized.

b. A sentence of probation would be the presumptive sentence for this category, with the prison sentences referred to utilized only in unusual circumstances, or upon revocation of probation.

c. A sentence of periodic imprisonment or imprisonment would be the presumptive sentence for this category. Probation would also be authorized.

d. A sentence of natural life also would be available for this category.
(b) a recitation of the defendant's criminal history score as determined by the court, whether there were any disputes regarding either that score or any adjustments thereto, and, if so, how the trial judge resolved them and the reasons therefor.

b. In any case where a trial judge imposes a sentence that the judge believes departs from Illinois' sentencing guidelines, the judge shall provide a statement on the record of the particular evidence, information, or other reasons that led to his or her sentencing determination.

§ 2. A PROPOSED AMENDMENT TO SUPREME COURT RULE 615

Supreme Court Rule 615 should be modified to allow the reviewing court to modify the punishment imposed by the trial court, and to provide the state with a qualified right to appeal sentences. The necessary modification would require an amendment to paragraph 615(b)(4) of the present rule as well as the addition of new subparagraphs (c) and (d), as provided below.

RULE 615

***

(b) Powers of the Reviewing Court. On appeal the reviewing court may:

***

(4) modify the punishment imposed by the trial court, as provided in paragraphs (c) and (d) of this rule; ***

***

Appellate Review of Sentence

(c) Right to Appeal.—The defendant or the state may appeal the legality of any sentence. In addition, the defendant or the state may appeal the discretionary aspects of any sentence for a felony or a misdemeanor to the appellate court, provided, however, that the state may not appeal any discretionary aspects of a sentence

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943. Supreme Court Rule 615(b) currently allows the reviewing court to:
(1) reverse, affirm, or modify the judgement or order from which the appeal is taken;
(2) set aside, affirm, or modify any or all of the proceedings subsequent to or dependent upon the judgement or order from which the appeal is taken;
(3) reduce the degree of the offense of which the appellant was convicted;
(4) reduce the punishment imposed by the trial court; or
(5) order a new trial.
ILL. SUP. CT. R. 615(b) (codified at ILL. REV. STAT. ch. 110A, § 615(b) (1983)).

if the state either agreed to the sentence or failed to advise the trial judge of the aspects of the sentence of which it complains, or failed to make timely and proper objection thereto.945

(d) Determination on Appeal.—The appellate court shall affirm the sentence imposed by the circuit court unless it finds:946

1. The circuit court purported to sentence within the sentencing guidelines but applied the guidelines erroneously;
2. The circuit court sentenced within the sentencing guidelines but the case involves circumstances in which the application of the guidelines would be clearly unreasonable; or
3. The circuit court either did not apply the sentencing guidelines or sentenced outside those guidelines, and the sentence is unreasonable.

When the appellate court finds it cannot affirm the circuit court’s sentence, if it further finds that all pertinent facts and circumstances necessary to the determination of a proper sentence have been fully and fairly developed, it may impose an appropriate sentence itself.947 In all other such cases, the appellate court shall vacate the sentence and remand for further proceedings.948

945. The detailed qualification of the state’s right to appeal sentences is designed to prevent abuse of the defendant’s right to appeal and to discourage politicization of judicial sentencing decisions.

946. This Rule would require affirmance of sentencing decisions unless an error appeared on the record. Purported errors involving disagreement over a sentencing judge’s use of his or her discretionary authority would require that the judge’s position taken below was “clearly unreasonable.” See Appendix to text, Part II § 2(d)(2), at 407.

947. This provision would expand the power of the appellate court by permitting it to impose a different type of sentence than that imposed by the circuit court. It would, however, offset that expansion by making the presumptively correct disposition in all cases involving overturned sentences to be a remand for further proceedings. Only where the necessary factual predicates for determining a proper sentence have been developed fully would the appellate court be free to impose a sentence itself.

948. Where the completeness of the record permitted, it also would be useful for the appellate court to give its view of the appropriate length or type of sentence.