
Robert P. Shuwerk

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INTRODUCTION

I. AN HISTORICAL OVERVIEW
   A. The Impetus for the Original Reform Proposals
   B. A Summary of the Early Reform Proposals
   C. Implementation of the Reform Proposals

II. STRUCTURAL CONTROLS ON THE EXERCISE OF PROSECUTORIAL DISCRETION
    A. The Nature of the Controls Proposed and Enacted
    B. The Effect of the Act on Plea Bargaining Practices
       1. The Frequency of Plea Bargaining
       2. The Nature and Quality of the Bargains Struck
       3. The Efficacy of Judicial Checks on Bargained-For Sentences
    C. Additional Reforms

III. STRUCTURAL CONTROLS OF JUDICIAL SENTENCING DISCRETION
    A. An Overview
    B. The Use-of-Information Requirement
    C. The Reasons Requirement
       1. The Erosion of the Reasons Requirement
       2. The Eliminations of the Reasons Requirement

* This article is the first of two articles by Professor Robert P. Schuwerk on Illinois' determinate sentencing. The second article will appear in the Volume 34, Winter 1985 issue.

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D. Appellate Review of Sentencing Decisions .......... 685
   1. The Standard of Review: "Abuse of Discretion" or
      Something Else? .................................. 686
   2. Treatment of the "New" Standard
      of Review ....................................... 691
   3. Abuse of Discretion After People v. Cox .......... 695
      a. Anticipated Data-Gathering
         and Data-Analysis Activities ................. 696
      b. Anticipated Development of Sentencing
         Guidelines .................................... 701
E. Possible Remedial Measures Under Judicial
   Auspices .......................................... 707

IV. STRUCTURAL CONTROLS ON THE DISCRETION
    OF CORRECTIONAL OFFICIALS ..................... 715
A. An Historical Overview ............................ 715
   1. Abolishing Parole ................................ 715
   2. Establishing Statutory Rates for the
      Accumulation of Good-Time Credits ............. 716
   3. Regulation of the Revocation of Good-
      Time Credits ................................... 718
B. Implementation of the Act's Structural Controls ..... 719
   1. Good-Time ..................................... 720
   2. Prison Discipline ................................ 722
      a. The DOC's Internal Disciplinary
         Procedures .................................... 723
      b. The Written Rules Requirement ............... 724
      c. Penalties .................................... 726
      d. PRB Involvement in Disciplinary
         Matters ....................................... 730
C. Proposals for Remedial Action ..................... 734
   1. Prison Overcrowding ............................ 734
   2. Prison Discipline ............................. 738

CONCLUSION ....................................... 739

INTRODUCTION

On December 28, 1977, amidst much fanfare, Illinois Governor James R.
Thompson signed into law Public Act 80-1099 (Act), amending the Unified
Code of Corrections and converting Illinois from a system of indeterminate
sentences to determinate prison sentences. The Act was widely hailed as ushering in

   Act No. 80-1099, 1977 Ill. Laws 3264-3318 (codified throughout Unified Code of Corrections,
2. Indeterminate sentences are ones in which the sentencing judge imposes a minimum
a new era in the sentencing of criminal offenders—one in which sentences would be both fairer across the board and, where warranted, far more severe than had previously been authorized by law. There were, however, dissenters from this view who saw the Act essentially as a punitive measure—one that would fill Illinois’ prisons to overflowing while doing little, if anything, to control the abuses of prosecutorial, judicial, and correctional discretion in sentencing that ostensibly had led to its enactment. Ironically, these dissenters included many of the earliest and most ardent supporters of the legislative predecessors to the Act, among whom was the present author.

As set out in more detail below, the Act and its numerous legislative predecessors adopted two broad strategies for improving the process of term and a maximum term on an offender with the precise date of release within that period determined by a correctional authority—in Illinois, the former Parole and Pardon Board. See ILL. REV. STAT. ch. 38, §§ 1003-3-1 to 1003-3-13 (1975). Traditionally, Illinois inmates were able to reduce both the minimum and maximum sentences imposed against them (and hence both the date on which they first would be eligible for parole and the date on which they would be required to be released) by accumulating a variety of good-conduct credits—typically by not violating prison disciplinary rules or by properly performing prison work or programmatic assignments. Id. §§ 1003-6-3, 1003-12-5. To prevent a judge from imposing a sentence so lengthy that an inmate would never become eligible for parole, Illinois law had also created a right to parole consideration for all inmates who had served at least 20 years (less time off for good-conduct credits earned). Id. § 1003-3-3(a).

Determinate sentences, on the other hand, call on sentencing judges to impose fixed terms of years on offenders, who would then have to serve their entire sentences (except, once again, for any time taken off for good behavior). See ILL. REV. STAT. ch. 38, § 1003-3-3(c) (1983). The concept of parole as a release mechanism is abolished for persons receiving determinate sentences. Id. § 1003-3-3(b). Under Pub. Act No. 80-1099, the only good-conduct credits which were expected to be awarded with any degree of regularity were those given for not violating prison disciplinary rules. Those credits were established by statute at one day off of an offender’s sentence for each infraction-free day spent in confinement. Pub. Act. No. 80-1099, § 3, 1977 Ill. Laws 3264, 3289 (codified at ILL. REV. STAT. ch. 38, § 1003-6-3 (1983)).

Both indeterminate and determinate prison sentences should be distinguished from mandatory prison sentences. The latter term denotes a prison sentence which must be imposed, while neither of the first two terms have that connotation. Mandatory prison sentences can—and have been in Illinois’ recent past—either indeterminate or determinate. See ILL. REV. STAT. ch. 38, §§ 1005-5-3(c), 1005-8-1, 1005-8-2 (1979); id. §§ 1005-5-3(g), 1005-8-1, 1005-8-2 (1975).


It should be noted, however, that many senators and representatives, including a number who voted for the bill, also expressed doubts over its efficacy as a deterrent to crime. The same senators and representatives were also concerned about the possibility of prison overcrowding and a severe drain on the state’s treasury resulting from the new sentencing schedule. See ILL. S. J., 1st Spec. Sess., 90-92 (1977) (remarks of Sen. Hickey); id. at 102-05 (remarks of Sen. Newhouse); id. at 116-18 (remarks of Sen. Washington); ILL. H. J., 1st Spec. Sess., 100-09 (1977) (remarks of Rep. Mugalajian); id. at 113-15 (remarks of Rep. Kane); id. at 115-16 (remarks of Rep. Barnes); id. at 119 (remarks of Rep. Madison).

4. To some extent, this assessment is based on conversations this author had with a number of individuals, some of whom might prefer to remain unidentified. Some of these assessments, however, are a matter of public record. See supra note 3.

5. At least 11 original or amended bills warrant inclusion in this list: (1) S.B. 1884, 1885,
bargaining for, imposing, and serving criminal sentences. The first strategy sought to structure the exercise of discretion in order to produce fairer and more consistent sentences. Included under this rubric are such reforms as requiring judges to consider certain information before imposing sentence and insisting that they give reasons for their sentences; imposing a variety of checks against potential abuses of discretion by prosecutorial, judicial, and correctional officials; and endeavoring, by a variety of means, to promote the continuing development of even more refined sentencing practices. These efforts are referred to as "structural" reforms because they did not directly limit the exercise of substantive sentencing powers. Rather, these proposals were meant only to promote the rational and consistent application of those powers.

The second strategy for improving the sentencing process sought to place direct limitations on substantive sentencing powers, primarily those of the judiciary. The principal proposals narrowed the ranges of permissible penalties for felonies by providing statutory factors in mitigation and

79th Ill. Gen. Assembly, 1976 Sess. (portions of legislative package embodying the original legislative reform proposals); (2) a draft bill prepared by the Adult Corrections Subcommittee of the Illinois House Judiciary II Committee, but never introduced, see infra note 38 and accompanying text (the earliest legislative reworking of the initial reform proposals); (3) H.B. 1500, 80th Ill. Gen. Assembly, 1977 Sess. and House Amendment No. 1 thereto (the legislation actually introduced to embody the initial proposals, prepared primarily by the Illinois House Judiciary II Committee); (4) S.B. 1272, 80th Ill. Gen. Assembly, 1977 Sess., as well as Senate Amendment No. 1 to S.B. 165, 80th Ill. Gen. Assembly, 1977 Sess. and Senate Amendment No. 1 to H.B. 1, 80th Ill. Gen. Assembly, 1977 Sess. (all early versions of Governor Thompson's proposed alternative to H.B. 1500, as amended); (5) H.B. 15, 80th Ill. Gen. Assembly, 1st 1977 Spec. Sess. (the bill embodying the revised position of the proponents of H.B. 1500, as amended); (6) S.B. 11, 80th Ill. Gen. Assembly, 1st 1977 Spec. Sess. (the bill containing Governor Thompson's revised proposed alternative to H.B. 1500, as amended); and (7) Senate Amendment No. 8 to H.B. 1500, 80th Ill. Gen. Assembly, 1st 1977 Spec. Sess. (the final compromise between the two legislative factions).

6. See infra notes 222-25 and accompanying text.
7. See infra notes 245-48 and accompanying text.
8. See infra notes 45-61 and accompanying text.
9. See generally infra notes 176-218 and accompanying text (discussing the Act's provisions requiring judges to give reasons for the sentences they impose, requiring the DOC to compile statistics on sentences imposed for judicial use and authorizing the Illinois Supreme Court to use its rulemaking authority to promote uniformity in sentencing).
10. See infra notes 508-30 and accompanying text.
11. See infra notes 185-90 and accompanying text.
12. Some direct limitations on the power of the Department of Corrections (DOC) to lengthen an inmate's sentence by depriving him of good-conduct credits also were proposed. See infra notes 525-30 and accompanying text.
aggravation to be utilized in imposing sentences, and specified the circumstances in which exceptionally lengthy sentences could be imposed. They are referred to as "substantive" controls because they were intended to directly affect the types and lengths of sentences that judges were free to impose.

As of this writing, the Act has been in effect for over six years. Thus, the time seems ripe for a critical reappraisal of its provisions. This article will review the extent to which the Act's structural controls on the exercise of prosecutorial, judicial, and correctional sentencing discretion have functioned as intended. It concludes that those controls have been largely nullified or rendered ineffective. A second article will analyze how the Act's substantive limitations on judicial sentencing discretion have fared. Both articles also will propose changes in Illinois law. The detailed recommendations call for the retention of determinate sentences, but within narrower ranges and with a variety of additional controls on the exercise of prosecutorial, judicial, and correctional discretion in the bargaining for, imposing, and serving of such sentences.

I. AN HISTORICAL OVERVIEW

To appreciate the significance of the Act's efforts to structure the exercise of sentencing discretion, it is necessary to review the initial legislative proposals, their detailed study by the Adult Corrections Subcommittee of the Illinois House Judiciary II Committee, and their ultimate refashioning by that committee into its legislative proposal, House Bill (H.B.) 1500. During this period there was a strong consensus in favor of what one
thoughtful observer has termed a “prisoner’s-eye-view” of sentencing.\textsuperscript{22} This view placed primary importance on fashioning a system of sentencing and corrections that would insure that incarcerated offenders were rationally sentenced and that those sentences were humanely served.\textsuperscript{23} This viewpoint generated all of the structural controls of sentencing adopted in the Act.

A. The Impetus for the Original Reform Proposals

Beginning in late 1974, a number of individuals, including this author,\textsuperscript{24} began drafting legislation to control what was regarded as undue discretion vested in prosecutors, judges, correctional officials, and parole boards by Illinois’ existing system of indeterminate sentencing and parole release determinations. Based in large part on a book by Dr. David Fogel\textsuperscript{25} and on numerous condemnations of both judicial sentencing practices and parole release decisions,\textsuperscript{26} the reform group believed that new legislation was necessary. The legislation was intended to replace indeterminate prison sentences with determinate ones, and replace parole as an early release mechanism with statutorily mandated day-for-a-day good-conduct credits.\textsuperscript{27} The proponents recognized that insuring the fair implementation of such a system required that the exercise of both prosecutorial and judicial sentencing discretion be narrowed and structured to be more informed, rational, and accountable.\textsuperscript{28} Similarly, careful controls had to be placed on the exercise of discretion by correctional officials to insure that initially fair sentences were not arbitrarily lengthened through the unjustified revocation of good-conduct credits.\textsuperscript{29} These concepts, termed the “justice model” of corrections, initiated the debate which was to lead to the Act’s passage.

\textsuperscript{22} See Zimring, Sentencing Reform in the States: Some Sobering Lessons from the 1970's, 2 N. Ill. U.L. Rev. 1, 8 (1981). Professor Zimring is rather critical of this perspective. Id. at 7-12.

\textsuperscript{23} See infra text accompanying notes 508-11.

\textsuperscript{24} The reform group was formed at the urging of then-Governor Dan Walker. It included Chester Kamin, Governor Walker’s special counsel; Dr. David Fogel, then-director of the Illinois Law Enforcement Commission (ILEC or the Commission); this author, then-staff counsel to the Commission; and others. Although ILEC staff played a major role in developing these reforms, their recommendations were not formally acted upon by the Commission.

\textsuperscript{25} D. FOGEL, WE ARE THE LIVING PROOF: THE JUSTICE MODEL FOR CORRECTIONS (1975).

\textsuperscript{26} The literature critical of either judicial sentencing practices or parole release practices is voluminous. For a representative cross-section of the literature extant at the time Pub. Act No. 80-1099 and its legislative predecessors were under consideration, see \textit{American Friends Service Committee, Struggle for Justice} (1971); D. Fogel, supra note 25; M. Frankel, Criminal Sentences (1973); N. Morris, The Future of Imprisonment (1974); Twentieth Century Fund Task Force on Criminal Sentencing, Fair and Certain Punishment (1976); E. Von Den Haag, Punishing Criminals (1975); A. Von Hirsch, Doing Justice 1976); J. Wilson, Thinking About Crime (1975); Mattick, Reflection of a Former Prison Warden, in Delinquency, Crime and Society 229-300 (J. Short, Jr. ed. 1976).

\textsuperscript{27} A good concise explanation of the reasoning underlying these positions can be found in Schuwerk, Commentary on Determinate Sentencing Bill 1-5, 47-49 (1975) [hereinafter cited as Proposal Commentary].

\textsuperscript{28} See infra notes 45-61, 176-218 and accompanying text.

\textsuperscript{29} See infra notes 525-30 and accompanying text.
B. A Summary of the Early Reform Proposals

The most radical change in Illinois' sentencing practices sought by the reform group was, of course, the replacement of indeterminate sentences with determinate sentences. This proposal was intended to eliminate all prospects of an early release except through the accumulation of day-for-day good-conduct credits. The reform group foresaw that such a shift in the structure of prison sentences would have a number of other important consequences. First, it would greatly increase the significance of prosecutorial and judicial decisions concerning the proper sentence to impose. Under the proposal, no parole board would exist to mitigate any unduly harsh sanctions through an early release. Any sentence imposed—less good-conduct credits earned—would be served in full. Judges, readily able to calculate the effect of such possible credits, could tailor their sentences accordingly, within statutory limits. For the first time, judges could impose prison sentences with some assurance that their wishes would actually be carried into effect. In this sense at least, the early proposals augmented, rather than restricted, judicial sentencing authority.

The reform group also recognized that its proposals would affect the

30. See infra notes 512-24 and accompanying text. At the outset, this change was widely viewed as a punitive measure. This was not its intent. Instead, from the reform group's perspective, it was more in the nature of a "truth in sentencing" bill, which accomplished two things. First, it let inmates know from the outset exactly how long they would serve, eliminating the widely perceived frustration and anger engendered by the traditional parole release process. Proposal Commentary, supra note 27, at 3, 8-9. Second, to a far greater extent than before, it proposed to place control over imprisoned inmates' sentences in their own hands rather than leaving that determination to some outside authority. This not only made inmates directly accountable for their successes or failures of self-control—lessons seen as valuable to them after leaving prison—but also gave them a direct stake in maintaining good order and discipline while incarcerated. Id. at 5, 8-9, 49.

31. It is widely believed that parole boards attempt, to some extent, to even out what they view as indefensible sentencing variations by releasing harshly sentenced inmates at the first opportunity, while holding for longer periods those offenders who appear to have received a light sentence. See, e.g., National Advisory Commission on Criminal Justice Standards and Goals, Corrections 394 (1973); J. Shin, Analysis of Outcomes (1972); United States Board of Parole, Annual Report (1975). A number of studies, however, have failed to discern such a trend. See Gottfredson, Parole Board Decision Making: A Study of Disparity Reduction and the Impact of Institutional Behavior, 70 Criminology 77 (1979); Report on New York Parole: A Summary, 11 Crim. L. Bull. 297 (1975); Citizen's Inquiry on Parole and Criminal Justice (1976).

32. As matters turned out, the pressure of severe prison overcrowding forced the DOC to institute an early release program predicated on supplemental good time awards. As a consequence, many judicially imposed sentences were shortened by substantially more than one-half. This practice was successfully challenged as excessive of the DOC's authority in Lane v. Sklodowski, 97 Ill. 2d 311, 454 N.E.2d 322 (1983). For a discussion of Lane, see infra notes 545-56 and accompanying text.

33. Or, as judicial orientation materials prepared in the wake of the Act's passage more graphically put it, "BIG NUMBERS NOW MEAN SOMETHING." (Bold-faced type in original). This feature has not always been recognized. See Aspen, New Class X Sentencing Law: An Analysis, 66 Ill. B.J. 344, 346 & n.26 (1978).
distribution of power within the correctional system. On the one hand, the position of senior correctional officials, clinicians, and the like would be weakened by the elimination from the correctional arsenal of various coercive powers stemming from the parole release mechanism. On the other hand, the power of lower level correctional officials would be enhanced by the increased importance of any disciplinary sanctions imposed on inmates because any revocation of good-conduct credits would inevitably lengthen inmates' sentences.

Thus, the effect sought by the reform group was not so much to eliminate discretion in sentencing matters as it was to reallocate existing discretion within and among components of the overall criminal justice system. In order to assure that this reallocation of sentencing discretion worked fairly and rationally in practice, the entire process of bargaining for, imposing, and serving criminal sentences had to be made more informed, consistent, and accountable. The aim was not to remove the judge's discretion in such matters, but rather to prevent its perversion into a right to behave in an arbitrary and unaccountable fashion.

C. Implementation of the Reform Proposals

Throughout 1975 and 1976, efforts to implement the reform group's proposals proceeded on two fronts. First, the proposals were submitted to the House Judiciary II Committee in mid-1975. That committee in turn created a Subcommittee on Adult Corrections to give the proposals intensive consideration. The reform group actively assisted the subcommittee in those efforts by preparing a detailed, section-by-section commentary on its legislative proposals and by assisting the subcommittee in conducting extensive hearings over the next eighteen months. The subcommittee concluded its first series of hearings and produced a report to the full House Judiciary II Committee in June 1976. In that report, the subcommittee made a number of

34. The abolition of good-conduct credits for programmatic or work-related activities furthered this tendency. See infra text accompanying notes 518-24.

35. No copies of the precise bills furnished to the subcommittee exist. Except for two substantive changes, however, the texts of S.B. 1882, 1883, 1884, 1885, 79th Ill. Gen. Assembly, 1976 Sess., very closely approximate those given to the subcommittee. First, the early drafts provided that murder could be punished only by regular and extended prison terms of 20-30 and 30-40 years, respectively, while S.B. 1885 also added a natural life sentence for certain particularly heinous murders. See S.B. 1885, 79th Ill. Gen. Assembly, 1976 Sess., ¶ 5-8-1(b)(1)(B) at 40. Second, the early legislation permitted only reductions in sentences on appeal, but S.B. 1884 allowed for increases as well. See S.B. 1884, 79th Ill. Gen. Assembly, 1976 Sess., ¶ 5-10-3, 5-10-6(b)(2) at 3-4.

36. The subcommittee was exceptionally-ably staffed by its counsel James Bagley, who was the principal drafter of a report and legislative proposals authorized by the subcommittee, see infra note 38, and by the full House Judiciary II Committee, see H.B. 1500, 80th Ill. Gen. Assembly, 1977 Sess.

37. Proposal Commentary, supra note 27.

38. Summary of the Report to The Illinois House Judiciary II Committee by The Subcommittee on Adult Corrections (June 24, 1976) [hereinafter cited as Subcommittee Report]. For
legislative recommendations in bill form that were consistent with some of the reform group's proposals and tentatively endorsed many other proposals, subject to further study. The reform group in turn responded to those legislative recommendations with a lengthy technical paper commenting on the subcommittee's bill, paragraph by paragraph, and recommending numerous changes to bring the bill into closer conformity with the reform group's original proposals. These changes were incorporated almost in toto into H.B. 1500, the bill eventually prepared by the full House Judiciary II Committee.

Just a few months prior to the issuance of the subcommittee's report, Governor Walker opened the second front by causing the introduction in the General Assembly of a four-bill package virtually identical to the reform group's bill then under study by the subcommittee. Although none of the Governor's bills became law, they nonetheless are of unusual significance in interpreting later legislative measures, because they too were directly and extensively relied upon in crafting H.B. 1500.

This close textual and philosophical linkage between the reform group's proposals and H.B. 1500 is significant because it reveals additional important sources of historical material which should be consulted in construing the meaning of the Act—sources which in some respects are far clearer than traditional legislative history materials. To the extent that the Act may be

the subcommittee's "recommendations for further study," see id. at 15-17. A "sample bill" (Subcommittee Bill) is also set out. Id. at 19-72.

43. The subcommittee, whose draft bill is commonly viewed as the sole legislative predecessor of H.B. 1500, took great pains to disavow any reliance on the concept of the reform group's "justice model," stating in its report: The Committee Proposal which we offer for consideration here differs significantly from both the 'Illinois Justice Model' and proposals being considered in other states, especially in regard to the flat time aspects of the 'Illinois Criminal Justice Model.'

Subcommittee Report, supra note 38, at 2 (emphasis in original).

Nevertheless, a direct textual comparison of either the Subcommittee Bill or H.B. 1500 with the reform group's principal sentencing bill, S.B. 1885, belies that claim. Similarities are pointed out throughout the balance of this article. Various authorities, however, have differed in assessing the extent of that influence. See, e.g., Aspen, supra note 33, at 346-47; Bagley, Why Illinois Adopted Determinate Sentencing, 62 JUDICATURE 390, 391 (1979). See generally McAnany, Merritt & Tromanhauser, Illinois Reconsiders "Flat Time": An Analysis of the Impact of the Justice Model, 52 CHI.-KENT L. REV. 621, 660-61 (1976) (the drafters appear to have taken the path of least resistance by amending only sections of the Unified Code of Corrections rather than adopting a total reform package). The subcommittee's disclaimer was not false pride of authorship. Rather, because Governor Walker's political fortunes were then at a low ebb, it was apparently believed that the proposal's future would be improved if it were disassociated from Walker.

44. By far the most useful conventional legislative history materials are the Subcommittee
traced to these early proposals, its interpretation should be derived from them as well.

II. STRUCTURAL CONTROLS ON THE EXERCISE OF PROSECUTORIAL DISCRETION

A. The Nature of the Controls Proposed and Enacted

One of the principal concerns of certain opponents of the Act was that the vagaries of a criminal justice system riddled with plea bargaining would overcome all efforts to make the sentencing process more rational. Proponents of early predecessors of the Act, while not unsympathetic to such views, were not offered any program to address them nor were they able to devise any on their own. Consequently, they contented themselves with proposals designed to control such practices indirectly, by assuring that sentencing judges were in a position to make—and did make—informed, independent sentencing decisions rather than blindly deferring to the recommendations of counsel. To that end, Senate Bill (S.B.) 1885, the group's

Report, supra note 38, and the Subcommittee Bill, supra note 38. Those materials are of limited value, however, because as the subcommittee's thinking continued to evolve, its proposals underwent several significant revisions, the reasons for which are not documented in conventional legislative sources. The only other traditional legislative history materials of note are the debates on the final version of Pub. Act No. 80-1099, Senate Amendment No. 8 to H.B. 1500. See Ill. S. J., 1st Spec. Sess., 82-125 (1977); Ill. H. J., 1st Spec. Sess., 104-21 (1977). They, however, are almost totally devoid of information concerning the substance of the legislation, apparently in large part because members had only an hour to review the material before casting their votes. See Ill. S. J., 1st Spec. Sess., 105 (1977) (remarks of Sen. Guidice).

A number of nonconventional sources, however, provide considerable insight into the explanations and justifications of the various legislative proposals which eventually culminated in Pub. Act No. 80-1099. Two of them, the Proposal Commentary, supra note 27, and the Technical Paper, supra note 40, detail the reasoning underlying two of the earliest legislative proposals. Those early proposals also were extensively critiqued by McAnany, Merritt and Tromanhauser in an article which provides a generally accurate summary of the legislative proponents' views in the 1975-1976 period. See McAnany, Merritt & Tromanhauser, supra note 43. Finally, a message Governor Thompson gave to the Illinois General Assembly contains a detailed explanation and defense of his sentencing proposals as then embodied in Senate Bill 11. Address by Governor Thompson, "The Class X Criminal Justice Program: An Analysis and Comparison," 1st Spec. Sess. (1977) [hereinafter cited as Class X Analysis].

In addition to these contemporaneous sources, a number of articles have been written in the wake of Pub. Act No. 80-1099, explaining its meaning or purpose. Among the most prominent authors are Bagley, supra note 43, and Aspen, supra note 33. Both Mr. Bagley and Judge Aspen were knowledgeable observers of the process leading to the enactment of Pub. Act No. 80-1099. See supra note 36.

45. See McAnany, Merritt & Tromanhauser, supra note 43, at 632.
46. See the author's prepared statement delivered to the Adult Corrections Subcommittee, at 1-5 (Dec. 1, 1976) [hereinafter cited as Schuwerk Statement].

Since the Act went into effect, however, a number of detailed proposals for regulating plea bargains have been made. See, e.g., Gifford, Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion, 1983 U. Ill. L.F. 37, 74-95; Schulhofer, Due Process of Sentencing, 128 U. Pa. L. Rev. 733, 755-60, 772-86, 791-98 (1980); Vorenberg, Decent Restraint of Prosecutorial Power, 94 Harv. L. Rev. 1521, 1560-72 (1981).
chief sentencing reform bill, proposed changing Illinois law to require the preparation of a pre-sentence investigation report in every case in which a defendant was convicted of a felony.47 Mandatory resort to the pre-sentence reports was viewed as essential because the reports provided the sentencing judges with their primary (and most unbiased) source of information necessary to making an intelligent sentencing decision.48 The proponents of H.B. 1500 agreed, and adopted this proposal without change.49

The early legislation also sought to insure that sentencing judges actually utilized this new information and did not unthinkingly acquiesce to the recommendations of counsel as to the appropriate sentence to be imposed. It was already clear under Illinois law that the imposition of a sentence was solely an act of judicial discretion and that counsels' recommendations were not binding upon a sentencing judge.50 Nonetheless, it was believed that the temptations to accept those recommendations were sufficiently numerous and compelling enough to require an admonition to the sentencing judge as to his or her duty.51 Consequently, S.B. 1885 explicitly required the sentencing judge to impose sentence “based on his independent assessment” of the factors relevant to a proper sentence.52 This requirement, too, was retained in H.B. 1500.53

But while this proposal contained no guidelines or admonitions directed to prosecutors concerning any procedural, ethical, or substantive limitations that might apply to plea bargains, it was nonetheless construed in some quarters as threatening the very existence of that practice.54 The proponents

48. Under prior law, these reports were optional and could be waived by the defendant. ILL. REV. STAT. ch. 38, §1005-3-1 (1975). A waiver typically occurred when the state's attorney and defense counsel had agreed on a sentence to be sought from the court. The reform group felt that this procedure placed far too much power in the hands of counsel and invited arbitrary and unfair sentences stemming from a variety of extraneous factors having no real bearing on the appropriateness of the offender's sentence, such as the relative bargaining acumen of prosecution and defense counsel. Proposal Commentary, supra note 27, at 26. Under existing law, the sentencing judge was free to request a pre-sentence report in any case, see ILL. REV. STAT. ch. 38, § 1005-3-1 (1975), but, for a variety of reasons, he or she was unlikely to do so. See infra note 62.
49. See H.B. 1500, 80th Ill. Gen. Assembly, 1977 Sess., ¶ 5-3-1 at 26; Subcommittee Bill, supra note 38, at 29, ¶ 5-3-1.
53. H.B. 1500, 80th Ill. Gen. Assembly, 1977 Sess., ¶ 5-4-1(b) at 28; see Subcommittee Bill, supra note 38, at 31, ¶ 5-4-1(b).
54. This concern was noted in correspondence from Sen. Jack E. Bowers:

Pursuant to our conversation, following is an abbreviated form of my principal objections to House Bill 1500.

3. Plea Bargaining
At the top of Page 35 [of H.B. 1500, as amended] the added language “based
of this view apparently had the ear of Governor Thompson, who proposed a legislative alternative to H.B. 1500 in the First Special Session of the 1977 General Assembly.\footnote{Letter from Senator Jack E. Bowers to Representative Lee Daniels (June 29, 1977).} That bill dispensed with a pre-sentence report altogether whenever "both parties agree to the imposition of a particular sentence,"\footnote{Senate Amendment No. 8 to H.B. 1500, 80th Ill. Gen. Assembly, 1977 Sess., ¶ 5-3-1 at 45.} apparently viewing the report as a useless and costly formality in such cases.\footnote{Id. ¶ 5-4-1(b) at 47.} The clear thrust of the Governor's scheme was to remove effective sentencing authority from the hands of the judiciary and give it to the prosecutors by eliminating the most ready source of judicial enlightenment concerning the soundness of the bargains struck.\footnote{Id.}

The compromise ultimately reached in this area reaffirmed the notion of judicial preeminence in sentencing matters. While not insisting on the preparation of full pre-sentence reports in cases where a bargain had been struck as to sentence, the enacted compromise guarded against the blind judicial ratification of inappropriate pleas. It did so by requiring judicial findings of defendants' histories of delinquency and criminality, including any previous noncustodial sentences imposed upon them.\footnote{See Class X Analysis, supra note 44, at 29-30.} This information, coupled with the retained requirement that a judge's sentence be "based upon his independent assessment" of relevant factors,\footnote{Id. ¶ 5-3-1 at 37.} promised to prevent at least grossly inappropriate bargains. The compromise, however, did legitimize in law what undoubtedly was already present in practice: some unspecified degree of judicial deference to "any agreement as to sentence reached by the parties."\footnote{Id.}
B. The Effect of the Act on Plea Bargaining Practices

The Act's relatively modest efforts to reform plea bargaining practices obviously were dependent to a considerable extent upon the interest and zeal of sentencing courts in asserting their prerogatives. Given the General Assembly's intent that prosecutors prevail in "close" cases—and the institutional tendencies to let them prevail in many more as well—it would be surprising if the Act had had any real impact on such practices.

Although the available data on plea bargaining practices offer only the most rudimentary description of those activities, three conclusions may be drawn. First, the Act does not seem to have affected the frequency of plea bargaining. Second, while no data permit a direct analysis of the nature, quality, or general effect of the bargains struck, certain studies and reported cases indicate that plea bargaining frequently results in pleas to inappropriate charges or the imposition of inappropriate sentences. Finally, reported cases strongly suggest that there is no discernible effort on the part of the judiciary to regulate those practices.

1. The Frequency of Plea Bargaining

The only statewide sources of data on plea bargaining practices are the Annual Reports prepared for the Illinois Supreme Court by the Administrative Office of the Illinois Courts. Those data, compiled in terms of dispositions of defendants by case, include information on whether those persons who were convicted of a felony were found guilty pursuant to a guilty plea or were convicted after a bench or jury trial. As shown in Chart 1 below, those data reveal that both before and after the Act went into effect, some ninety percent of all convicted felons chose to plead guilty to the charges of which they were convicted.

62. A judicial "hard look" at agreed-upon sentences is not a naturally congenial act for at least three reasons. First, it will impose additional work on the judicial system in the short term and, if the bargain is rejected, in the long term as well, because the case will have to be tried. Second, it will impose an additional strain on the local probation authority. Third, it will incur the wrath of counsel. None of these consequences, of course, normally would be decisive in a clearly egregious case; but they all would have the tendency to convince a beleaguered trial judge that the bargain before him isn't so bad after all.

63. See infra notes 66-67 and accompanying text.

64. See infra notes 68-83 and accompanying text.

65. See infra notes 85-131 and accompanying text.

66. The Administrative Office of the Illinois Courts has prepared an Annual Report to the Supreme Court of Illinois each calendar year since the 1970 Illinois Constitution became effective.

67. These data are based on the chart entitled "Dispositions in [Year] of Defendants Charged With a Felony" [hereinafter cited as Sentencing Chart], and the chart entitled, "Sentence Imposed During [Year] on Defendants Convicted of a Felony" [hereinafter cited as Dispositions Chart] contained in each of the Administrative Office's Annual Reports for the years 1974 through 1981.

The way dispositions are recorded is somewhat complicated. According to Anthony Valaika,
### Chart 1

<table>
<thead>
<tr>
<th>Year</th>
<th>Jurisdiction *</th>
<th>Method of Conviction</th>
<th>(%)**</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>PG</td>
<td>BT</td>
</tr>
<tr>
<td>1974</td>
<td>Downstate</td>
<td>89.5</td>
<td>2.9</td>
</tr>
<tr>
<td></td>
<td>Cook</td>
<td>92.3</td>
<td>5.6</td>
</tr>
<tr>
<td></td>
<td>Total</td>
<td>91.2</td>
<td>4.4</td>
</tr>
<tr>
<td>1975</td>
<td>Downstate</td>
<td>89.0</td>
<td>3.6</td>
</tr>
<tr>
<td></td>
<td>Cook</td>
<td>92.4</td>
<td>5.9</td>
</tr>
<tr>
<td></td>
<td>Total</td>
<td>90.9</td>
<td>4.9</td>
</tr>
<tr>
<td>1976</td>
<td>Downstate</td>
<td>90.5</td>
<td>2.8</td>
</tr>
<tr>
<td></td>
<td>Cook</td>
<td>92.3</td>
<td>5.1</td>
</tr>
<tr>
<td></td>
<td>Total</td>
<td>91.5</td>
<td>4.1</td>
</tr>
<tr>
<td>1977</td>
<td>Downstate</td>
<td>85.6</td>
<td>8.1</td>
</tr>
<tr>
<td></td>
<td>Cook</td>
<td>90.3</td>
<td>6.5</td>
</tr>
<tr>
<td></td>
<td>Total</td>
<td>88.3</td>
<td>7.2</td>
</tr>
<tr>
<td>1978</td>
<td>Downstate</td>
<td>91.0</td>
<td>3.1</td>
</tr>
<tr>
<td></td>
<td>Cook</td>
<td>90.3</td>
<td>6.5</td>
</tr>
<tr>
<td></td>
<td>Total</td>
<td>90.5</td>
<td>5.3</td>
</tr>
<tr>
<td>1979</td>
<td>Downstate</td>
<td>90.0</td>
<td>3.7</td>
</tr>
<tr>
<td></td>
<td>Cook</td>
<td>88.8</td>
<td>7.9</td>
</tr>
<tr>
<td></td>
<td>Total</td>
<td>89.3</td>
<td>6.3</td>
</tr>
<tr>
<td>1980</td>
<td>Downstate</td>
<td>90.0</td>
<td>3.3</td>
</tr>
<tr>
<td></td>
<td>Cook</td>
<td>86.4</td>
<td>10.3</td>
</tr>
<tr>
<td></td>
<td>Total</td>
<td>87.9</td>
<td>7.4</td>
</tr>
<tr>
<td>1981</td>
<td>Downstate</td>
<td>91.5</td>
<td>3.2</td>
</tr>
<tr>
<td></td>
<td>Cook</td>
<td>84.4</td>
<td>12.9</td>
</tr>
<tr>
<td></td>
<td>Total</td>
<td>87.4</td>
<td>8.8</td>
</tr>
</tbody>
</table>

*Downtown refers to the 101 Illinois counties outside of Cook County. Cook County contains both Chicago and the bulk of the felonies committed in Illinois each year.

**PG = plea of guilty; BT = bench trial; JT = jury trial

There has been a slight decrease in the number of plea bargains in Cook County (Chicago) since the Act became effective in 1978, most of it attributable to a rather substantial increase in the number of defendants electing a bench trial there. It is unlikely that this decrease is due to the Act, however, because during the same period there has been an increase in the use of plea bargains in Illinois' downstate counties.

These data reveal little if anything about either the nature or quality of the bargains struck or the effectiveness of judicial oversight of plea bargaining as it relates to the sentences actually imposed on offenders. They do show, however, the importance of regularizing plea bargaining practices to achieve a rational sentencing system. Any reform that ignores the manner in which such bargains are struck will fail to ameliorate any disparities or
inequities resulting from either the charges lodged against, or the sentences imposed upon, approximately ninety percent of all convicted felons.

2. The Nature and Quality of the Bargains Struck

Plea bargains are of three general types, although particular bargains frequently employ features of more than one type. The first is a bargain to plead guilty to a stated charge in return for the prosecutor’s agreement to dismiss other pending charges. This is frequently referred to as a “bargain as to counts” (referring to separate charges or “counts” in the felony charging instrument). The second is an agreement to plead guilty to a lesser offense in return for the prosecutor’s agreement not to press a more serious charged offense. This is frequently referred to as a “bargain as to charge.” The third type of plea bargain is an agreement to plead guilty to certain charges, which may or may not be some or all of the original charges, in return for an agreement by the prosecutor to make, or not to oppose, a particular sentence recommendation. This type of bargain is frequently referred to as a “bargain as to sentence.” A plea made without any such assurance is typically called a “blind plea.” Of all these practices, that which presents perhaps the greatest potential for abuse is a bargain as to charge that does not retain at least one charge of the same class as the most serious offense supportable by the admissible evidence. Such a plea has two very grave and related defects. Most importantly, such a plea will inevitably alter the range of sentences available to the court in such a way as to make a suitably severe sentence improbable, if not impossible. Second, given the limited information available to the court in this setting, such a bargain is more likely to mislead the court about the nature of the crime committed. There are no data available on the frequency of this type of plea.

an Assistant Director and Chief Statistician for the Administrative Office, the most serious action taken against a defendant in a given case will control how his disposition is recorded. Thus, for example, if a single defendant is charged with rape (a class X felony) and burglary (a class 2 felony) but is found guilty only of burglary, his “disposition will be shown as one defendant convicted of a class 2 felony. The acquittal of rape will not appear. If two defendants are charged in a single indictment with burglary, and one is convicted of burglary while the other is acquitted, two separate dispositions will be shown, one for each defendant.

68. Prosecutors frequently charge the offender with a number of offenses related to one criminal act. See Gifford, supra note 46, at 46.

69. An offender may face charges for multiple offenses or a more serious offense than necessary for his criminal conduct.

70. See Gifford, supra note 46, at 49.

71. This is not merely because the range of legally authorized penalties is not broad enough. It may be that a suitably severe sanction is available, but that because of the misrepresentation of the nature of the current crime, the court would not consider using it.

72. It should be recalled that at sentencing the court normally will have only the defendant’s prior adult and juvenile record, together with information received to establish a factual basis for the plea. See Ill. Rev. Stat. ch. 38, § 1005-3-1 (1983).

73. The Administrative Office records dispositions of felony cases by the class of the most serious charge sustained. See Dispositions Chart, supra note 67. Since it does not track felony
Nonetheless there are scattered indicia that such offense-distorting pleas are prevalent. For example, as shown in Charts 2 and 3 below, in the years 1979, 1980, and 1981, the statewide ratio of class 1 felony convictions to class X felony convictions is substantially higher than the corresponding ratio of class 1 felony arrests to class X felony arrests for those years. The data

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**Chart 2**

**A COMPARISON OF THE NUMBERS OF ARRESTS FOR CLASS X AND CLASS 1 FELONIES IN DOWNSTATE AND COOK COUNTIES**

<table>
<thead>
<tr>
<th>Year</th>
<th>Jurisdiction</th>
<th>Class X</th>
<th>Class 1</th>
<th>Cl. 1/Cl. X</th>
</tr>
</thead>
<tbody>
<tr>
<td>1979</td>
<td>Downstate</td>
<td>1754</td>
<td>189</td>
<td>10.8</td>
</tr>
<tr>
<td></td>
<td>Cook</td>
<td>6391</td>
<td>57</td>
<td>0.9</td>
</tr>
<tr>
<td></td>
<td>Total</td>
<td>8145</td>
<td>246</td>
<td>3.0</td>
</tr>
<tr>
<td>1980</td>
<td>Downstate</td>
<td>1521</td>
<td>158</td>
<td>10.4</td>
</tr>
<tr>
<td></td>
<td>Cook</td>
<td>6617</td>
<td>96</td>
<td>1.5</td>
</tr>
<tr>
<td></td>
<td>Total</td>
<td>8138</td>
<td>254</td>
<td>3.1</td>
</tr>
<tr>
<td>1981</td>
<td>Downstate</td>
<td>1298</td>
<td>142</td>
<td>10.9</td>
</tr>
<tr>
<td></td>
<td>Cook</td>
<td>5953</td>
<td>57</td>
<td>1.0</td>
</tr>
<tr>
<td></td>
<td>Total</td>
<td>7251</td>
<td>199</td>
<td>2.7</td>
</tr>
</tbody>
</table>

**Chart 3**

**A COMPARISON OF THE NUMBERS OF CONVICTIONS FOR CLASS X AND CLASS 1 FELONIES IN DOWNSTATE AND COOK COUNTIES**

<table>
<thead>
<tr>
<th>Year</th>
<th>Jurisdiction</th>
<th>Class X</th>
<th>Class 1</th>
<th>Cl. 1/Cl. X</th>
</tr>
</thead>
<tbody>
<tr>
<td>1979</td>
<td>Downstate</td>
<td>371</td>
<td>295</td>
<td>79.5</td>
</tr>
<tr>
<td></td>
<td>Cook</td>
<td>1724</td>
<td>260</td>
<td>15.1</td>
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<tr>
<td></td>
<td>Total</td>
<td>2099</td>
<td>555</td>
<td>26.5</td>
</tr>
<tr>
<td>1980</td>
<td>Downstate</td>
<td>429</td>
<td>242</td>
<td>56.4</td>
</tr>
<tr>
<td></td>
<td>Cook</td>
<td>1840</td>
<td>322</td>
<td>17.5</td>
</tr>
<tr>
<td></td>
<td>Total</td>
<td>2269</td>
<td>564</td>
<td>24.9</td>
</tr>
<tr>
<td>1981</td>
<td>Downstate</td>
<td>492</td>
<td>325</td>
<td>66.1</td>
</tr>
<tr>
<td></td>
<td>Cook</td>
<td>1857</td>
<td>305</td>
<td>16.4</td>
</tr>
<tr>
<td></td>
<td>Total</td>
<td>2349</td>
<td>630</td>
<td>26.8</td>
</tr>
</tbody>
</table>

*filings* in that manner, comparisons of the number or nature of charges brought with those sustained are presently not possible without a manual search of court records.

74. Felonies are classified, for the purposes of sentencing, into six categories. Murder is a separate class of felony that carries a minimum sentence of 20 years and maximum of 40 years, or, if the court finds the murder was accompanied by exceptionally brutal or heinous
show that throughout those years convictions for class 1 felonies downstate were about six to eight times more frequent than their proportion of arrests would indicate, while in Cook County they were from twelve to sixteen times more frequent.\textsuperscript{75}

Of course, without checking individual cases it is impossible to be certain where those "extra" class 1 crimes came from. One tempting conclusion consistent with the data is that they represent class X felonies bargained down to attempted class X felonies—the latter being class 1 felonies.\textsuperscript{76} This is revealed rather strikingly by the fact that consistently far more persons are convicted of class 1 offenses than are even arrested for them. Chart 4 below shows, for example, that there were five times as many convictions as arrests for class 1 felonies in Cook County in 1981. The only apparent source of these extra class 1 convictions would be fortunate plea-bargaining class X offenders.\textsuperscript{77}

\begin{center}
\textbf{Chart 4}
\end{center}

\textbf{A COMPARISON OF THE NUMBERS OF ARRESTS AND CONVICTIONS FOR CLASS 1 FELONIES IN DOWNSTATE AND COOK COUNTIES 1979 TO 1981}

<table>
<thead>
<tr>
<th>Year</th>
<th>Jurisdiction</th>
<th>Class 1</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Arrests</td>
<td>Convictions</td>
</tr>
<tr>
<td>1979</td>
<td>Downstate</td>
<td>189</td>
<td>295</td>
</tr>
<tr>
<td></td>
<td>Cook</td>
<td>57</td>
<td>260</td>
</tr>
<tr>
<td></td>
<td>Total</td>
<td>246</td>
<td>555</td>
</tr>
<tr>
<td>1980</td>
<td>Downstate</td>
<td>158</td>
<td>242</td>
</tr>
<tr>
<td></td>
<td>Cook</td>
<td>96</td>
<td>322</td>
</tr>
<tr>
<td></td>
<td>Total</td>
<td>254</td>
<td>564</td>
</tr>
<tr>
<td>1981</td>
<td>Downstate</td>
<td>142</td>
<td>325</td>
</tr>
<tr>
<td></td>
<td>Cook</td>
<td>57</td>
<td>305</td>
</tr>
<tr>
<td></td>
<td>Total</td>
<td>199</td>
<td>630</td>
</tr>
</tbody>
</table>

behavior, or by any aggravating factors delineated in the Unified Code of Corrections (§ 9-1), a term of natural life imprisonment may be imposed. Ill. Rev. Stat. ch. 38, §§ 1005-5-1(b)(1), 1005-8-1(1) (1983). An offender convicted of murder may also be sentenced to death. Id. § 1005-5-3(c)(1). Beyond murder, the other felonies are classified as: class X, which carry a minimum sentence of six years and a maximum of 30 years, id. § 1005-8-1(a)(3); class 1, which carry a minimum sentence of four years and a maximum of 15 years, id. § 1005-8-1(a)(4); class 2, which carry a minimum sentence of three years and a maximum sentence of seven years, id. § 1005-8-1(a)(5); class 3, which carry a minimum sentence of two years and a maximum of five years, id. § 1005-8-1(a)(6); class 4, which carry a minimum sentence of one year and a maximum of three years, id. § 1005-8-1(a)(7).

\textsuperscript{75} Data on felony arrests by class of felony were furnished by the Statistical Analysis Center of the ILEC, which derived them from the Illinois' Uniform Crime Report data for 1979, 1980 and 1981. Data on convictions by class of felony were derived from Dispositions Chart, supra note 67.


\textsuperscript{77} The Act of Sept. 16, 1981, Pub. Act No. 82-517, 1982 Ill. Laws 2618, 2618 (codified
Such bargains are not necessarily either unethical or unjust. Their prevalence could be explained as a result of the reaction to the harsh minimum sentences for class X felonies, a reaction the legislature always risks evoking whenever it makes such sanctions sufficiently draconian. For the purpose of analyzing charge-bargaining, however, this observation has additional significance. It raises the possibility that a prosecutorial willingness to bargain down class X charges might not be representative of a general willingness to reduce charges in that manner. While there is little hard evidence either supporting or refuting that possibility, one system-wide measure may shed some light on the question: a willingness of prosecutors to bargain at the other end of the offense spectrum by reducing felony charges to misdemeanors.

at ILL. REV. STAT. ch. 38, § 9-2 (1983)), making voluntary manslaughter a class 1 felony, became effective January 1, 1982. After that date, some of the extra class 1 convictions may be explained as the bargained-for reduction of murder charges.

78. See ABA, STANDARDS FOR CRIMINAL JUSTICE Ch. 3, The Prosecution Function, Standards 3-3.8(a), 3-3.9(b) (2d ed. Approved Feb. 1979) [hereinafter cited as ABA Prosecution Function Standards]. Those standards provide:

Standard 3-3.8. Discretion as to noncriminal disposition
(a) The prosecutor should explore the availability of noncriminal disposition, including programs of rehabilitation, formal or informal, in deciding whether to press criminal charges. Especially in the case of a first offender, the nature of the offense may warrant noncriminal disposition.

Standard 3-3.9. Discretion in the charging decision
(b) The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his or her discretion are:
(i) the prosecutor's reasonable doubt that the accused is in fact guilty;
(ii) the extent of the harm caused by the offense;
(iii) the disproportion of the authorized punishment in relation to the particular offense or the offender;
(iv) possible improper motives of a complainant;
(v) reluctance of the victim to testify;
(vi) cooperation of the accused in the apprehension or conviction of others; and
(vii) availability and likelihood of prosecution by another jurisdiction.

Id.

79. Since the passage of the Act, numerous courts have balked at imposing (and occasionally have simply refused to impose) the penalties the Act required. For a representative cross-section of the various stratagems employed, see People ex rel. Daley v. Schreier, 92 I11. 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 ex rel. Daley v. Limperis, 86 I11. 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 an unappealable acquittal of the class X offense of delivering over 30 grams of cocaine by finding defendants guilty of delivering lesser amounts, even though the parties had stipulated that the quantity exceeded 30 grams); People ex rel. Carey v. Bentivenga, 83 I11. 2d 537, 541, 416 N.E.2d 259, 263 (1981)
In that regard, Chart 5 below displays the percentages of defendants charged with felonies who had those charges reduced to misdemeanors by the prosecutor. As that chart shows, there was a marked difference between Cook County and the rest of the state under this measure. In 1980, for example, reductions of felonies to misdemeanors occurred in only a miniscule 2.4% of those cases resulting in conviction in Cook County, compared to a downstate figure of 39.9%.

Chart 5

PERCENTAGE OF ALL CONVICTED DEFENDANTS CHARGED WITH A FELONY WHOSE MOST SERIOUS CONVICTION WAS FOR A MISDEMEANOR

<table>
<thead>
<tr>
<th>Year</th>
<th>Jurisdiction</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>1980</td>
<td>Downstate</td>
<td>39.9</td>
</tr>
<tr>
<td></td>
<td>Cook</td>
<td>2.4</td>
</tr>
<tr>
<td></td>
<td>Total</td>
<td>17.7</td>
</tr>
<tr>
<td>1981</td>
<td>Downstate</td>
<td>41.3</td>
</tr>
<tr>
<td></td>
<td>Cook</td>
<td>3.3</td>
</tr>
<tr>
<td></td>
<td>Total</td>
<td>19.1</td>
</tr>
</tbody>
</table>

This startling difference makes it doubtful that a prosecutorial willingness to reduce felonies to misdemeanors can be utilized as a direct measure of proneness to charge-bargain felony offenses generally. Given the overall frequency with which such reductions occur, however, it seems fair to conclude that there is a considerable willingness on the part of prosecutors to

(iissuing a writ of mandamus directing the trial judge to vacate its order granting defendant probation for a non-probationable offense); People 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 nolle prosequi a charge merely because the prosecutor and 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). Cf. People v. Verstat, 112 Ill. App. 3d 90, 97, 444 N.E.2d 1374, 1380 (2d Dist. 1983) (court may not deny state's motions for continuance and to nolle prosequi cases and proceed to "trial" over state's objection); People v. Oswald, 106 Ill. App. 3d 645, 650, 435 N.E.2d 1369, 1373 (2d Dist. 1982) (termination of supervision instanter not an allowable sentencing disposition).

80. This information was unavailable for Cook County prior to 1980. Chart 5 was compiled from Dispositions Chart, supra note 67.

81. It is certainly no reflection on the Cook County state's attorney's office to wonder whether it really is some 12 to 18 times less likely to reduce felony charges than its downstate counterparts, as this differential would suggest. A more likely explanation is that the former office has had an extensive felony screening operation in place during the period in question. Through this screening, all incidents that local police authorities believe should be treated as felonies are reviewed and approved by an assistant state's attorney before formal charges are filed. Such a system could, of course, be expected to reduce to a minimum the subsequent reduction of felony charges to misdemeanors. A similar explanation could account for a number
accept plea bargains as to charge.\textsuperscript{12} It is difficult to believe that all of these bargains are in the interest of justice. Rather, one of two possibilities seems far more likely. First, it may be that defendants are being routinely overcharged and then those charges are reduced to more appropriate ones during the bargaining process. The other possibility is that prosecutors are filing appropriate charges initially, but then are abandoning proveable and appropriate offenses in favor of lesser, factually inappropriate ones.

The prevalence of either one of these practices, but particularly the latter, obviously raises substantial questions concerning not only the quality of sentences but the basic integrity of the criminal justice system as well. While the Act contains limited safeguards against inappropriately lenient or severe sentences resulting from plea bargains, all of them are premised on the notion that an offender before the court for sentencing has pled guilty to a charge bearing some resemblance to what he or she actually did. It obviously makes no sense to struggle to fit a sentence to an offender and his or her offense of the other downstate counties—12 in 1980 and 15 in 1981—that also reduced less than 10% of their felony filings to misdemeanors. See infra note 83 (discussing an increased frequency in defendants' lesser charges than brought by prosecutors).

A few further words of caution in interpreting these data also are in order. First, there is no way of knowing whether an observed tendency to reduce felonies to misdemeanors result from unilateral prosecutorial decisions (perhaps a needed corrective to local police practices) or whether such reductions arise from bargains with defense counsel. The answer to that question obviously would be of the utmost significance in assessing what any given frequency of reduction meant. Likewise, there could be substantial differences from one jurisdiction to another in the proportion of less serious or marginally proveable felonies in a prosecutor's mix of cases, and this variation, in turn, could justify substantial differences in the rate of reduction of felonies. In short, it would be unjustified to equate a particular rate of reduction with prosecutorial effectiveness.

82. In 1979, 1980 and 1981 a total of 34, 42 and 31 counties respectively reduced more than 40% of their felony filings to misdemeanors at the instance of the prosecutor, as shown in the table below.

<table>
<thead>
<tr>
<th>% of Misdmr. Convictions</th>
<th>Number of Counties</th>
</tr>
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<tbody>
<tr>
<td>40+ to 50</td>
<td>12</td>
</tr>
<tr>
<td>50+ to 60</td>
<td>9</td>
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<tr>
<td>60+ to 70</td>
<td>8</td>
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<tr>
<td>70+ to 80</td>
<td>4</td>
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<tr>
<td>80+ to 90</td>
<td>1</td>
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<tr>
<td>90+ to 100</td>
<td>0</td>
</tr>
<tr>
<td>TOTALS</td>
<td>34</td>
</tr>
</tbody>
</table>

There seems to be at least some downward trend in the 1981 data, with only four counties handling more than 60% of their felony filings in that manner, as compared to 10 in 1980 and 13 in 1979.
if the latter is distorted or concealed from the court as a result of prosecutorial practices. Nevertheless, the available data indicate that this is occurring with some degree of regularity. This article will return at a later point to a fuller discussion of how this problem might be alleviated. For now it will assess how the Act's intended judicial oversight of prosecutors' sentencing recommendations has worked out in practice.

3. The Efficacy of Judicial Checks on Bargained-For Sentences

For two reasons, a complete assessment of judicial supervision of plea bargained sentences is not possible at present without a detailed study of individual court records. First, very little data concerning these bargains are available. The number of pleas involving prosecutorial sentencing recommendations is unknown, as is the number of such pleas rejected by the judiciary. Second, even if this information was available and a rate of judicial and prosecutorial confrontations over sentencing could be established, the proper interpretation of such data would be difficult. A low rate of confrontation, for example, would not necessarily mean that the Act's stric-

83. This trend may have accelerated since passage of the Act. One early study of the impact of the Act on the criminal justice system in Cook County found the frequency of cases in which defendants charged with armed robbery (a class X felony) were disposed of by a plea or finding of guilty to some lesser charge was 42% after the Act's passage as compared to only 20% before its enactment. Schiller, Illinois' New Sentencing Laws—The Effect on Sentencing in Cook County: Some Early Returns, 60 Chi. B. Rec. 130, 138-39 (1978). A later study, using different case samples, found that the frequency of cases in which a defendant was allowed to plead guilty to reduced charges increased from 17% in the pre-act sample to 23% in the post-act sample—an overall 35% increase which the study's authors termed a "significant difference." See Consult, Ltd., Analysis of the Impact in Cook County of the 1978 Illinois Sentencing Legislation 12 (1981) (unpublished, prepared for the Evaluation Committee of the Chicago-Cook County Criminal Justice Commission).

Apparently this high rate of pleas to reduced charges has continued. The most recent study on this subject followed the cases of a cohort of 272 defendants charged with armed robbery through to disposition, and found that a total of 64 (23.5%) were sentenced only to some reduced charge, 41 (15.1%) were sentenced apparently as the result of plea bargains and the remaining 23 (8.4%) as a result of judicial determinations at preliminary hearing or trial. See Chicago Crime Commission, Armed Robbery in Chicago: The Response of the Cook County Justice System 20-26 (1984) [hereinafter cited as CCC Armed Robbery Study].

84. See infra notes 135-74 and accompanying text.

85. Some of these deficiencies are referred to supra note 73. The studies referred to in supra note 83 do not extensively discuss the judicial role in plea bargaining. Interestingly enough, the Chicago Crime Commission study, while generally criticizing the lenity of the sentences imposed on repeat offenders, whether after plea or trial, nonetheless concluded that "[t]here was little difference in the sentences given to those defendants who either pled or were found guilty before the bench." CCC Armed Robbery Study, supra note 83, at 29, 41-42.

86. There are only a few reported opinions in which trial judges imposed different (and usually more severe) sentences on defendants than those proposed by the prosecution. See, e.g., People v. Horstman, 103 Ill. App. 3d 17, 430 N.E.2d 523 (5th Dist. 1981); People v. Cheshier, 3 Ill. App. 3d 523, 278 N.E.2d 93 (3d Dist. 1972). It is likely, however, that most instances of judicially rejected bargains are not the subject of reported decisions because the parties either accede to the judge's view or proceed to trial.
tures were ineffective. Arguably, the mere existence of a legislative structure for a detached and somewhat enlightened judicial review of sentencing bargains could have produced agreements more readily defensible on their merits. If so, judicial interference would seldom be necessary.

But while direct evidence of the nature and extent of judicial plea bargains may not be available, there is a small group of cases that casts doubt on the rosy theory of judicial "benign neglect." This group is comprised of those multi-defendant cases in which some but not all defendants plead guilty to a particular offense and the remaining defendants, tried and convicted of the same offense, challenge their sentences as excessive compared to those of their pleading colleagues. These cases all too frequently display a pattern in which judges allow questionably lenient bargains to be made with more culpable members of the criminal enterprise while imposing all the law allows—and sometimes a bit more—on those defendants who insist on their right to trial. 87

The case of People v. Surges, 88 involving the armed robbery of a man and the subsequent brutalization of his family, starkly illustrates the blind judicial acceptance of plea bargained sentences. The opinion reveals that Surges and two codefendants, Banks and Smith, accosted a man on the street and robbed him at gunpoint, with Banks wielding the weapon. 89 Under threat

87. Even before passage of the Act, Illinois law had treated sentencing disparity in such cases as creating special problems irrespective of the apparent propriety of the sentence imposed on the more heavily punished offender. The prevailing, but not unanimous, view was that any substantial difference in the sentences imposed on different offenders should be justified by their respective prior adult and juvenile records, the degree and manner of their participation in the crime, and any other personal factors which should be considered in imposing sentence. If these factors were not considered, then notions of "fundamental fairness and respect for the law" required that the sentences be brought in line. See, e.g., People v. Cherry, 130 Ill. 2d 965, 969, 267 N.E.2d 744, 747 (5th Dist. 1971), cert. denied, 406 U.S. 962 (1972); People v. Steg, 69 Ill. App. 2d 188, 191-92, 215 N.E.2d 854, 855-56 (3d Dist. 1966); cf. People v. Curl, 131 Ill. 2d App. 2d 944, 269 N.E.2d 740 (4th Dist. 1971) (refusing to reduce sentence of not less than three years for conviction of armed robbery where accomplice, who had pleaded guilty, was given probation).

The application of this body of law to cases involving a mix of pleading and tried codefendants has been tempered by the realization that concessions in the sentences imposed on those pleading guilty were frequently necessary to obtain their pleas. A greater degree of disparity would be tolerated than in a case involving defendants who had either pleaded guilty or had been found guilty. Consequently, while recognizing that a defendant was not to be punished for asserting his or her right to put the state to its proof, People v. Moriarty, 25 Ill. 2d 565, 185 N.E.2d 688, 689 (1962), a defendant who was tried and found guilty could not prevail merely by showing that his or her sentence was more severe than that of an otherwise similarly situated codefendant who pled guilty. Rather, he or she had the additional burden of showing that the sentence was both grossly disparate from that of a codefendant and unjustified in light of his or her prior criminal record and the nature of his or her participation in the offense at bar. See People v. Utinas, 55 Ill. App. 3d 306, 324-25, 370 N.E.2d 1080, 1093 (1st Dist. 1978); cf. People v. House, 98 Ill. App. 3d 304, 307, 424 N.E.2d 412, 415 (5th Dist. 1981) (disparity created by prosecutorial grant of immunity to codefendant not a basis for challenging sentence imposed).

89. Id. at 964, 428 N.E.2d at 1014.
of death, the three men then forced their victim to take them to his home, ostensibly to get more money. Upon their arrival, however, Banks pistol-whipped the initial victim and then sexually assaulted the victim's wife and fourteen-year-old daughter. Smith also sexually assaulted the daughter. Surges stood watch over the husband while these crimes were being committed, but did not otherwise participate in them.

Banks and Surges were tried jointly, Banks to the bench and Surges to a jury. In the middle of the trial, Banks changed his plea to guilty and was given concurrent eight year sentences for armed robbery, rape, attempted rape, and indecent liberties. At the time, Banks was already serving a fifteen-to-thirty-year sentence for murder. Surges's trial continued. He claimed that the victims had been mistaken in their identification of him, and presented an alibi defense. The jury, however, convicted him of armed robbery and unlawful restraint. The trial judge imposed concurrent sentences of thirteen and three years for these offenses, giving no reason for doing so.

On appeal, Surges contended that his thirteen-year sentence for armed robbery was grossly disparate from the eight-year sentence imposed on the far more culpable Banks. Surges suggested that the only reasonable explanation for his longer term was his decision to exercise his right to a jury trial and to interpose a vigorous defense. The appellate court disagreed, concluding that Banks's lighter sentence was supported by the fact that he was already sentenced to a long term and had presented only a "minimal" defense. In contrast, the appellate court strongly implied that Surges's alibi defense consisted of suborned perjured testimony. Those factors, coupled with Surges's facilitation of the more serious crimes committed by Banks and Smith, were seen as justifying his longer sentence.

The traditional rationales favoring disparity in codefendant sentencing include prior criminal record, degree of participation in the offense, and amenability to rehabilitation. There is not one shred of evidence in the Surges opinion to suggest that any of these traditional rationales would sup-

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90. Id.
91. Id. at 965, 428 N.E.2d at 1014.
92. Id.
93. Id.
94. Id. at 966, 428 N.E.2d at 1015.
95. Id. at 971, 428 N.E.2d at 1019.
96. Id.
97. Id. at 972, 428 N.E.2d at 1019-20.
98. Id. at 964, 428 N.E.2d at 1014.
99. Id.
100. Id. at 971, 428 N.E.2d at 1019.
101. Id.
102. Id. at 972, 428 N.E.2d at 1020.
103. Id.
port a shorter sentence for Banks than for Surges. Banks was both the leader and the most vicious perpetrator of all of the crimes committed. He apparently had the more serious criminal record, and there certainly is nothing to suggest any reasonable likelihood of his rehabilitation any time in the foreseeable future.

Any error in Surges's sentence, however, is dwarfed by the real problem the case presents: the inexplicably lenient eight-year sentence imposed on Banks. There are innumerable reported decisions in which less culpable offenders than Banks have received extended terms of imprisonment. Even though the propriety of Banks's sentence was not directly at issue, a sharp criticism of that penalty would have been far more constructive and appropriate than the court's remarkably farfetched defense of it. The appellate court could have influenced countless future sentencing decisions for the better by making it clear that the Act did not intend trial courts to routinely approve bargained sentences. Its pusilanimous deference to the reasoning and result reached below, however, undoubtedly had just the opposite effect. As the appellate court in People v. Blumstengel wisely observed, "[t]he mere fact that the trial court has a superior opportunity

105. See supra text accompanying notes 89-93.
106. Banks had been previously convicted and sentenced of an unrelated murder. 101 Ill. App. 3d at 972, 428 N.E.2d at 1019.
107. Moreover, the appellate court was faced not with a well-reasoned sentencing decision but rather with a totally unexplained one. Id. at 971-72, 428 N.E.2d at 1019. Although the court held that the defendant had waived that issue, the court's approach to the question of waiver appears to be erroneous. See infra notes 265-315 and accompanying text. Certainly, its willingness to search the record for factors which might support the sentence imposed and then to assume that such factors were relied upon below was clearly inappropriate, especially where those factors appeared to involve Surges's assertion of his right to a jury trial. As the second article in this series will make clear, however, such opinions are the legacy of the abuse-of-discretion standard of review prevailing in this area.

108. See, e.g., People v. Perruquet, 118 Ill. App. 3d 293, 300, 454 N.E.2d 1055, 1060 (5th Dist. 1983) (affirming consecutive 60-year sentence imposed for two acts of rape of same victim, where defendant had "extensive prior record," including previous rape conviction); People v. Medley, 111 Ill. App. 3d 444, 444 N.E.2d 269 (4th Dist. 1983) (defendant received concurrent 45-year sentences for brutal rape and home invasion, did not appeal sentence); People v. Perez, 101 Ill. App. 3d 64, 73, 427 N.E.2d 820, 828-29 (1st Dist. 1981) (defendant's 60-year sentence for rape affirmed, based on prior rape conviction and testimony of two other women at sentencing hearing who said defendant also raped them); cf. People v. Nance, 100 Ill. App. 3d 1117, 1122, 427 N.E.2d 630, 635-36 (4th Dist. 1981) (affirming 45-year sentence for unaggravated armed robbery based primarily on prior armed robbery conviction). These cases are cited for comparative purposes only and not to imply that they all are appropriate in their own right.
109. Affirming a lenient sentence on the grounds that the defendant receiving it has already been convicted of murdering someone else will hopefully not soon be repeated. Given the nature of Banks's crimes and the strength of the evidence against him, rewarding him for his graceful surrender with a lenient sentence makes the "minimal defense" rationale rather like the argument asserted by the defendant of fable who murders his parents and then throws himself on the mercy of the court because he is an orphan.
110. See supra notes 50-61 and accompanying text.
111. 61 Ill. App. 3d 1016, 378 N.E.2d 401 (5th Dist. 1978).
to observe and evaluate potential dangerousness of a criminal offender. . . does not imply that the sentence imposed in a particular case is just and equitable." The Surges court would have done well to observe that admonition.

Beyond such general exhortations to virtue, the Surges court could have taken some tentative steps down the road to quantifying the lenity in sentencing which is appropriate in return for a guilty plea. Even prior to the Act, isolated opinions recognized the injustice of permitting too great a differential to develop between the sentences given to pleading and tried defendants. Justice Schaefer, who supported some such differential, pointed out in People v. Darran that "a great disparity [between sentences], combined with other circumstances unrelated to guilt or innocence, may cause innocent persons to plead guilty." Certainly, these concerns are even more relevant since the Act's passage. While the Act did not intend to eliminate either guilty pleas or sentencing concessions as a quid pro quo for such pleas, it did seek to subject those practices to its overriding concern for fairness and proportionality in sentencing. The Act intended that standards be developed to quantify the permissible differences between the sentences imposed on plea-bargained and tried defendants and to ensure that all sentences would lie within a relatively narrow range of reasonable dispositions, given all the relevant facts and circumstances. This intent is demonstrated by the Act's general concern over undue sentencing disparity, its efforts to improve the quality of the sentencing process, and its insistence that even bargained-for sentences be subject to an independent judicial assessment of their propriety. Nevertheless, it seems clear that, with rare exceptions, the Act has not fostered the development of these standards.

The recent case of People v. Frank illustrates the need for a systematic

112. Id. at 1021, 378 N.E.2d at 404.
113. For some tentative suggestions along these lines, see infra text accompanying notes 159-66.
115. Id. at 180-81, 210 N.E.2d at 481; see also People v. Hall, 17 Ill. App. 3d 1, 4, 307 N.E.2d 664, 667 (5th Dist. 1978) (sentence of 100 to 150 years for murder found excessive and reduced to 35 to 80 years where codefendant received sentence of only 20 to 50 years, notwithstanding substantially worse criminal record of the more severely sentenced offender).
116. See supra text accompanying notes 27-61.
118. See authorities cited infra note 422; see also People v. Griffin, 113 Ill. App. 3d 184, 189, 446 N.E.2d 1175, 1181 (lst Dist. 1982) (four consecutive five-year sentences for conspiracy to commit theft reduced to concurrent sentences of same length); People v. Hobbs, 90 Ill. App. 3d 587, 588, 413 N.E.2d 454, 456 (4th Dist. 1980) (affirming conviction, but reversing six-year extended term sentence imposed on defendant having extensive (but unspecified) prior record for stealing five bottles of whiskey), vacated, 86 Ill. 2d 242, 427 N.E.2d 558 (1981); People v. LaPointe, 85 Ill. App. 3d 215, 221, 407 N.E.2d 196, 204 (2d Dist. 1980) (reducing sentence of life imprisonment without parole to term of 60 years to allow for possibility of rehabilitation), rev'd, 88 Ill. 2d 482, 431 N.E.2d 344 (1981).
and careful consideration of codefendants' sentence disparity. That case involved a brutal murder committed by Frank and two other defendants, Wieting and Johnson. The evidence at Frank's trial revealed that although he and Johnson both had had serious disagreements with the victim in the recent past, all three defendants had played active roles in the planning and execution of this brutal crime. Johnson and Wieting each pleaded guilty to murder and received sentences of thirty-five and thirty years, respectively. Frank, however, insisted on a jury trial. He was convicted of murder and received a sentence of seventy-five years. Frank argued on appeal that his sentence was excessive in light of those imposed upon his codefendants. The appellate court disagreed, stating that the Wieting/Frank disparity was justified by differences in their prior criminal records (the nature of which was not discussed) and that the Johnson/Frank disparity was justified by Johnson's serious grievance with the victim. The appellate court upheld Frank's sentence, concluding that there was "no evidence" that Frank "was being punished for standing on his right to stand trial." The court's explanation of why he should have been sentenced to forty or forty-five more years than his partners in crime seems to be somewhat lacking in substance. The court's use of Frank's prior criminal record to support some sentencing differential between him and Wieting was appropriate. A disparity of this magnitude seems excessive, however, especially because the court apparently was not willing to distinguish between Johnson and Frank on that basis, and Johnson's sentence was only five years more than Wieting's. Similarly, the highlighting of Johnson's prior grievance against the victim smacks rather strongly of a post hoc rationale, especially because the court ignored Frank's prior differences with the victim and also downplayed Johnson's role in perpetrating various atrocities on the victim.

120. Id. at 390, 397, 424 N.E.2d at 800, 805.
121. All three defendants waylaid the victim after work and, using guns supplied by Frank, sought to abduct him. When the victim attempted to flee, Wieting shot and wounded him in one knee, and Frank then shot him in the other leg. After the victim was subdued, he was taken to Johnson's van where he was handcuffed and chloroformed. Id. at 390-91, 424 N.E.2d at 800-01. The defendants then drove around for awhile, trying to decide what to do with the victim. At one point Johnson administered chloroform to him again, with the intent to kill him, but apparently was unsuccessful. After Wieting pointed out that the victim still appeared to be alive, he was taken to a deserted stretch of road, and dumped in a snowbank, still unconscious. He apparently died of exposure, contributed to by the many wounds he had received. Id. at 390, 424 N.E.2d at 801.
122. Id. at 397-98, 424 N.E.2d at 805-06.
123. Id. at 397, 424 N.E.2d at 805.
124. Id.
125. See supra note 87. The Act also requires courts to take into account defendants' prior histories of delinquency or criminal activity in sentencing. Ill. REV. STAT. ch. 38, §§ 1005-5-3.2(a)(3), 1005-5-3.2(b)(1) (1983). Indeed, it is the only matter that must be considered even in plea-bargained cases. Id. § 1005-3-1.
126. 98 Ill. App. 3d at 397, 424 N.E.2d at 805.
127. Id. at 390, 424 N.E.2d at 800.
In short, the factors purportedly relied on by the court in upholding Frank’s sentence were dwarfed in importance by its conclusion that a sentencing differential of this magnitude between the pleading and non-pleading codefendants was legitimate. Such a tolerant attitude was inappropriate even before passage of the Act. Under the Act’s additional strictures against such disparity, it is even more inappropriate today.

C. Additional Reforms

Although the issue of codefendant sentencing disparity has attracted a great deal of judicial attention and controversy, the need to devise a rational solution to that issue should not obscure the need to address a far more crucial problem: the need to develop general principles to govern the negotia-

128. See supra note 121.
129. A hint of the court’s visceral reaction in this regard was its willingness to go out of its way to reject the idea that “a person who is found guilty of murder after a full trial should have his sentence reduced to the length of sentence of his companions who pleaded guilty and were not tried.” 98 Ill. App. 3d at 398, 424 N.E.2d at 806. Frank, however, had made no such argument.
130. See authorities cited supra notes 114-15.
131. See supra text accompanying notes 24-33 and infra notes 176-218, 343-58 and accompanying text.
133. The most sensible way to approach plea/trial codefendant disparity cases is that suggested by the dissenting opinion in People v. King, 102 Ill. App. 3d 257, 261-64, 430 N.E.2d 292, 295-97 (3d Dist. 1981) (Stouder, J., dissenting). Beginning with the principle that the sentence imposed ought not depend on the judge rendering the decision “but only on the application of the legal rules [governing sentencing] in an objective manner,” the dissent suggested that the sentence deemed appropriate for the first offender be treated as “a point of departure or standard of comparison” in determining the sentences of others participating in that same offense. Id. at 262, 428 N.E.2d at 296 (Stouder, J., dissenting). While stating that a judge imposing a later sentence should not be bound by the first sentence, Justice Stouder maintained that a substantially different sentence should not be imposed unless the judge found, based on matters of record, either that: (1) the defendants were distinguishable in terms of traditionally recognized objective factors or (2) the earlier-acting court had abused its discretion in imposing a sentence that was either too severe or not harsh enough. Id. at 263, 428 N.E.2d at 297 (Stouder, J., dissenting).

This approach, it is submitted, is both entirely consistent with the Act and quite likely to ameliorate existing criticisms of the codefendant disparity doctrine. Treating the latter point first, the codefendant rule is most persistently faulted because there is no reason to assume that the lower sentence is appropriate and, if it is not, there is no reason to compound that error by imposing another unduly lenient or unduly severe sentence on a codefendant. See authorities cited supra note 132. The proposed approach would accommodate this concern by insisting that the earlier imposed sentence’s appropriateness be re-examined by allowing a departure therefrom, based on a convincing and properly articulated rationale. It thus would permit the
tion of all plea bargains. Cases involving questionable sentencing differentials between codefendants represent only a small percentage of the plea bargains presented to sentencing judges each year. Larger issues must be faced, including how to facilitate the striking of appropriate bargains across the board and how to assure an appropriate level of scrutiny of such bargains.

There are no easy answers to fashioning the necessary improvements in those areas. Direct control of prosecutorial charging decisions seems unlikely to be effective. The judiciary cannot insist that particular charges be brought, and legislative injunctions seeking to do so are probably impossible to police. To be beneficial the solution should appeal to prosecutors' and...

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"best" sentence to be imposed on all defendants, as critics of the codefendant rule argue should occur.

Moreover, this approach could have a number of important collateral benefits affecting the plea bargaining process by curbing excessive differentials in sentences between pleading and tried codefendants. Once a rule became established that any objectively indefensible lenity in the bargains offered to defendants would have to be publicly repudiated by a later-acting judge, prosecutors would undoubtedly begin negotiating within a more appropriate range of alternatives. Such a prospect would not only reign in unduly lenient bargains, but also would alleviate the in terrorem effect of threats of the likely sanctions for defendants who chose not to plead.


Some authorities have called for early judicial scrutiny of prosecutorial charging decisions, arguing that it is essential to effective regulation of plea bargaining practices. See Arenella, Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication, 78 Mich. L. Rev. 463, 530-32 (1980); Gifford, supra note 46, at 75-77. The author seriously doubts the wisdom of that approach for four reasons. First, it would tend to enmesh the judiciary, to a very significant extent, in the affairs of the prosecution. Second, it would require the judiciary to make detailed assessments of the weight and sufficiency of the evidence, which would be both time consuming and arguably inappropriate at least where defendants later chose to exercise their right to trial. Third, the "return" for such supervision probably would be minimal for all but the small percentage of cases where very serious charges (murder, class X or class 1 felonies) were substantially and unjustifiably reduced at a later stage of the proceedings. Finally, judicial oversight of this last class of cases can be accomplished by less intrusive means. See infra text accompanying notes 149-57.

136. Additionally, the constitutionality of any such efforts might well be called into question as violations of the principle of separation of powers, as rigidly construed in such cases as People v. Davis, 93 Ill. 2d 155, 442 N.E.2d 855 (1982) (effort by legislature to require judges to give reasons for imposing sentences would be unconstitutional intrusion on judicial prerogatives) (discussed infra in text accompanying notes 291-315), and People v. Cox, 82 Ill. 2d 268, 412 N.E.2d 541 (1980) (legislative efforts to provide for appellate review of sentences struck down as unconstitutional intrusion by General Assembly into the manner in which cases are decided) (discussed infra in text accompanying notes 369-90). As argued in those discussions, although both cases were incorrectly decided and certainly should not be extended to the measures proposed herein, they obviously cast a pall over efforts by the General Assembly to control how other branches of government utilize their sentencing discretion. It remains to be seen whether the judiciary will defend prosecutorial powers against perceived legislative encroachments as zealously as it has defended its own prerogatives.
judges’ senses of professionalism and fairness and should strike at the factors that might prevent such officials from attaining those standards. Several measures, only one of which is apt to be expensive, merit consideration.

First, prosecutors should not be forced by the press of their dockets and budgets into making concessions that they do not believe are in the interests of justice. It seems likely, in many areas of the state, that prosecutors labor under burdens that make it difficult for them to strike bargains that are in the best interests of both society and the defendant. Where that is so, their resources should be strengthened. The extent of any such bolstering must, of course, be tempered by pragmatic considerations. The resources that can be made available to any component of the criminal justice system are finite. Moreover, any strengthening of prosecutorial resources almost certainly will place additional demands on judicial and criminal defense personnel rather quickly. Considerations of efficiency and fairness clearly require a response to such demands as well. It is beyond this author’s competence to estimate how substantial those costs may be.

In addition, it is likely that increases in the resources available to adjudicate criminal cases will impose additional burdens on the correctional system. The nature and magnitude of that impact is also difficult to assess. On the one hand, additional resources at the adjudicatory stage of criminal proceedings could speed up conviction rates, and hence, incarceration rates. These rate increases could occur, at least in the short term, regardless of whether the frequency or length of prison sentence were increased. In addition, if unduly lenient bargains predominate over those of undue severity, as seems to be the case, then the net effect of the plea bargaining reforms proposed below could be to increase both the frequency and length of prison sentences with a resultant increase in prison population. On the other hand, in this author’s opinion, the entire structure of prison sentences, as well as many individual sentences, are too severe and should be modified downward

137. The influence such considerations have on prosecutorial willingness to bargain is not entirely clear. One authority recently reviewed the literature on that subject and concluded that “caseload considerations may not be as important as commonly believed,” and that “even if heavy caseloads do encourage prosecutors to plea bargain generally, they do not determine a prosecutor’s attitude toward plea bargaining in any particular case.” Gifford, supra note 46, at 44.

138. It is unclear to what extent public funds will be committed. The answer will depend on the manner in which criminal defense work is handled in the areas of the state most directly affected, as well as the present workload of judges sitting in those areas. Judicial caseloads vary widely in Illinois, and in many locales substantial increases in criminal caseloads might well be accommodated without any appreciable increases in judicial manpower. Criminal defense counsel, on the other hand, appear more universally hard pressed with numerous counties not even served by full-time public defenders.

139. Such a phenomenon appears to have contributed to recent prison population increases in Illinois, as Cook County judicial and criminal justice authorities responded to a substantial backlog in criminal cases by assigning large numbers of additional judges, prosecutors and public defenders to these matters. For a fuller discussion of the DOC’s overcrowding problems, see infra text accompanying notes 539-56.

140. See supra text accompanying notes 73-83.
rather substantially. 

Were such reforms instituted, their effect would be to lower the prison population, or at least to lessen its rate of growth. How these opposing tendencies would balance out is problematic, but the likelihood of some increase in public expenditures for correctional facilities or programs must be acknowledged.

The next step in rationalizing the plea bargaining process would be to eliminate features of the Act that in themselves tend to induce distortion of the facts or the law in order to do "justice" in a particular case. On occasion, the minimum penalties applicable to some offenses are perceived as so severe that everyone—prosecutor, defense counsel, and judiciary—may agree that it would be highly unjust to impose them. In such cases, even in a system free of undue demands on prosecutorial resources, it is likely that an offense-distorting bargain will be struck and approved.

A far better approach to such cases would be to build sufficient flexibility into the sentencing code to handle such exceptionally mitigated offenders without altering the offense in that manner. As discussed in more detail elsewhere, to achieve such flexibility, it would be necessary to amend the Act to include a modest downward modification of present sentencing ranges, to allow for periodic imprisonment for a narrowly described group of class X or class 1 felony offenders currently subject to mandatory prison sentences, to modify the armed violence statute, and perhaps to further narrow other provisions of the Act that presently mandate prison sentences.

141. This topic is covered systematically in the second article in this series. See authorities cited supra note 79 and infra notes 631-42 and accompanying text.

142. See authorities cited supra note 79. This phenomenon is commonly recognized in the literature on plea bargaining. See D. Newman, Conviction: The Determination of Guilt or Innocence Without Trial 177-84 (1966); Alschuler, The Prosecutor's Role in Plea Bargaining, 36 U. Chi. L. Rev. 50, 52-53 (1968).

143. See infra text accompanying notes 631-42. Further support for such a change also will be proffered in the second article in this series.

144. See supra note 630 and accompanying text.

145. The amendments to Illinois' armed violence statute included in the Act made it a class X felony to commit any felony while armed with a dangerous weapon. Pub. Act No. 80-1099, § 1, 1977 Ill. Laws 3264, 3268 (codified at Ill. Rev. Stat. ch. 38, § 33A-2 (1983)). Case law quickly established that the statute was constitutional as applied even to nonviolent felonies in which the defendant was armed with a dangerous weapon, but made no effort to use it. People v. Haron, 85 Ill. 2d 261, 264, 422 N.E.2d 627, 630 (1981); People v. Pace, 100 Ill. App. 3d 213, 215, 426 N.E.2d 983, 986 (1st Dist. 1981). But see People v. Griswald, 111 Ill. App. 3d 454, 444 N.E.2d 267, 268-69 (4th Dist. 1983) (questioning the wisdom of such a broadly drawn statute).

In addition, a number of courts concluded that the armed violence statute applied to either voluntary manslaughter, People v. Rollins, 108 Ill. App. 3d 480, 495, 438 N.E.2d 1322, 1332-33 (1st Dist. 1982), or involuntary manslaughter, People v. Matzke, 102 Ill. App. 3d 905, 907-08, 430 N.E.2d 353, 355 (1st Dist. 1981), if committed while armed with a deadly weapon. These conclusions gave prosecutors the option to convert most homicides into class X felonies. This situation, at least, appears to have been remedied by the court in People v. Alejos, 97 Ill. 2d 502, 507-14, 455 N.E.2d 48, 50-53 (1983), which held that the armed violence statute was not intended to apply to voluntary manslaughter. The other problems with the statute, however, still remain.

146. See People ex rel. Carey v. Bentivenga, 83 Ill. 2d 537, 416 N.E.2d 259 (1981), for
If such a flexible system is conditioned to avoid abuses, plea negotiations may take place within that broadened framework. This will allow the defendant to be sentenced appropriately without sacrificing public safety. Such a revision, while probably not significantly changing the types and lengths of sentences actually received by exceptionally mitigated offenders, nonetheless could produce substantial benefits for the public. Because it would produce more accurate versions of the criminal propensities of defendants, such a system would go a long way towards assuring that dangerous recidivist offenders would be quickly detected and appropriately punished.

After removing these barriers to rational bargains, troublesome questions remain. What standard should be used to determine whether a bargained-for sentence is in compliance with the Unified Code of Corrections, and how will a judge actually go about determining whether that standard has been met? For the prosecutor, the basic starting point is to consider the information at hand concerning the nature and circumstances of the offense, the defendant's participation therein, and the defendant's personal background including any prior history of delinquency or criminal activity. The prosecutor then must ask and answer the following question: Given all of the foregoing information, what charge(s) would I be prepared to bring against the defendant at trial and what sentence(s) would I recommend upon conviction? This is a complicated process, but a necessary one, for the

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147. The ethical precepts governing decisions on charging and sentencing require the prosecutor to consider such matters. As to charging considerations, the ABA Prosecution Function Standards, supra note 78, make it "unprofessional conduct" for a prosecutor to either institute or permit the continued pendency of charges once it becomes known either that they are not supported by probable cause or that there is insufficient admissible evidence to support a conviction. Id. Standard 3-3.9(a). Similarly, Standard 3-3.9(e) points out that a prosecutor should not bring or seek charges greater in number or degree than can reasonably be supported with evidence at trial. For the text of Standard 3-3.9(b), see supra note 78. See also ILLINOIS CODE OF PROFESSIONAL RESPONSIBILITY Rule 7-103(a) (codified as Article VIII of the Illinois Supreme Court Rules set out following ILL. REV. STAT. ch. 110A, § (1983)) ("prosecutor may not institute criminal charges when obvious no probable cause") [hereinafter cited as ILL. CPR].

The ABA Prosecution Function Standards, supra note 78, also call upon the prosecutor to play a role in the sentencing process very much like that called for by this proposal. In that regard, Standards 3-6.1 and 3-6.2 provide in pertinent part:

Standard 3-6.1 Role in Sentencing
(a) The prosecutor should not make the severity of sentences the index of his or her effectiveness. To the extent that the prosecutor becomes involved in the sentencing process, he or she should seek to assure that a fair and informed judgment is made on the sentence and to avoid unfair sentence disparities.
(b) . . . When requested by the court to furnish a sentencing recommendation, the prosecutor should have the obligation to do so.

Standard 3-6.2 Information Relevant to Sentencing
(a) The prosecutor should assist the court in basing its sentence on complete and accurate information for use in the presentence report. The prosecutor should disclose to the court any information in the prosecutor's files relevant to the sentence. If incompleteness or inaccuracy in the presentence report comes to the prosecutor's
sentence thus arrived at is the benchmark against which the propriety of any leniency in the actual plea bargain reached must be measured.\textsuperscript{148} The process of determining how much leniency is too much cannot be answered without a candid assessment of what is being foregone.

For offenders chargeable with a class 1 or greater felony, a further measure would be proposed: the filing with the sentencing judge, under seal,\textsuperscript{9} of a statement by the prosecutor answering the question posed above and explaining why he or she was prepared to recommend making any concessions embodied in the plea bargain.\textsuperscript{150} This document would serve a number of useful purposes. First, the judge would be informed of the basis and attention, the prosecutor should take steps to present the complete and correct information to the court and to the defense counsel.

(b) The prosecutor should disclose to the defense and to the court at or prior to the sentencing proceeding all information in the prosecutor's files which is relevant to the sentencing issue.

ABA Prosecution Function Standards, supra note 78, Standards 3-6.1, 3-6.2.


The possibility of offering additional leniency to an offender, up to and including immunity, based on the cooperation with law enforcement authorities, was deliberately omitted from this calculus for several reasons. First, many cases do not involve this variable at all, making it an improper subject of inclusion in a generally applied rule. Second, these cases vary enormously, making the formulation of any general rule rather difficult. At one extreme are those in which a relatively minor actor in a criminal episode provides absolutely critical information against the major figure in the case, which is essential for successful prosecution. At the other extreme are cases in which the information or testimony furnished either is of little or no importance to the prosecution of others or is outweighed by other factors, such as the cooperating defendant's role in the commission of the offense, and/or his or her prior record.

Perhaps the closest one can come to a general rule in this area is that plea bargaining concessions should not normally be offered for such cooperation, unless it is of significant help to law enforcement authorities and could not be obtained without a sentence discount of the type offered. Agreements to sentences of probation or grants of immunity would be reserved for those cases in which a nonincarcерative sentence otherwise would have been appropriate. See Gifford, supra note 46, at 84-85.

149. Keeping prosecutorial sentencing recommendations confidential in this manner could have the twin benefit of encouraging prosecutorial candor while discouraging prosecutorial play to the gallery of public opinion. It is anticipated, however, that the prosecutor's recommendations would be available to defense counsel, in accordance with prevailing ethical precepts. See ABA Prosecution Function Standard 3-6.2, supra note 147; cf. Ill. CPR, supra note 147, Rule 7-104(b). Other authorities have argued that such disclosures should be made public, as a matter of principle. See Gifford, supra note 46, at 85-86.

150. This measure is tied to the offenses charged rather than those pleaded to by the defendant. This allows close scrutiny of the disposition of all offenders who were believed by the authorities to have committed those crimes posing the greatest danger to public safety. The decision to allow these offenders to plead guilty to charges of an entirely different character undoubtedly poses the greatest threat to the public's well-being. Admittedly, some such persons might still escape scrutiny by convincing the responsible authorities to file more lenient but factually inappropriate initial charges. Because counsel for the accused is not involved at that stage of the typical case, however, such reductions would almost certainly be limited to those rare cases with extraordinary mitigating circumstances. A failure to file the full range of charges in these cases could well be viewed as entirely appropriate. See ABA Prosecution Function
magnitude of the concessions being offered and would be alerted to whether additional measures, such as a pre-sentence investigation, should be undertaken before approving or disapproving the bargain. Second, the judge would be provided with a second opinion as to the appropriate "non-discounted" sentence for the offender. Finally, this statement would provide a more informed basis for the sentencing judge's deference to the bargain struck between the parties than is presently called for under the Act.

It is, of course, possible that these prosecutorial statements would be biased or self-serving, but it is far from clear that such would be the case. To begin with, rule 7-102(a)(5) of Illinois' Code of Professional Responsibility expressly forbids the attorneys from "knowingly mak[ing] a false statement of . . . fact," a prohibition echoed in ethical standards directed specifically to prosecutors. Those strictures, when coupled with a variety of other ethical constraints, hopefully could be expected to keep such prosecutorial statements reasonably accurate.

Moreover, there are a number of pragmatic factors that would operate in favor of keeping such statements within reasonable bounds. Persistent prosecutorial puffing concerning the charges that could be asserted and the sentences that would be recommended after conviction would expand the differential between the bargained-for sentence and that deemed "just." This

Standards, supra note 78, Standard 3-3.9(b); see also supra note 135 (cases holding that the judiciary cannot insist that prosecutors bring particular charges against offenders).

There is no reason in principle why such recommendations should be limited to the offenses herein proposed. At least one authority has advocated that a similar disclosure be required, not just for serious offenses, but for every case in which the prosecutor has made a sentencing recommendation. See Gifford, supra note 46, at 85. In this author's view, however, because of this requirement's possible additional burden on prosecutorial authorities and its marginal importance in many less serious cases in which imposition of probation would be virtually a foregone conclusion, it seems preferable to confine it to cases involving more serious charges as herein proposed. Proponents of Governor Thompson's original criminal justice package also favored this view. S.B. 165, as amended 80th Ill. Gen. Assembly, 1977 Sess., ¶ 1.


152. For a discussion of the reasons for crediting this recommendation as "appropriate," see infra notes 154-58 and accompanying text. Of course, nothing in this proposal prevents defense counsel from disputing the prosecutor's contentions.

153. See supra notes 59-61 and accompanying text.

154. See Ill. CPR, supra note 147, Rule 7-102(a)(5).

155. See ABA Prosecution Function Standards, supra note 78, Standard 3-2.8(a), which provides in pertinent part: "It is unprofessional conduct for a prosecutor intentionally to misrepresent matters of fact . . . to the court."

156. Prosecutors' attempts to make their pre-sentence statements either biased or self-serving would also appear to violate Rules 1-102(a)(4) (prohibiting "conduct involving dishonesty, fraud, deceit or misrepresentation") and 1-102(a)(5) (prohibiting "conduct that is prejudicial to the administration of justice") of the Illinois Code of Professional Responsibility. Such conduct also could be construed as a "fraud upon a tribunal," which Rule 7-102(b)(2) would require him to "promptly reveal . . . to the tribunal." See Ill. CPR, supra note 147, Rules 1-102(a)(4), 1-102(a)(5), 7-102(b)(2), and Rules 1-102(a)(1), 7-102(a)(8) (both forbidding conduct that violates a disciplinary rule).
gap would not only tend to reflect adversely on the prosecutor's bargaining acumen, if not the prosecutor's veracity, but also could jeopardize the bargain itself if the trial judge should be convinced that the proposed disposition was unduly lenient. If, on the other hand, the prosecutor sought to minimize these problems by "low-balling" the state's supposed charging and sentencing demands at trial, other difficulties would arise. The prosecutor would have to explain why a light sentence would have been acceptable, in light of the original charges and the offender's prior history of delinquency or criminal activity. The desire to avoid these embarrassing extremes, together with the efforts of defense counsel, would hopefully keep most prosecutors steered to a middle course.

What, then, of the sentencing judge's review of bargained-for sentences? It seems that the judge is confronted with a process very similar to that facing the prosecutor. Like the prosecutor, the judge must first consider the information at hand concerning the nature and circumstances of the offense, the defendant's participation in it, the defendant's personal background, and any prior history of delinquency or criminal activity. The judge then must ask: Given all the foregoing information, what range of sentences would I have been prepared to impose had the defendant been convicted after a trial on the charges in the bargained for plea? The answer to this question, difficult though it may be, is nonetheless an essential prerequisite to a decision as to whether to approve the plea bargain, for it is that hypothetical post-trial sentence that provides the scale against which the bargained-for sentence must be measured.

How great a deviation should be tolerated? The Act contains no answer, but it was designed to insure that all offenders receive sentences which are at least arguably commensurate with their crimes, prior records, and other pertinent circumstances. Given the legislative design, some specific and relatively narrow limitations are appropriate. For the sake of discussion, the following proposals are advanced. First, for class 2, 3, and 4 felonies, a plea bargain should be approveable if the bargained-for sentence is within.

Other proposals regulating plea bargaining have recommended pegging allowable concessions to percentages of a "presumptive" sentence to be set for each offense. See Gifford, supra note 46, at 77-85 (total available range normally to be within plus or minus 30% of presumptive sentence). While that approach has its virtues, the author believes that it does not allow sufficient interplay for the principal variables that can effect a choice of sentence—the defendant's prior record and the variations in circumstances surrounding commission of the offenses charged. It also would necessitate additional amendments to Illinois' sentencing law which, in this author's judgment, are utterly beyond the political pale.

Normally, of course, a discounted plea-bargained sentence "within" a given range of
two years of the sentence the judge would have imposed after trial. Second, for class X and class I felonies, a bargained-for sentence should be approveable only if within six and three years respectively of the judge's hypothetical sentence. Third, special rules should govern prosecutorial recommendations of probation or periodic imprisonment. In such cases, the judge's hypothetical after-trial sentence would have to be within two years of the minimum term for class 4 and 3 felonies, within one year of the minimum term for class 2 felonies, and equal to the minimum term for class 1 or X felonies before such agreements could be approved. Finally, for class M felonies, the bargained-for sentence should be within ten years of the judge's hypothetical post-trial sentence if it would have been imprisonment for a term of years, not less than the median extended-term sentence if the after-trial sentence would have been natural life, and not less than the maximum extended-term if the judge's sentence would have been death.

This rule would allow considerable flexibility to prosecutors and judges to compromise their differences, especially for minor offenses. The two-year differential between prosecutorial and judicial sentencing recommendations for class 2, 3, and 4 felonies covers the overwhelming majority of sentences currently meted out for such offenses. For example, with respect to the decision as to whether to grant probation in such cases, the judge could accept a bargain in which the prosecutor agreed to probation for every class 4 felon except those for whom an extended term of imprisonment seemed to be required, and for those class 3 and 2 felons whom the judge believed did not deserve prison sentences in excess of four years. Because most offenders at present receive a hypothetical post-trial judicial sentence would be below rather than above the hypothetical sentence. In those presumably rare instances where the court would be inclined to give a less severe sentence than that proposed in the bargain at hand, it would probably be appropriate to order a pre-sentence investigation to determine the source of the discrepancy. If the information provided by that investigation left the judge convinced of the correctness of his or her assessment, he would, of course, be free to impose the sentence of his choice, as in any other case. See supra note 160. If a bargained-for sentence were beyond the acceptable range of deviation from the hypothetical judicial sentence, however, the sentencing judge would be required to disapprove it.

162. At present, all class X felonies and many class I felonies carry mandatory prison terms. See ILL. REV. STAT. ch. 38, § 1005-5-3(c)(2) (1983). In later sections of this article, as well as in the next article in this series, proposals for making sentences of periodic imprisonment available in a carefully circumscribed group of such cases are recommended. See infra note 630 and accompanying text. Unless such changes were implemented, however, the above recommendations would apply only to certain class I felonies.

163. Under present law, the median extended term sentence for murder is 60 years and the maximum extended term sentence for that crime is 80 years. See ILL. REV. STAT. ch. 38, § 1005-8-2(a)(1) (1983). Interestingly, the latter part of this proposal already may be law. See People v. Walker, 84 Ill. 2d 512, 419 N.E.2d 1167 (1981) (where state offered defendant an 80-year sentence if he pleaded guilty to murder and trial court indicated that sentence would not exceed that amount, state not later allowed to seek death penalty when defendant withdrew his plea), cert. denied, 104 S. Ct. 1297 (1984).

164. These limitations are based on the minimum prison sentence for classes 4, 3 and 2 felons of one, two or three years respectively, see ILL. REV. STAT. ch. 38, § 1005-8-1(a)(5)(6)(7) (1983), and the proposed requirement that hypothetical judicial after-trial sentences be within
sentences well below those figures, no appreciable impact is anticipated on plea bargaining practices for such offenses. For class M, X, and 1 felonies, the permissible divergence increases to ten, six, and three years respectively, in recognition of the need to offer greater concessions to obtain guilty pleas to serious charges. Hopefully, most bargained for sentences will fall within these ranges of their hypothetical judicial after-trial counterparts so as to minimize interbranch conflicts.

This proposal is subject to a number of criticisms from a wide variety of quarters. For one, it legitimates both plea bargaining and concessions in sentencing made for the purpose of obtaining bargains, two practices that have been widely condemned. A sufficient answer, however, is that such

two years of those minima for Class 4 and 3 felons and one year for Class 2 felons. See text accompanying supra note 162.

165. Most convicted offenders in these categories presently receive probation. See Chart 6 in text, at 699. Likewise, data provided by the DOC show that most offenders in these categories who are incarcerated presently receive relatively minimal prison sentences. See infra text accompanying notes 413-25.

166. Not surprisingly, even under the current unstructured bargaining regime, substantially fewer persons plead guilty to more serious felonies than to lesser ones. The following table, compiled from the Dispositions Chart, supra note 67, displays the percentages of felons convicted of various classes of felonies who pleaded guilty to such offenses in each indicated year.

<table>
<thead>
<tr>
<th>Year</th>
<th>Jurisdiction</th>
<th>M</th>
<th>X</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
</tr>
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<tbody>
<tr>
<td>1979</td>
<td>Downstate</td>
<td>32.8</td>
<td>61.5</td>
<td>76.9</td>
<td>92.2</td>
<td>92.5</td>
<td>91.4</td>
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<td></td>
<td>Cook</td>
<td>42.9</td>
<td>75.7</td>
<td>81.5</td>
<td>92.8</td>
<td>97.7</td>
<td>87.0</td>
</tr>
<tr>
<td></td>
<td>Total</td>
<td>41.2</td>
<td>73.2</td>
<td>79.1</td>
<td>92.6</td>
<td>92.6</td>
<td>89.8</td>
</tr>
<tr>
<td>1980</td>
<td>Downstate</td>
<td>24.1</td>
<td>58.3</td>
<td>80.7</td>
<td>92.7</td>
<td>92.1</td>
<td>92.6</td>
</tr>
<tr>
<td></td>
<td>Cook</td>
<td>37.1</td>
<td>69.5</td>
<td>65.4</td>
<td>90.3</td>
<td>91.4</td>
<td>88.8</td>
</tr>
<tr>
<td></td>
<td>Total</td>
<td>33.6</td>
<td>67.3</td>
<td>72.0</td>
<td>91.2</td>
<td>91.7</td>
<td>90.8</td>
</tr>
<tr>
<td>1981</td>
<td>Downstate</td>
<td>29.6</td>
<td>61.0</td>
<td>86.8</td>
<td>92.8</td>
<td>93.5</td>
<td>94.9</td>
</tr>
<tr>
<td></td>
<td>Cook</td>
<td>30.6</td>
<td>60.2</td>
<td>79.3</td>
<td>87.7</td>
<td>90.0</td>
<td>86.1</td>
</tr>
<tr>
<td></td>
<td>Total</td>
<td>30.4</td>
<td>60.3</td>
<td>83.2</td>
<td>89.7</td>
<td>91.3</td>
<td>92.0</td>
</tr>
</tbody>
</table>

167. The author has made no effort to ascertain what types of sentencing concessions are actually offered by prosecutors in order to induce pleas to such charges. Were it to turn out that those concessions are presently less than those proposed here, reductions to the current levels would be favored. A considerable number of cases indicate, however, that the current "discount" being offered for such serious offenses is considerably greater than proposed here. See People v. Jackson, 89 Ill. App. 3d 461, 411 N.E.2d 893 (1st Dist. 1980) (defendant sentenced to 40 to 120 years for murder after trial instead of 15 to 25 years offered pursuant to plea of guilty); People v. Peddicord, 85 Ill. App. 3d 414, 407 N.E.2d 89 (3d Dist. 1980) (defendant offered probation if he pleaded; sentence of eight years after trial affirmed); People v. Franklin, 80 Ill. App. 3d 128, 398 N.E.2d 1071 (1st Dist. 1979) (defendant claimed to have been offered 18 to 50 years if he pleaded guilty to murder, affirmed sentence of 200 to 600 years imposed after trial). If those differentials are typical of the discounts offered, a thorough airing of the causes of such conduct and any necessary corrective measures would be highly desirable.

activities are a practical necessity approved by law. Moreover, this proposal at least has the virtue of rendering the criticized practices somewhat more standardized, limited, and regulated.

Another likely criticism of this proposal is a charge that it will hamstring prosecutors. Certainly that is not the intent, nor in this author's judgment the likely effect, of such a system. Furthermore it seems clear that present plea bargaining practices raise intolerable barriers to a rational sentencing scheme. Thus, a remedy involving some structuring and limiting of prosecutorial discretion must be undertaken. If such a remedy can be accomplished in a way that is viewed as less threatening to legitimate prosecutorial interests, its identification and implementation would be most welcome.

Finally, the proposal could be subject to the opposite criticism—that it will accomplish nothing. Under this view, judges would tailor their theoretical sentences to fit the proposed limitations, while prosecutorial recommendations, however bizarre and unsupportable, would be routinely approved just as they are now. This author believes, however, that most sentencing judges really will try to take an independent "hard look" at the bargains brought before them if they are convinced that it is their duty to do so. Quite apart from that possibility, the mere existence of concrete guidelines concerning plea bargaining concessions could favorably affect the quality of the


170. See supra notes 147, 165-67 and accompanying text.

171. The paramount interests served by prosecutors are not obtaining convictions and lengthy sentences, but doing justice and obtaining appropriate sentences. See Ill. CPR, supra note 147, Rule 7-104; ABA Prosecution Function Standards, supra note 78, Standards 3-1.1(b)(c), 3-1.4, 3-2.5(a), 3-3.4(c), 3-3.8, 3-3.9, 3-3.11, 3-6.1(a)(b), 3-6.2.

172. See supra notes 113-31 and accompanying text.

173. The term "hard look" is borrowed from various administrative law cases, where it is utilized as a shorthand description for the degree of scrutiny to be given to the decision of administrative agencies by reviewing courts. See, e.g., South Terminal Corp. v. EPA, 504 F.2d 646 (1st Cir. 1974); Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971); Leventhal, Environmental Decisionmaking and the Role of the Courts, 122 U. Pa. L. Rev. 509, 511 (1974).

174. This opinion may appear surprising in light of the unkind reflections on certain judicial decisions appearing later in this article. See infra notes 262-64, 313-24, 376-89 and accompanying text. Nonetheless, it is sincerely held. The requisite judicial independence would, of course, be all the more likely were the Illinois Supreme Court to exercise either its inherent or statutory rulemaking authority in support of such an effort. See Ill. Rev. Stat. ch. 38, § 1005-5-4.2 (1983). Indeed, the entire proposal outlined above could be implemented in this manner and, as a matter of constitutional law, it arguably should be. Suggestions for the court's consideration in that regard, as well as others, are discussed infra in notes 467-507 and the accompanying text.
bargains struck between counsel by setting realistic parameters for their negotiations. Of course, recommendations for even more effective procedures are wholly consistent with this limited effort.\textsuperscript{175}

But control of plea bargaining practices, important as it is, represents only one aspect of the efforts needed to structure the exercise of sentencing discretion. Another facet of that problem, the one most directly affected by the Act, concerns its efforts to control judicial sentencing discretion.

III. STRUCTURAL CONTROLS OF JUDICIAL SENTENCING DISCRETION

A. An Overview

The Act took a somewhat ambivalent approach to structuring the exercise of judicial discretion in sentencing. On the one hand, it clearly recognized the preeminent role to be played by the judiciary in sentencing matters by investing it with the authority and tools necessary to police prosecutorial sentencing discretion.\textsuperscript{176} On the other hand, mindful of the maxim "who will guard the guardians," The Act sought in a variety of ways to insure that judicial sentencing prerogatives would be exercised in an informed, reasoned manner. The provisions expanding resort to pre-sentence investigations,\textsuperscript{177} requiring a sentencing judge to be aware of a felony-defendant's prior juvenile and adult record before imposing sentence,\textsuperscript{178} and mandating an independent judicial assessment of any bargained-for sentence\textsuperscript{179} all illustrate efforts to structure sentencing discretion for that purpose.

In addition to these measures, the Act placed heavy reliance on a requirement that a trial judge prepare a statement detailing the evidence, information, or factors relied upon in selecting the sentence imposed.\textsuperscript{180} The Act also mandated the preparation of a report containing all information presented to the court in connection with the defendant's sentencing and a verbatim transcript of the sentencing hearing itself.\textsuperscript{181} These requirements, which have their origins in almost identical provisions of the reform group's bill,\textsuperscript{182} were intended to serve two principal goals. First, they were expected to focus the trial judge's mind on the purposes and importance of the sentencing decision, thus enhancing the likelihood that an appropriate sentence would be imposed.\textsuperscript{183} Second, they were expected to facilitate an informed appellate review of any sentences that were challenged as inappropriate.\textsuperscript{184}
In addition, the Act also intended that a number of sources of aid be available to counsel and trial judges who wished to place a particular sentencing decision in a larger context. First, the Department of Corrections (DOC) was required to gather detailed information concerning the sentences imposed on felony offenders committed to the department and to prepare annual reports of that information for the use of sentencing judges and counsel in criminal cases. These efforts were to be augmented by a newly-created Criminal Sentencing Commission (CSC). The CSC's role was to gather a wide range of information on sentencing dispositions, to monitor the Act's overall effects on the criminal justice system, and to propose any additional reforms that it thought appropriate to further the purposes of the Act, including sentencing guidelines. The data generated by the DOC and the CSC, it was believed, would serve to educate both judges and counsel as to the prevailing sentencing practices in the state. Thus, by identifying certain sentences as either extremely lenient or exceptionally harsh as compared to the usual run of cases, both sentencing judges and reviewing courts would be alerted to their anomalous, and arguably unduly disparate, nature.

In addition, the Supreme Court of Illinois was authorized to utilize its rulemaking powers to "prescribe such practices and procedures as [would] promote a uniformity and parity of sentences within and among the various circuit courts and appellate court districts." This action, it was hoped, would serve to interject issues of parity into the sentencing process in the most painless fashion possible—by allowing the judiciary a leading role in developing guidelines and standards for the exercise of the considerable sentencing discretion left to it under the reform proposals.

But what if, in spite of all these measures, a sentence was imposed that was wholly disproportionate to the facts and circumstances of the case? The Act provided a final barrier against such an eventuality by expanding the power of the appellate courts to modify the sentencing judge’s decision. Because of the controversy this proposal engendered, it is useful to trace the historical development of the Act’s appellate review provisions in some detail.

As originally conceived, the process for appellate review of sentencing was designed as a principal means for imposing regional and, ultimately, statewide...
controls upon any undue sentencing extremes, whether of unwarranted harshness or lenity. 2 Placing this power to modify sentences firmly under judicial auspices was believed to have at least four advantages. First, it would permit the development of a "common law" approach to sentencing that would be more responsive to significant factual differences arising from one case to the next. Second, it would draw fully on the existing expertise of judges in sentencing matters. Third, it would lessen concerns over the supposed threats to judicial independence implicit in the new law. 3 Finally, resistance to any evolving limitations on sentencing discretion would be lessened if those limitations were developed by judges rather than by others. 4

As originally developed, appellate review procedures were contained in a rather complicated bill that proposed both a state-initiated review 5 and a defendant-initiated review 6 of the sentence for legality, fairness, and proportionality. 7 This initial approach, however, was criticized on the ground that it was neither necessary nor appropriate for the General Assembly to prescribe the precise method for reviewing a sentencing decision. 8 The proposal was abandoned in drafting H.B. 1500, in favor of a simple provision authorizing felony defendants to appeal their sentences 9 and, as a protection against frivolous appeals, creating "a rebuttable presumption that the sentence imposed by the trial judge [was] proper." 20 If a defendant succeeded in overcoming this presumption, the appellate court was authorized to "modify the sentences and enter any sentence that the trial judge could have entered." 21 The appellate court, however, was precluded from increasing the severity of any sentence even though the defendant had put the propriety of his or her sentence at issue. 22 Moreover, the right of the state to challenge the leniency of a given sentence was eliminated. 23 The ultimate appellate review provision adopted in the Act closely tracked this language, differing only in authorizing the state to challenge the leniency of any sentence that had been put at issue by the defendant. 24

192. Technical Paper, supra note 40, at 43.
193. Id.
194. This point was never made explicit, but it was a concern of this author and at least some members of the subcommittee and its staff.
196. Id. ¶ 5-10-2 at 2-3.
197. Id.
198. Certain members of the judiciary took this position in testimony before the Adult Corrections Subcommittee.
200. Id.
201. Id. ¶ 5-5-4.1(1).
202. Id. ¶ 5-5-4.1(2).
203. Id. ¶ 5-5-4.1.
204. Pub. Act No. 80-1099, § 3, 1977 Ill. Laws 3264, 3302 (codified at Ill. Rev. Stat. ch. 38, § 1005-5-4.1 (1983)). This was a rather hollow right, as it was unlikely that a sentence that a defendant found too severe would be found too lenient by the appellate court. The author cannot recall a single reported instance in which the state sought to exercise this right before § 1005-5-4.1 was struck down as unconstitutional in People v. Cox, 82 Ill. 2d 268, 412 N.E.2d 541 (1980), discussed infra in text accompanying notes 369-90.
Throughout the period in which these legislative efforts were being undertaken, however, Illinois already had a mechanism for obtaining appellate review of the sentence imposed on a criminal defendant. Supreme Court Rule 615(b)(4) empowered a reviewing court to “reduce the punishment imposed by the trial court.” There were two reasons to legislate in this area despite the existence of rule 615(b)(4). The first was to permit increases in sentences on appeal, the assumption being that such a power would be exercised responsibly. It was also thought that this power would enable the appellate courts to fashion a more balanced and complete treatment of sentencing issues by bringing before those courts a fuller range of the sentences actually imposed on offenders, rather than merely the most severe sentences.

The second reason for legislative action was the narrow construction given to rule 615(b)(4) in People ex rel. Ward v. Moran. In that case, the Illinois Supreme Court held that the rule did not authorize a reviewing court to alter the type of sentence imposed on an offender by the sentencing judge. This limitation, which certainly was not apparent from the language of the rule itself, seemed particularly anomalous. It made those sentences thought by an appellate court to be most unfair—sentences of imprisonment when periodic imprisonment or probation was believed most appropriate—the least amenable to correction. This state of affairs seemed to be particularly undesirable in a sentencing system in which parole, the only source of discretionary power to mitigate sentences (other than the appellate courts), was to be abolished.

The General Assembly obviously felt it to be both fair and prudent to vest broad sentencing review powers in the appellate courts in such circumstances. That decision, however, was not prompted by any specific desire to modify the “abuse of discretion” standard for reviewing trial judges’ sentencing determinations. This standard had become firmly fixed in law by the time of the Act’s passage. Although the legislature felt that appellate

206. There were dissenters from this view. See McAnany, Merritt & Trombanhauser, supra note 43, at 639. Policy considerations aside, arguments were advanced from certain quarters that allowing state-initiated appeals might violate the double jeopardy clauses of the Illinois and United States Constitutions. This argument seems ripe for re-evaluation in light of the subsequent Supreme Court decision in United States v. DiFrancesco, 449 U.S. 117 (1980) (allowing appellate court to increase sentence on appeal initiated by government does not violate double jeopardy clause of the United States Constitution). But see Bullington v. Missouri, 451 U.S. 430, 446-47 (1981) (statute allowing prosecutor to appeal defendant’s sentence in capital case held unconstitutional, on rationale that the statute subjected defendant to “a trial on the issue of punishment”). DiFrancesco, of course, does not resolve the question of state constitutional strictures against such appeals, a subject beyond the scope of this article.
207. Proposal Commentary, supra note 27, at 56.
208. 54 Ill. 2d 552, 301 N.E.2d 300 (1973).
209. Id. at 555, 301 N.E.2d at 302.
review of sentencing decisions had been sporadic and ineffective at best, it believed that that condition had arisen because reviewing courts had been hamstrung by a lack of legislative guidance regarding appropriate sentences, coupled with a dearth of information concerning the bases for the sentences imposed below. With those defects corrected, it was anticipated that both sentencing errors and appropriate dispositions would be far clearer than they had been in the past. But while this meant that trial judges’ sentencing decisions would be vacated more frequently than before the Act’s passage, no modification of the abuse-of-discretion standard itself was seen as necessary in order for this to occur.

Properly analyzed, then, the Act’s efforts to structure judicial sentencing discretion were quite conservative and deferential to both the general independence and sentencing prerogatives of the judiciary. The preeminent role of judicial discretion in sentencing matters was preserved largely as it had been prior to the Act. Indeed, that role was enhanced in a number of respects. Nor was this done at all reluctantly. Rather, it seems fair to say that the legislature trusted judges to impose a proper sentence in most cases, provided that they were informed adequately as to the particulars of the case before them and that they were fully informed concerning the factors pertinent to their decisions. When errors did occur, it was anticipated that they would be revealed by the requirement for a reasoned basis for imposing sentence. The General Assembly trusted the judiciary to correct such errors itself through the appellate review process established by the Act, as well as through judicially created guidelines governing the exercise of trial

212. Subcommittee Report, supra note 38, at 11.
213. Id. The Subcommittee Report’s treatment of the issue of undue judicial discretion was itself a model of legislative discretion. Thus, while finding that undue disparity in sentencing had occurred, the subcommittee did not lay this failure directly on the judiciary itself. Instead, it found that “the wide range [of sentences] provided by indeterminate sentence statutes” was “responsible for excessively disparate and inequitable sentences.” Id. at 4. These disparities, the subcommittee noted, were “compounded by the uncertainties and inequities caused by the capriciousness of arbitrary parole decisions.” Id. at 5.

 Nonetheless, either in the body or appendix of its report, the subcommittee endorsed each of the proposals suggested by the reform group for either structuring or directly limiting the exercise of judicial sentencing discretion. Id. at 15-16.
214. This is not to deny that substantive limitations of sentencing discretion were imposed as well in a variety of forms—providing specific factors in mitigation and aggravation, Ill. REV. STAT. ch. 38, §§ 1005-5-3.1, 1005-5-3.2 (1983), narrowing existing sentencing ranges, id. §§ 1005-8-1, 1005-8-2, and limiting the circumstances under which extended or consecutive term sentences could be imposed, id. §§ 1005-5-3.2(b), 1005-8-4(a), being the most noteworthy. Nonetheless, as will be proffered in the next article in this series, these controls were deliberately subordinated to the structural controls discussed below.
215. The reassertion of judicial control over plea-bargained sentences illustrates this point. Indeed, determinate sentences in and of themselves enhance that authority, by assuring the sentencing judges that their wishes as to punishment will be implemented. See supra notes 32-33 and accompanying text.
216. See supra notes 180-83, 185-90 and accompanying text.
217. See Proposal Commentary, supra note 27, at 29.
judges’ sentencing discretion. Direct legislative limitations on that discretion were kept to a minimum.

This experiment in judicial self-restraint and self-policing appears to have worked rather poorly in practice. All three of the Act’s major controls on judicial discretion have been subject to constitutional attack as violative of the separation of powers. Only the first requirement, the mandatory consideration of certain information before imposing sentence, has been sustained. The latter two requirements, mandating a statement of reasons for imposing sentence and requiring a searching appellate review of sentencing decisions, have been invalidated as unconstitutional legislative intrusions on judicial prerogatives. These developments have been accompanied by an almost liturgical devotion to the perceived wisdom of the sentencing decisions of trial judges. As a result, the correction of such decisions on appeal as “abuses of discretion” has become a far too infrequent event. These developments are traced out in detail below.

B. The Use-of-Information Requirement

The Act sought to improve sentencing practices by mandating judicial consideration of certain information in all felony cases. When the parties had agreed upon a sentence to recommend to the court, a legislative judgment was made that the court need not have more information available to it than “the defendant’s history of delinquency or criminality.” When such an agreement had not been negotiated, however, a full pre-sentence report


219. See People v. Youngbey, 82 Ill. 2d 556, 413 N.E.2d 416 (1980) (sustaining constitutionality of mandatory consideration of certain information by trial judge before imposing sentence). For a discussion of Youngbey, see infra notes 226-40 and accompanying text.

220. See People v. Davis, 93 Ill. 2d 155, 442 N.E.2d 855 (1982) (stating that any effort by the General Assembly to require judges to provide reasons for imposing sentences would be unconstitutional; and holding that the Act’s language that judges “shall” do so was directory rather than mandatory); People v. Cox, 82 Ill. 2d 268, 412 N.E.2d 541 (1980) (holding that the Act’s appellate review provisions were unconstitutional as intrusions by the General Assembly on the manner in which cases are decided). For a discussion of Davis, see infra notes 291-315 and accompanying text. For a discussion of Cox, see infra notes 369-90 and accompanying text.

221. The author is aware of approximately 20 cases since the Act went into effect in which trial judges’ sentences were vacated on appeal as unduly harsh and which were not in turn reinstated by the Illinois Supreme Court. None of these cases develops any general guidelines for taking such actions and a number appear to have been erroneously decided. See infra notes 445-66 and accompanying text.

touching on a wide variety of matters was required.\textsuperscript{223} This information was required to be disclosed and considered because of the public interest in informed, rational sentencing decisions. The public interest overrode any custom of allowing the parties to strike their own bargains and have them ratified with minimal judicial oversight.\textsuperscript{224} Those procedures also facilitated the intelligent presentation of sentencing issues to trial courts and the review of those courts’ sentencing decisions on appeal, as the Act intended.\textsuperscript{225}

The right of the legislature to pursue these goals did not go unchallenged. In \textit{People v. Youngbey},\textsuperscript{226} the Illinois Supreme Court reviewed a circuit court decision that had held, \textit{sua sponte}, that the legislative requirement of a mandatory pre-sentence investigation was an unconstitutional encroachment on both the judiciary’s sentencing power and the executive’s plea bargaining authority.\textsuperscript{227} Neither party to the appeal supported this ruling\textsuperscript{228} and the supreme court made short work of it as well. The court referred to its then recent opinion in \textit{Strukoff v. Strukoff}\textsuperscript{229} for an authoritative discussion of the limitations that the legislature must observe in enacting laws relating to judicial proceedings. The court concluded that the pre-sentence investigation provision was constitutional.\textsuperscript{230} While observing that the imposition of sentence is a judicial function, the \textit{Youngbey} court went on to note that the provision on review dealt merely with an aspect of presentencing procedure\textsuperscript{231} that had been enacted “for the enlightenment of the court as well as for the benefit of the defendant.”\textsuperscript{232} Such a “useful tool for the sentencing judge” constituted a “reasonable legislative requirement” that did not violate the separation of powers.\textsuperscript{233}

The \textit{Youngbey} court’s heavy reliance on \textit{Strukoff} seemed to bode well for the resolution of separation of powers issues raised by other provisions of the Act. The \textit{Strukoff} court had tolerated a far more marked intrusion into an area of judicial activity than was presented by any of the Act’s provisions.\textsuperscript{234} In so doing, it had specifically refused an invitation to “fence off” the procedural aspects of judicial operations as beyond the legislative

\begin{itemize}
\item \textsuperscript{223} Pub. Act No. 80-1099, § 3, 1977 Ill. Laws 3264, 3294 (codified at \textsc{Ill. Rev. Stat.} ch. 38, § 1005-3-2 (1983)).
\item \textsuperscript{224} See \textit{supra} notes 180-83 and accompanying text.
\item \textsuperscript{225} See \textit{supra} note 184 and accompanying text.
\item \textsuperscript{226} 82 Ill. 2d 556, 413 N.E.2d 416 (1980).
\item \textsuperscript{227} \textit{Id.} at 559, 413 N.E.2d at 418.
\item \textsuperscript{228} \textit{Id.}
\item \textsuperscript{229} 76 Ill. 2d 53, 389 N.E.2d 1170 (1979).
\item \textsuperscript{230} 82 Ill. 2d at 560, 413 N.E.2d at 419.
\item \textsuperscript{231} \textit{Id.}
\item \textsuperscript{232} \textit{Id.} at 565, 413 N.E.2d at 421.
\item \textsuperscript{233} \textit{Id.}
\item \textsuperscript{234} In \textit{Strukoff v. Strukoff}, 76 Ill. 2d 53, 389 N.E.2d 1170 (1979), the court sustained a legislative provision requiring bifurcated trials in contested divorces. Although the statute did not conflict directly with any Illinois Supreme Court rule, it obviously was a direct regulation of the procedure to be followed by trial courts in conducting their day-to-day activities, an area in which judicial prerogatives are entitled to exceptional deference.
\end{itemize}
It also rejected the notion that the separation of powers doctrine necessitated "rigidly separated compartments" of government. Rather, the "real thrust" of the doctrine was to keep each branch of government "free from the control or coercive influence of the other departments."

The Strukoff court then analyzed the legislative purpose in enacting the measure noting that its objective was "unquestionably laudable . . . reasonable, and within the province of legislative power." The court concluded that, because the legislature had not tried to "direct how a court should decide cases . . . [or] to determine facts and apply the law to them," the measure at issue did not pose the dangers necessary to a proper invocation of the separation of powers doctrine.

Based on that reasoning, it would seem to follow that legislative requirements that judges give reasons for their sentencing decisions and that those decisions be subjected to correction on appeal could not possibly be unconstitutional intrusions on judicial prerogatives. These requirements posed no threat to the institutional independence of the judicial branch of government, nor were they an effort by the legislature to influence the outcome of particular cases. Instead, they had the "unquestionably laudable [and] . . . reasonable" objective of insuring that the legislative sanctions were imposed in a fair, rational, and even-handed manner. In two exceptionally misguided decisions, however, the Illinois Supreme Court struck down each of these requirements on precisely those grounds.

C. The Reasons Requirement

One of the linchpins of the new law was its requirement that a trial judge give reasons for the sentence imposed on an offender. This feature of the law served three principal functions. First, it accorded offenders a measure of fundamental fairness: the right to know why a particular sentence was imposed and to be assured that it met minimum standards of rationality.

235. In fact, the court noted rather tolerantly that "statutory provisions governing procedure are not uncommon." 76 Ill. 2d at 61, 389 N.E.2d at 1173.

236. Id. at 58, 389 N.E.2d at 1172 (quoting In re Estate of Barker, 63 Ill. 2d 113, 119, 345 N.E.2d 484, 488 (1976)).

237. 76 Ill. 2d at 58-59, 389 N.E.2d at 1172 (quoting People v. Farr, 63 Ill. 2d 209, 213, 347 N.E.2d 146, 148 (1976)).

238. 76 Ill. 2d at 61, 389 N.E.2d at 1173.

239. Id. at 60, 389 N.E.2d at 1172 (quoting People ex rel. County Collector v. Jeri, Ltd., 40 Ill. 2d 293, 203, 239 N.E.2d 777, 781 (1968)).

240. 76 Ill. 2d at 58-62, 389 N.E.2d at 1172-73.

241. ILL. REV. STAT. ch. 38, §§ 1005-4-1(c), 1005-8-1(b), 1005-8-4(b) (1983).

242. Id. § 1005-5-4.


245. Pub. Act No. 80-1099, § 3, 1977 Ill. Laws 3264, 3296, 3309 (codified at ILL. REV. STAT. ch. 38, §§ 1005-4-1(c), 1005-8-1(b) (1983)).

246. See supra notes 176-84 and accompanying text.
This effect also bolstered the second main purpose of this requirement: facilitating the correction of sentencing errors at the trial level by permitting the defendant to correct any errors or misperceptions the court might have had regarding the nature of the offender or the circumstances of the offense. Finally, if the trial judge remained convinced of the propriety of the sentence, this requirement eliminated the need to speculate on why the judge imposed a given sentence. Instead, a complete record would be provided upon which an appellate court could conduct a thorough review of the sentence imposed for appropriateness under the Unified Code of Corrections.

From the outset, the requirement of a statement of reasons was given a rather chilly reception by courts of review. Countless indulgent appellate panels approved even the most minimal utterance by trial judges as sufficient, exhibited an unquestioning acceptance of lengthier explanations of doubtful quality, and even excused sentences apparently imposed in part for reasons that violated the Act. Finally, in People v. Davis the Illinois Supreme Court administered the coup de grace to this requirement by holding that it was directory rather than mandatory.

1. The Erosion of the Reasons Requirement

Judicial hostility to the requirement of a reasoned basis for imposing sentence is manifested by a wide variety of presumptions used by appellate courts to shield questionable sentencing decisions from attack. In numerous cases, for example, trial judges made only passing generic reference to extensive mitigating evidence tendered by the defendants. At the same time, these judges dwelt at length on aggravating circumstances. Defendants' claims that the trial judges did not give due consideration to those mitigating factors have usually failed. Frequently the appellate courts have excused the

247. See supra notes 182-84 and accompanying text.
248. See supra text accompanying note 184.
249. Illustrative of this attitude is the case of People v. Riley, 99 Ill. App. 3d 244, 424 N.E.2d 1377 (4th Dist. 1981), in which the trial court's statement that "justice would be served" and a sufficient deterrent effected" by imposition of the sentences at issue would satisfy the statutory requirement. Id. at 254, 424 N.E.2d at 1384.
251. See, e.g., People v. Lobdell, 121 Ill. App. 3d 248, 259, 459 N.E.2d 260, 263 (3d Dist. 1983) (extended term sentence of 50 years for brutal rape affirmed, even though appellate court recognized that trial judge had relied on one admittedly improper factor, as well as on a general deterrence rationale, which also is not an appropriate basis for such a sentence); People v. Longoria, 117 Ill. App. 3d 241, 256, 452 N.E.2d 1350, 1360 (2d Dist. 1983) (imposition of extended term sentence on defendant affirmed, even though trial court had relied on a mistaken view of the severity of defendant's prior record in imposing sentence). This issue will be discussed at greater length in the next article in this series.
252. 93 Ill. 2d 155, 442 N.E.2d 855 (1982).
253. Id. at 162-63, 442 N.E.2d at 858.
254. See, e.g., People v. Meeks, 81 Ill. 2d 524, 533-34, 411 N.E.2d 9, 14 (1980); see also
absence of any specific reference to the mitigating materials by saying that the reasons requirement does not obligate trial judges to recite and assign a value to each factor they relied upon.\textsuperscript{255} Other courts have gone still further and stated, against all logic, that a court of review may assume that a trial judge who did articulate factors in aggravation also properly considered the factors in mitigation which were not articulated.\textsuperscript{256} Finally, other courts have erected a presumption that mitigating evidence was considered by the trial judge, absent some indication to the contrary, \textit{other than the sentence imposed}.\textsuperscript{257}

The Act's requirement of an articulated, reasoned basis for imposing sentence also has been affected by appellate courts' repeated affirmation of the principle that a sentencing judge should be given exceptionally wide latitude, free of traditional evidentiary restrictions, in deciding what matters to consider in imposing a given sentence.\textsuperscript{258} The basic rule in this context has been that any information bearing on the defendant's background or character, or the circumstances of the crime, may be taken into account in sentencing, as long as it meets minimal standards of fairness, reliability, and accuracy.\textsuperscript{259} Pursuant to this rule, a great quantity and variety of information has been held to have been properly put before sentencing judges. Moreover, lengthy sentences have been affirmed without any serious consideration being given to the reliability of the information, the fairness of its use against the defendant at sentencing, or the weight given to it by the sentencing judge.\textsuperscript{260} Defendants frequently have fared little better even in

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\item \textsuperscript{255} See authorities cited supra note 254.
\item \textsuperscript{257} People v. Baker, 114 Ill. App. 3d 803, 811, 448 N.E.2d 631, 637 (2d Dist. 1983); People v. Fugitt, 87 Ill. App. 3d 1044, 1047, 409 N.E.2d 537, 540 (3d Dist. 1980).
\item \textsuperscript{258} See, e.g., People v. LaPointe, 88 Ill. 2d 482, 491, 431 N.E.2d 344, 349-350 (1981); People v. Meeks, 81 Ill. 2d 524, 535, 411 N.E.2d 9, 14-15 (1980); People v. Adkins, 41 Ill. 2d 297, 300-01, 242 N.E.2d 258, 260 (1968).
\item \textsuperscript{259} See supra note 258; see also People v. Crews, 38 Ill. 2d 331, 337-38, 231 N.E.2d 451, 454 (1967) (stating that a sentencing determination is not bound by the usual rules of evidence, but may search anywhere within reasonable bounds for other factors which tend to aggravate or mitigate the offense).
\item \textsuperscript{260} People v. LaPointe, 88 Ill. 2d 482, 494-95, 431 N.E.2d 344, 349 (1981) (defendant's acknowledged use of illegal drugs, as well as alleged attempt to have them smuggled into jail, found to be a history of prior criminal activity); People v. Woods, 122 Ill. App. 3d 176, 179, 460 N.E.2d 880, 883 (1st Dist. 1984) (defendant's 60-year rape sentence affirmed in part because
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those rare cases where they have succeeded in convincing an appellate court that the rule's generous limits were exceeded. In these cases, yet another presumption has protected trial judges' sentencing discretion: that trial judges have recognized and disregarded incompetent evidence introduced during sentencing proceedings, unless the contrary clearly appears in the record.\textsuperscript{261}

This rather cavalier approach hardly comprises the battery of rules that would be formulated by a judiciary bent on assuring fairness and justice in sentencing. In their totality, these rules have eroded the value of the statement of reasons as a check on improper judicial sentencing decisions and have placed an extraordinary and unfair burden on any defendants seeking to challenge their sentences. The practical effect of these cases has been to create the presumption that trial judges have weighed all salient matters, and no others, in imposing sentence. Thus, trial judges have been allowed to consider matters that should not be given weight, and to ignore factors that should be taken into account. Inasmuch as the length of a sentence alone has been deemed irrelevant,\textsuperscript{262} defendants apparently may secure reductions of "explained" sentences only in those rare appeals in which that explanation contained an explicit error.\textsuperscript{263}

he attempted to hire person to kill victim after he had been apprehended); People v. Alexander, 118 Ill. App. 3d 33, 38, 454 N.E.2d 691, 694-95 (1st Dist. 1983) (defendant's 20-year armed robbery sentence affirmed in part on basis of testimony of another alleged victim of defendant who claimed he had robbed her); People v. Goree, 115 Ill. App. 3d 157, 162-63, 450 N.E.2d 342, 345-46 (5th Dist. 1983) (defendant's 40-year murder sentence affirmed in part on basis of his alleged involvement in another murder); People v. Smith, 105 Ill. App. 3d 639, 642-43, 433 N.E.2d 1169, 1171 (4th Dist. 1982) (fact that defendant utilized shotgun rather than some less dangerous weapon in perpetrating armed robbery held to be legitimately considered in aggravation, even though weapon was never fired); People v. Perez, 101 Ill. App. 3d 64, 67, 427 N.E.2d 820, 824 (1st Dist. 1981) (defendant's 60-year sentence for rape affirmed in part on the basis of testimony by two women, other than the complainant, who said he had raped them in separate incidents). Also fairly considered under this category are cases which permit defendants' perceived perjury at trial, People v. Hayes, 62 Ill. App. 3d 360, 366, 378 N.E.2d 1212, 1216 (1st Dist. 1978), or at sentencing, People v. Oravis, 81 Ill. App. 3d 717, 719, 402 N.E.2d 297, 299 (4th Dist. 1980), to be utilized in aggravation as indicia of a lack of remorse. These and similar cases, many of which are rather questionable in the author's view, are discussed at greater length in the second article in this series.


262. See supra note 257 and accompanying text.

263. Occasionally such explicit admissions are made. See, e.g., People v. Moriarty, 25 Ill. 2d 565, 566-67, 185 N.E.2d 688, 689 (1962) (vacating sentence where the trial judge had stated that the heavy sentence was imposed in part because the defendant had availed himself of his right to a jury trial); People v. Young, 20 Ill. App. 3d 891, 894, 314 N.E.2d 280, 282 (1st Dist. 1974) (sentence vacated where trial judge acknowledged that it had been increased in part because defendant had exercised his right to trial by jury). In rare instances, courts will vacate sentences based solely on the disparity between the rejected bargain and the sentence imposed after trial, but only in extreme cases. See People v. Dennis, 28 Ill. App. 3d 74, 76-77, 328 N.E.2d 135, 137-38 (1st Dist. 1975) (40- to 80-year sentence vacated where defendant was offered term of two to four or two to five years to plead guilty to same charges).
The Act unquestionably requires far more of both sentencing judges and reviewing courts. The whole purpose of the reasons requirement is to eliminate precisely the kinds of guesswork and speculation that the above cases have papered over with presumptions. Whenever factors which may have been either improperly excluded or improperly included may have been material to the sentence reached, remand for further sentencing proceedings should be required unless the undisputed matters of record fully justified the sentence imposed. The present trend, however, is in precisely the opposite direction: the internment rather than the resurrection of the reasoned basis requirement.

2. The Elimination of the Reasons Requirement

Even the forgiving rules of construction developed in the cases discussed above did not dispose of a more troubling group of cases: those in which the trial court had stated no reason for imposing sentence. The sentences in these cases had clearly been imposed in a manner contrary to that required by the Act. The question thus arose whether such an omission automatically required an appellate court to vacate the sentence and remand the case, or whether the omission, in at least some cases, might not have been excused on the basis of either harmless error or waiver.

Among the early appeals involving the complete failures of trial judges to follow the reasons requirement, a split of authority soon appeared as to the need for a further sentencing hearing. One of the first cases, People v. Rickman, held that a new sentencing hearing was required because the statutory provision mandated an adequate specification of reasons. The Rickman opinion did not mention whether the defendant had been prejudiced by or had waived the omission. Shortly thereafter People v. Slack also vacated a "no reason" sentence and remanded for a new sentencing hearing, holding that the statute made "some statement of sentencing considerations mandatory." Once again, the issues of prejudice and waiver were not specifically raised. Prejudice to the defendant seemed likely, however, because he had received concurrent maximum regular term sentences for the offenses involved despite his presentation of mitigating evidence at his sentenc-

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264. See supra text accompanying notes 245-48.
265. Pub. Act No. 80-1099, § 3, 1977 Ill. Laws 3264, 3296, provided that "[i]n imposing a sentence for a felony, the trial judge shall specify on the record the particular evidence, information, factors or other reasons that led to his sentencing determination." Public Act No. 80-1099, § 3, 1977 Ill. Laws 3264, 3296 (emphasis added), amended by Pub. Act No. 82-209, § 1, 1981 Ill. Laws 1163, 1164 (codified at ILL. REV. STAT. ch. 38, §1005-4-1(c) (1983)) (included factors in mitigation and aggravation); see also Public Act No. 80-1099, § 3, 1977 Ill. Laws 3264, 3309 (the judge's reasons may include any mitigating or aggravating factors specified in the Unified Code of Corrections) (codified at ILL. REV. STAT. ch. 38, § 1005-8-1(b) (1983)).
266. 73 Ill. App. 3d 755, 391 N.E.2d 1114 (3d Dist. 1979).
267. Id. at 762, 391 N.E.2d at 1120.
268. 81 Ill. App. 3d 557, 402 N.E.2d 275 (5th Dist. 1980).
269. Id. at 559, 402 N.E.2d at 277.
ing hearing.\textsuperscript{270} The \textit{Slack} court noted that the basic purposes behind the requirement were to enable reviewing courts to determine whether sentencing decisions were "consistent with statutory objectives," and to further the defendant's rehabilitation by making it clear that the sentences were not the result of "arbitrariness or persecution."\textsuperscript{271} Neither of these statutory purposes could be fulfilled, the court noted, if the bases for the sentencing decisions were unclear.\textsuperscript{272}

In a line of cases beginning with \textit{People v. Taylor},\textsuperscript{273} however, the First District took a different view. The \textit{Taylor} court, while agreeing that the statutory requirement was mandatory, nonetheless held that a remand for resentencing was unnecessary absent a showing of any prejudice caused by the omission.\textsuperscript{274} In \textit{Taylor}, a defendant with two prior convictions for forgery and counterfeiting received a four year prison sentence for a robbery in which he repeatedly struck the victim.\textsuperscript{275} Although a pre-sentence report had been prepared and a hearing in aggravation and mitigation had been held, the trial judge gave no reason for his choice of sentence.\textsuperscript{276} On appeal, the defendant challenged that omission but did not allege that his sentence was illegal or excessive. Nor did he allege that the trial court had considered incompetent evidence in arriving at its determination.\textsuperscript{277}

The appellate court concluded that the failure to give reasons in such circumstances was "only technical or formal error."\textsuperscript{278} Noting that the defendant had not even attempted to counter the statutory rebuttable presumption that the trial court's sentence was proper,\textsuperscript{279} the \textit{Taylor} court concluded that "it could hardly be contended that a sentence one year greater than the minimum was excessive or improper."\textsuperscript{280} Consequently, the appellate court concluded that the statutory purpose of facilitating the appellate review of sentences would not be furthered by a remand for a new sentencing hearing, and refused to require one.\textsuperscript{281}

The \textit{Taylor} court also implied that the defendant had waived his right to challenge the trial judge's omission of reasons for sentencing by failing to object thereto either contemporaneously or in post-trial motions.\textsuperscript{282} Nevertheless, two later cases, \textit{People v. Padilla}\textsuperscript{283} and \textit{People v. Wilson},\textsuperscript{284} made

\textsuperscript{270} \textit{Id.} at 559, 402 N.E.2d at 276.
\textsuperscript{271} \textit{Id.} at 559, 402 N.E.2d at 277.
\textsuperscript{272} \textit{Id.}
\textsuperscript{273} 82 Ill. App. 3d 1075, 403 N.E.2d 607 (1st Dist. 1980).
\textsuperscript{274} \textit{Id.} at 1077, 403 N.E.2d at 608-09.
\textsuperscript{275} \textit{Id.} at 1077, 403 N.E.2d at 608.
\textsuperscript{276} \textit{Id.}
\textsuperscript{277} \textit{Id.} at 1077, 403 N.E.2d at 609.
\textsuperscript{278} \textit{Id.}
\textsuperscript{279} \textit{Id.}
\textsuperscript{280} \textit{Id.}
\textsuperscript{281} \textit{Id.} at 1078, 403 N.E.2d at 609-10.
\textsuperscript{282} \textit{Id.}
\textsuperscript{283} 91 Ill. App. 3d 799, 415 N.E.2d 12 (1st Dist. 1980).
\textsuperscript{284} 93 Ill. App. 3d 161, 416 N.E.2d 1169 (1st Dist. 1981).
it clear that a waiver rationale would not stand when undisputed facts of record did not clearly and affirmatively show that the trial court's sentence was proper.\textsuperscript{285} In\textit{Padilla}, the defendant was able to point to "facts which show he might have been given a lesser [prison] sentence or some other disposition."\textsuperscript{286} As a result, his five-year sentence for voluntary manslaughter was vacated and the case remanded for a new sentencing hearing.\textsuperscript{287} \textit{Wilson} went even farther, vacating the relatively modest sentences of thirty and fifteen years imposed by the trial court for a brutal shotgun murder and attempted murder respectively, even though the defendant alluded to no specific circumstances in mitigation.\textsuperscript{288} The \textit{Wilson} court noted that the defendant's allegation of an excessive sentence could not be reviewed due to the trial court's failure to articulate the factors it had considered. On that basis the court found neither "actual nor substantial compliance with the statute" and remanded for a new sentencing hearing.\textsuperscript{289}

The \textit{Padilla/Wilson} approach was a most salutary construction of the new law because it promised to prevent the imposition of arbitrary and unjustifiable sentences while forestalling needless delay and disruption. In effect, it stripped away the statutory presumption that a sentence was proper\textsuperscript{290} when the reasoned weighing and analysis of the nature of the offender and the circumstances of the offense underlying that presumption did not affirmatively appear in the record. If a defendant in such circumstances could point to factors suggesting that a reasonable sentencing judge might have imposed a lesser sanction, a new sentencing hearing would be held. Otherwise the sentence would be affirmed based either on the appellate court's independent review of the record or on a "waiver" rationale.

All of these developments were thrown into disarray, however, by the Illinois Supreme Court's opinion in \textit{People v. Davis}.\textsuperscript{291} \textit{Davis} involved two consolidated cases in which defendants had been sentenced without a statement of reasons by the trial court. The defendants had not objected to that omission at the sentencing hearing or in a post-trial motion.\textsuperscript{292} In each case,
the appellate court had refused to remand for resentencing, holding that the defendant had waived his right to an explanation of his sentence.293 The supreme court noted that these appellate decisions conflicted with the view that the specification of reasons was "an independent duty imposed upon the trial court by statute which cannot be waived by either party," and whose violation always called for remand for a proper sentencing hearing.294 The middle ground adopted in such cases as Padilla and Wilson, requiring remand only when the absence of prejudice to the defendant did not clearly appear of record, apparently escaped the court’s notice.295

Thus, under the Davis court’s view of existing authority there were two lines of cases, both of which viewed the statute as imposing a mandatory requirement on trial judges to give reasons for the sentences they imposed, but only one of which permitted that requirement to be waived by the defendant.296 In a stunning turnabout, however, this uniform—and unquestionably accurate—construction of the Act was rejected by the court in its holding that the legislature had merely directed rather than mandated that trial courts give their reasons for sentencing.297 The Davis court concluded that a mandatory provision "would clearly . . . [be] an unconstitutional invasion of the inherent power of the judiciary" to impose sentence.298 To avoid invalidating the statute, the court construed it as merely stating a purely personal right of the defendant, rather than imposing an independent duty on the sentencing judge. The court concluded that this right could be waived.299

The Davis court’s constitutional argument was both unnecessary and ill-conceived. Inexplicably, a majority of the court seemed anxious to go out of its way to discourse on what was, at best, an ephemeral separation-of-powers issue.300 Rather than raise a constitutional issue, the court could have construed the statutory language, albeit erroneously,301 as intended solely to confer a personal benefit on a defendant which was waivable by that defendant in much the same way that other important rights are waivable.302 Alternatively, the court could have avoided constitutional questions by adopting the construction put forward in the Padilla/Wilson line of cases, excus-

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293. Id. at 158-59, 442 N.E.2d at 856.
294. Id.
295. The Court cited Wilson, supra notes 284-94, but treated it as an absolute "no waiver" case. Davis, 93 Ill. 2d at 159, 442 N.E.2d at 856.
296. Id. at 159, 442 N.E.2d at 856-57.
297. Id. at 160-61, 442 N.E.2d at 857-58.
298. Id. at 162, 442 N.E.2d at 858.
299. Id.
300. A dissent in Davis contended that the majority had raised the applicability of this doctrine on its own. Id. at 163, 442 N.E.2d at 859 (Simon, J., dissenting).
301. Cases such as People v. Slack, 81 Ill. App. 3d 557, 402 N.E.2d 275 (5th Dist. 1980), had correctly noticed that this requirement also served a public purpose of having sentences imposed consistent with statutory objectives. See supra text accompanying notes 271-72.
302. The full panoply of constitutional protections available to persons accused of crimes can be, and routinely are, waived in connection with pleas of guilty.
ing noncompliance except when a defendant could demonstrate possible prejudice—that is, a colorable basis for concluding that he might have been entitled to a less severe sentence.\textsuperscript{303}

Additionally, as a strong dissent pointed out, the majority was clearly wrong in its disposition of the separation-of-powers issue.\textsuperscript{304} The dissent noted that the court’s prior pronouncements in this area had repeatedly recognized the General Assembly’s right to enact laws governing judicial practice, as long as those laws did not unduly infringe upon the powers of the judiciary.\textsuperscript{305} The dissent then argued that no plausible basis had been suggested for finding the present intrusion to be “undue.”\textsuperscript{306} The statute, the dissent noted, did not dictate the content of any sentence.\textsuperscript{307} Moreover, its practical effect was indistinguishable from a provision of the Juvenile Court Act requiring a judicial statement of reasons for taking certain actions,\textsuperscript{308} the validity of which already had been sustained by the court.\textsuperscript{309} The dissent also maintained that the provision at issue was far less intrusive on judicial sentencing prerogatives than other legislative provisions that the court had sustained in the past.\textsuperscript{310} The dissent concluded:

> An unfortunate aspect of the majority’s decision is that it emasculates a fair and wise pronouncement of our legislature. . . . The result will be the creation in the eyes of the public of an imperial judiciary—a judiciary that is too busy fighting battles with the legislature over an imaginary encroachment on its independence to understand its relationship with the legislature and the people in proper perspective.\textsuperscript{311}

The position taken in the dissent, it is submitted, is entirely correct. The \textit{Davis} majority completely failed to consider that the reasons requirement had both private and public interest aspects. Quite apart from a particular defendant’s interest in receiving a proper sentence, the General Assembly has a legitimate interest of its own in seeing that the sentences which it authorizes are imposed in a fair and rational manner and that some viable mechanism exists for the correction of sentences which are at variance with those principles.\textsuperscript{312} The \textit{Padilla/Wilson} “harmless error” approach recognized

\begin{itemize}
\item \textsuperscript{303} See supra notes 266-89 and accompanying text.
\item \textsuperscript{304} 93 Ill. 2d at 163-68, 442 N.E.2d at 858-61 (Simon, J., dissenting).
\item \textsuperscript{305} Id. at 165, 442 N.E.2d at 860 (Simon, J., dissenting).
\item \textsuperscript{306} Id. at 166, 442 N.E.2d at 860 (Simon, J., dissenting).
\item \textsuperscript{307} Id. (Simon, J., dissenting).
\item \textsuperscript{308} Id. (Simon, J., dissenting).
\item \textsuperscript{309} Id. (Simon, J., dissenting); see \textit{In re Griffin}, 92 Ill. 2d 48, 440 N.E.2d 852 (1982).
\item \textsuperscript{310} \textit{Davis}, 93 Ill. 2d at 167, 442 N.E.2d at 860-61 (Simon, J., dissenting).
\item \textsuperscript{311} Id. at 167-68, 442 N.E.2d at 861 (Simon, J., dissenting).
\item \textsuperscript{312} The dissent in \textit{Davis} recognized this when it stated:
> The legislature of this State obviously has an interest in ensuring that our entire system of criminal justice is workable and fair to all concerned with it. Legislators declare what acts will be illegal and provide the permissible range of punishments. They put the ball in motion and obviously are interested in what comes after. By requiring judges to give reasons for the sentences they impose, legislators may become better informed and able to set punishment ranges.

The cause of uniformity in
and accommodated this public interest as well as the legitimate judicial interest in avoiding wasteful and pointless supplemental sentencing proceedings.\textsuperscript{313} Davis, on the other hand, inexplicably ignored these interests altogether. The court’s failure to acknowledge and defer to these interests, a marked departure from its own prior decisions, amounts to a rather gross judicial curtailment of legislative prerogatives.\textsuperscript{314} That curtailment is even more inexplicable in light of the supreme court’s apparent acceptance of the unanimous view of the appellate courts that the statute has properly conferred a right on a defendant to require the court to furnish a statement of reasons for the sentence imposed.\textsuperscript{315} If the supreme court is really saying that the legislature may vest a defendant with a power that the legislature could not exercise directly, that is a most peculiar doctrine indeed. The majority's position, in short, seems to be completely indefensible.

Unfortunately, the error propagated by Davis has already spread to another area in which it could have even more severe consequences for defendants: the imposition of consecutive sentences. Because these sentences could increase a defendant’s period of incarceration dramatically,\textsuperscript{316} the Act set out a special admonition requiring that a judge “shall set forth in the record” the basis for imposing consecutive sentences.\textsuperscript{317} This section of the Act was not dis-

\textit{Id.}

\textsuperscript{313} See supra notes 283-90 and accompanying text.

\textsuperscript{314} The court apparently forgot its observation of a few years earlier that “statutory provisions governing [judicial] procedures are not uncommon,” Strukoff v. Strukoff, 76 Ill. 2d 53, 61, 389 N.E.2d 1170, 1173 (1979), as well as its conclusion that in such cases, at least where “there is no conflict with a rule of this court, the procedural requirements … [will not be found to be] an unconstitutional legislative encroachment upon the rulemaking power of the judicial branch.” Id. There was, of course, no Supreme Court rule existing governing the giving of reasons for sentences in criminal cases.

\textsuperscript{315} In Davis, the court noted that the appellate courts had unanimously concluded that the Act entitled a defendant to a statement of reasons and that it would be error for the court to refuse to make a statement when requested. 93 Ill. 2d at 159, 442 N.E.2d at 857. While the court did not expressly affirm this view, a subsequent case has continued to characterize the statute as conferring a personal right on a defendant to a statement. See People v. Burton, 121 Ill. App. 3d 182, 184-85, 459 N.E.2d 329, 332 (2d Dist. 1984) (citing People v. Davis, 93 Ill. 2d 155, 442 N.E.2d 855 (1982)) (claim that trial judge erred in not providing such a statement held “waived . . . for failure to request [same]”).

\textsuperscript{316} Under the Act, consecutive sentences may range up to the sum of the maximum extended terms for the two most serious offenses of which the defendant is convicted. Pub. Act No. 80-1099, § 3, 1977 Ill. Laws 3264, 3311-12 (codified at ILL. REV. STAT. ch. 38, § 1005-8-4(c)(1) (1983)). For a defendant convicted of two class X felonies, for example, the potential maximum sentence would be extended from 60 years to 120 years. Pub. Act No. 80-1099, § 3, 1977 Ill. Laws 3264, 3310-12 (codified at ILL. REV. STAT. ch 38, §§ 1005-8-2(a)(2), 1005-8-4(c)(1) (1983)).

\textsuperscript{317} Pub. Act No. 80-1099, § 3, 1977 Ill. Laws 3264, 3311 (emphasis added) (codified at ILL. REV. STAT. ch. 38, § 1005-8-4(b) (1983)).
cussed in *Davis*. Nevertheless, in *People v. Hicks* the supreme court concluded, solely on the authority of *Davis*, that this requirement also was permissive rather than mandatory. Consequently, because the defendant had not requested that the trial judge set forth the basis for his decision to impose consecutive sentences, the issue was deemed waived.

The *Hicks* court's separation-of-powers analysis is subject to the same infirmities as was *Davis*. Moreover, as in *Davis*, it appears to have been an entirely gratuitous argument on the supreme court's part, because it appears that the defendant was given a full explanation of the sentence imposed on him. It can only be hoped that the Illinois Supreme Court will reexamine this area in the immediate future and ameliorate the mischief caused by *Davis* and *Hicks*, and adopt a rule patterned after the Padilla/Wilson approach.

**D. Appellate Review of Sentencing Decisions**

The provisions of the Act concerning the appellate review of sentencing decisions were designed to effectuate two main changes in prior law. First, review was to be more intensive. Before passing muster, a sentence would have to be found to be appropriate rather than merely authorized by law. Appropriateness was to be determined not only by applying the objectives and standards of the sentencing laws to the facts of the case at hand, but also by considering whether the proposed disposition was proportionate to the sentences imposed on similarly situated offenders. Second, the power of the appellate court to correct sentencing errors was to be expanded so that the full range of possible abuses could be remedied on appeal. This was to be accomplished by legislatively supplementing the power already granted to reviewing courts by Illinois Supreme Court Rule 615(b)(4) so as to permit the imposition by the appellate court of "any sentence that the trial judge could have entered, including increasing or decreasing the sentence or entering an alternative sentence to a prison term." These two changes were, of course, conceptually quite distinct. The first

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319. Id. at 374, 462 N.E.2d at 476-77.
320. Id. at 374, 462 N.E.2d at 477.
321. See supra notes 304-15 and accompanying text.
322. *Hicks*, 101 Ill. 2d at 374, 462 N.E.2d at 477; id. at 377, 462 N.E.2d at 478 (Simon, J., concurring).
323. Such reconsideration need not be in the form of a judicial limitation or repudiation of the constitutional doctrines enunciated in those decisions. Instead, the court could exercise its rulemaking authority to address the problems that the two decisions have spawned. For detailed recommendations along those lines, see infra notes 472-507 and accompanying text.
324. See supra notes 266-90 and accompanying text.
325. See supra notes 211-13.
326. See infra text accompanying notes 343-45.
327. See supra text accompanying notes 205-10.
dealt with how closely sentencing decisions should be examined on appeal. The second concerned what remedies should be available to the appellate court once an erroneous sentencing decision was detected. Consequently, if either of these provisions was infirm, the propriety of the other would not necessarily be affected. Nonetheless, these two issues were soon fused together as appellate courts sought to exercise the powers, long denied them by the Illinois Supreme Court, to scrutinize prison sentences intensively and to determine whether they should be reduced to terms of probation. Because of this conflation of issues, the Illinois Supreme Court erred in its analysis of both the meaning and the constitutionality of the Act’s sentencing review provisions.

1. The Standard of Review: “Abuse of Discretion” or Something Else?

Prior to the effective date of the Act, the Illinois Supreme Court had held on many occasions that the sentence imposed upon a convicted criminal was to be reversed on appeal only for an “abuse of discretion.” Although that phrase was typically left undefined, the dissenting opinion in People v. Perruquet explained that abuse of judicial discretion occurs “when the judicial action is arbitrary, fanciful or unreasonable,” so that no reasonable person would agree with the trial court. In the dissent’s view, this standard vested the circuit courts “with virtually unlimited discretion” to sentence offenders, resulting in a justifiably criticized disparity in sentences.

The dissent’s characterization of abuse of discretion seems an apt one. Certainly it was in keeping with the Perruquet majority to give the widest possible latitude to trial judges in sentencing matters, while keeping to a minimum the appellate interference with their determinations. Noting that it was not the function of the supreme court “to serve as a sentencing court” or to substitute its judgment for that of the trial court, the majority went on to eulogize the role of the circuit court judge in the sentencing process.

331. See infra text accompanying notes 368-91.
333. 68 Ill. 2d 149, 368 N.E.2d 882 (1977).
334. Id. at 157, 368 N.E.2d at 885 (Goldenhersh, J., dissenting).
335. Id. at 158, 368 N.E.2d at 886 (Goldenhersh, J., dissenting).
336. Id. at 156, 368 N.E.2d at 885 (Goldenhersh, J., dissenting).
337. The Perruquet majority explained the role of the circuit court judge as follows:

We have frequently stated that the trial judge is normally in a better position to determine the punishment to be imposed than the courts of review. A reasoned judgment as to the proper sentence to be imposed might be based upon the particular circumstances of each individual case. The trial judge, in the course of the trial and the sentencing hearing, has an opportunity to consider these factors “which
The sentence the judge selected was portrayed as a "reasoned judgment," based on "many factors, including the defendant's credibility, demeanor, general moral character, mentality, social environment, habits and age," which an appellate court could not hope to capture in its review of the record. 338

Much could be said against this sanctification of the sentencing process, particularly as it relates to the great run of cases disposed of by plea bargains. 339 To the extent that this portrayal is accurate at all, it appears applicable only to contested sentences imposed after full trials. When sentence is imposed pursuant to a plea bargain, most of this information will not be before the sentencing judge. 340 Although it is true that a trial court's ability to assess such factors, when they are present, is normally superior to that of an appellate court, 341 the Perruquet court failed to consider that appellate tribunals have familiarity with the sentencing practices of a large number of judges, an offsetting advantage denied the sentencing judge. That perspective gives appellate tribunals a corresponding awareness of sentences that vary substantially from those typically imposed and thus are in need of modification. 342

It was precisely this added element of comparative fairness or appropriateness that the legislature sought to provide through a more intensive appellate review of sentences. 343 The broad discretion typically given sentencing judges to adjust the sanction to fit the individual circumstances 344 was to be tempered by also requiring that the penalty imposed show a due regard for penalties imposed on other similarly situated offenders. In other words, a sentence that conformed on its face with statutory guidelines could be adjusted by an appellate court because it markedly and unjustifiably departed from the penalty typically imposed on offenders in comparable circumstances to the defendant. 345

The General Assembly's desire for more intensive appellate review emerges clearly from the legislative history of the Act, as several appellate courts

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338. "is superior to that afforded by the cold record in this court." (People v. Morgan (1974), 59 Ill.2d 276, 282, 319 N.E.2d 764, 768.) We continue to find that the trial court is normally the proper forum in which a suitable sentence is to be determined and the trial judge's decisions in regard to sentencing are entitled to great deference and weight.

339. See Chart I in text, at 644.

340. See supra notes 45-50 and accompanying text.

341. This is not to say that this advantage is always utilized.

342. See supra text accompanying notes 188-90 and infra text accompanying notes 399-407.

343. See supra text accompanying notes 191-213.

344. Although the Act was widely viewed as limiting judicial discretion, these limitations, as will be shown in the next article in this series, have proved to be more apparent than real.

345. See supra text accompanying notes 191-213. See generally sections I. A and I. C of this article.
Relying on the subcommittee report as well as various pre- and post-enactment commentaries on the new law, these cases correctly concluded that the legislature specifically intended a review of sentences with an eye to equalization and fairness. Nonetheless, the appellate courts were uncertain as to the reach of their new authority in light of the supreme court's abuse of discretion cases. Although these appellate courts realized that the extraordinary deference historically shown to trial court sentencing decisions was incompatible with the appellate courts' new responsibilities under the Act, it was unclear what the new standard of review should be.

Scanning the Act for insight, several courts seized upon its creation of a "rebuttable presumption that the sentence imposed by the trial judge is proper." Beginning with People v. Choate, several appellate courts concluded that the fact that the legislature used the term "rebuttable presumption" rather than "abuse of discretion" indicated an intent to authorize a new standard of review. These courts concluded that under the common legal meaning of rebuttable presumption, the circuit court's sentence could "be presumed to have been properly made and for sound reasons," absent an affirmative showing to the contrary.

This approach had a number of analytical shortcomings. On the one hand, this "new" standard did not appear to differ markedly from the old "abuse of discretion" standard it supposedly was supplanting. After all, if a sentence seemed to be indefensible even after having been accorded "every reasonable intendment," in all probability it also could be fairly described as one which...
no reasonable person would adopt within the traditional abuse-of-discretion line of cases. On the other hand, it was certainly incongruous to discover a mandate for closer appellate scrutiny of trial court sentencing decisions in the guise of a presumption clearly intended as a protection against the precipitous overturning of sentences by overly zealous appellate tribunals. In short, the Act's "rebuttable presumption" phraseology may have been an appealing peg upon which to hang a reformist hat, but it provided neither the source nor the content of the appellate courts' sentencing review powers. That phrase was a limitation upon, rather than a grant of, such powers, and it did not differ appreciably from the old abuse-of-discretion standard.

The true source and nature of the appellate courts' new responsibilities is both more indirect and more difficult to define. Those courts' new duties did not stem from some positive grant of power to replace the prevailing abuse-of-discretion standard with some more easily satisfied test. Rather, sentencing decisions were to be more readily reversible because the Act had made it easier for trial judges to commit an abuse of discretion. Because the new law required more of sentencing judges than the old had, both procedurally and substantively, sentencing decisions that formerly would not have been abuses of discretion now could be. The need to correct such abuses necessarily entailed a more intensive review of sentences than had been permitted previously. The ultimate standard of review—abuse of discretion—was unchanged; but the content of that standard had been transformed.

The type of appellate review envisioned by the Illinois legislature is indeed attainable. The truth of this assertion is illustrated by the Illinois Supreme Court's role in reviewing attorney discipline cases. In that capacity, the supreme court has consistently recognized an overriding duty to seek "a uniform standard of discipline" in comparable cases. Indeed, in recent


356. See supra text accompanying notes 199-204.

357. See supra text accompanying notes 211-13.

358. The intended substantive limitations on judicial sentencing discretion are discussed in detail in the second article in this series. See also supra notes 12-16 and accompanying text.

359. No claim is made, of course, that the General Assembly had this specific example in mind, or even that it fits exactly with the Act's intended role for appellate courts in reviewing trial judges' sentencing decisions. Nonetheless, the analogy is sufficiently close in a number of respects to merit a brief treatment here.

Final responsibility for the disciplining of attorneys rests with the Illinois Supreme Court. In re Chapman, 95 Ill. 2d 484, 492, 448 N.E.2d 852, 855 (1983). The court's involvement, however, occurs only after a lengthy administrative process in which allegations of attorney misconduct are first heard by a Hearing Board and, if any party so desires, by a Review Board. Ill. REV. STAT. ch. 110A, § 753(d), (e) (1983). Reports of the Review Board recommending disciplinary action are filed with the supreme court and, after the attorney has been given an opportunity to respond, that court determines the appropriate sanction, if any. Id.

years it has come to attach ever greater importance to that goal.\textsuperscript{361} Such a uniform standard is, of course, precisely what the Act sought to accomplish in the realm of criminal sentencing.\textsuperscript{362}

Moreover, the supreme court has not hesitated to limit the effect to be given to the determinations made by the finders of fact in attorney discipline cases where such appeared necessary in the interests of achieving that uniform standard. Thus, while showing considerable deference to their assessments of such issues as credibility, state of mind, and the like,\textsuperscript{363} the court has shown far less deference to their views on the legal significance of those facts in determining the proper measure of discipline in the case at hand. Instead, it has not hesitated to independently review the facts from that perspective\textsuperscript{364} and to directly compare the case at hand with past disciplinary matters\textsuperscript{365} in order to bring a disciplinary recommendation made in a lower court into line with prevailing standards.

The similarities of this approach to the proper role of appellate courts in reviewing criminal sentences are obvious. Sentencing determinations involve questions of both fact and law. The Act left questions of fact to trial judges, but it sought to increase the role of appellate courts in assessing what legal significance those facts should have in sentencing. It did so in the interests of achieving a greater degree of uniformity and parity in sentencing. The techniques available to appellate courts to achieve that end are likely to be at least as effective in the area of criminal sentencing as are those employed

\textsuperscript{361} The supreme court's most complete statement in this regard appeared recently in \textit{In re Berkos}, 93 Ill. 2d 408, 444 N.E.2d 150 (1982):

This court has said that "[w]hile a degree of uniformity in the application of attorney discipline is desirable, each case must still be determined on its merits." (\textit{In re Andros} (1976), 64 Ill. 2d 419, 425-26, 1 Ill. Dec. 325, 356 N.E.2d 513). But more recently this court has emphasized a keen awareness of "the necessity for consistency in the imposition of discipline in similar cases." (\textit{In re Porcelli} (1979), 77 Ill. 2d 473, 479, 34 Ill. Dec. 158, 397 N.E.2d 830). In the case of \textit{In re Saladino} (1978), 71 Ill. 2d 263, 275, 16 Ill. Dec. 471, 375 N.E.2d 102, the rationale for this consistency was stated as follows: "Although appropriate factors may always be considered in mitigation, predictability and fairness require a degree of consistency in the selection of sanctions for similar types of misconduct." \textit{Id.} at 275, 16 Ill. Dec. at 475-76, 375 N.E.2d at 106-07.

\textsuperscript{362} See supra text accompanying notes 343-45.

\textsuperscript{363} See, e.g., \textit{In re Jafree}, 93 Ill. 2d 450, 458, 444 N.E.2d 143, 148 (1982) (hearing panel's determination accorded substantially same weight as that of any trier of fact); \textit{In re Kink}, 92 Ill. 2d 293, 301, 442 N.E.2d 206, 209 (1982) (accord); \textit{In re Pappas}, 92 Ill. 2d 243, 247, 442 N.E.2d 142, 143 (1982) (findings of hearing panel entitled to considerable weight as the trier of fact).


In each of these cases, the court accepted the factual findings made below concerning the nature of the attorneys' conduct, but disagreed with the fact-finders' recommended sanctions for the conduct.

in attorney discipline cases; and there can be no doubt that the interests at stake are at least as vital. It is regrettable that the Illinois Supreme Court, willing to exhibit such a keen awareness of the need for a minimal degree of consistency and fairness to members of the bar, has adopted such a contrary approach to legislative efforts emulating these concerns in the area of criminal sentencing.

2. Treatment of the "New" Standard of Review

As suggested above, a change in the meaning of the term "abuse of discretion" was necessitated by changed legislative goals in sentencing. In attempting to conceptualize their new powers of review under the Act, appellate courts unfortunately never examined the matter in this way. Instead, the issue was framed in terms of the General Assembly's authority to change the standard of appellate review from that declared by the supreme court. In several opinions, dissenting judges argued that the action violated the doctrine of separation of powers. In People v. Cox the Illinois Supreme Court, influenced by that view, concluded that the legislature's purported replacement of the abuse-of-discretion standard was unconstitutional because it infringed upon the supreme court's exclusive power to promulgate rules of appellate practice and procedure.

The unanimous Cox court's analysis of the separation of powers issue left a great deal to be desired. It began by noting that the Illinois Constitu-

366. Many courts seem convinced that a meaningful degree of consistency is an elusive and perhaps impossible goal in the area of criminal sentencing. See, e.g., People v. Welsh, 99 Ill. App. 3d 470, 470-71, 425 N.E.2d 53, 54 (4th Dist. 1981) (sentences imposed in similar cases "could have no bearing" on sentence imposed in case at hand "so long as the human psyche differs radically between and among individuals"); People v. King, 102 Ill. App. 3d 257, 260-61, 430 N.E.2d 292, 294-95 (3d Dist. 1981) (expressing doubt that meaningful comparisons can be made for sentencing purposes, even between codefendants). The supreme court, however, is much more sanguine about the achievability of uniform standards of attorney discipline. Its view has been that the task, in that context, is difficult but far from insurmountable. See, e.g., In re Hall, 95 Ill. 2d 371, 375, 447 N.E.2d 805, 806 (1983) (similar cases should be treated alike, considering unique factors of each case); In re Berkos, 93 Ill. 2d 408, 413-14, 444 N.E.2d 150, 152 (1983) (both fairness in particular case and a degree of consistency from one case to the next should be considered); In re Pappas, 92 Ill. 2d 243, 248, 442 N.E.2d 142, 143 (1982) (court should try to be consistent in imposing sanctions for similar conduct).

There is no reason why it should be more difficult to differentiate between criminals than between attorneys. In fact, criminal cases should be easier in some respects, for at least two reasons. First, the factors considered are specified by statute. See Ill. Rev. Stat. ch. 38, §§ 1005-5-3.1, 1005-5-3.2, 1005-8-1(a)(1), 1005-8-4(a) (1983). Second, additional techniques, based on statistical aggregates of sentences, can be used to supplement the application of those standards to a particular case. For a discussion and application of this approach, see infra notes 399-407 and accompanying text.

367. The liberty interests at stake in criminal cases are clearly entitled to at least as great a solicitude by the judiciary as are the property interests involved in attorney disciplinary matters.


369. 82 Ill. 2d 268, 412 N.E.2d 541 (1980).

370. Id. at 276, 412 N.E.2d at 545.
tion of 1970 had vested "judicial power" in the courts to be exercised "exclusively and exhaustively" by them.\textsuperscript{371} The court acknowledged that the phrase "judicial power" was not defined in the constitution,\textsuperscript{372} and also conceded that the General Assembly "ha[d] the power to enact laws governing judicial practice [which did] not unduly infringe upon the inherent powers of the judiciary."\textsuperscript{373} The court, however, found undue infringement here because the Act's appellate review provisions conflicted with a rule related to a "matter within the court's authority." This rule, Supreme Court Rule 615(b)(4), authorized reviewing courts to "reduce the punishment imposed by the trial court."\textsuperscript{374} In case of conflict between the rule and the Act, the court concluded that the rule had to prevail. Otherwise, "a basic tenet of our form of democratic government would be destroyed."\textsuperscript{375}

The Cox court's assertion of its preeminent rulemaking authority is on shaky ground both constitutionally and factually. Surely the court overstates matters when it claims that any legislative pronouncement in conflict with a supreme court rule "within the court's authority" is void. The proper formulation of the argument would be that any such conflict pertaining to a matter within the supreme court's exclusive authority is constitutionally infirm.\textsuperscript{376} As numerous precedents had recognized, the separation of powers doctrine was not intended to hermetically seal off one branch of government from another.\textsuperscript{377} Instead, there are numerous areas in which branches of government have overlapping authority. Sentencing is certainly one of these areas.\textsuperscript{378} In terms of the famous analysis employed by Justice Jackson,

\textsuperscript{371} Id. at 274, 412 N.E.2d at 544.
\textsuperscript{372} Id.
\textsuperscript{373} Id. at 274, 412 N.E.2d at 545.
\textsuperscript{374} Id.
\textsuperscript{375} Id.
\textsuperscript{376} Only activities within the exclusive province of a non-legislative branch of state government are beyond the General Assembly's power to regulate. This is the teaching of Mr. Justice Jackson's famous concurring opinion in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-40 (1952) (Jackson, J., concurring), in which, speaking of the validity of presidential action taken against the will of Congress, he concluded that such an action could be sustained only if "within his domain and beyond the power of Congress." Id. at 640 (emphasis added); see authorities cited infra note 377.
\textsuperscript{378} The virtually plenary power of the General Assembly to define offenses and to prescribe the penalties therefor, frequently recognized by the court, has a significant and direct impact on judicial sentencing prerogatives by eliminating certain sentences from consideration in a wide variety of circumstances. See, e.g., People ex rel. Carey v. Bentivenga, 83 Ill. 2d 537, 542, 416 N.E.2d 259, 262 (1981); People v. Smith, 14 Ill. 2d 95, 97, 150 N.E.2d 815, 817 (1958); see also ILL. REV. STAT. ch. 38, § 1005-5-3(c)(2)(A)-(F) (1983) (requiring imprisonment for certain offenses); id. § 1005-5-3(c)(6) (requiring imprisonment for certain offenses if committed while on probation or parole); id. § 1005-5-3(c)(2)(F) (requiring imprisonment for certain offenders having sufficiently aggravated prior records). Clearly such legislation has a far more direct and immediate effect on the manner in which cases are decided than did
such areas fall within a “zone of twilight” in which legislative “inertia, indifference or quiescence may . . . enable, if not invite, measures of independent . . . [judicial] responsibility.”

Certainly the Illinois Supreme Court’s promulgation of rule 615(b)(4) was appropriate under this test. The rule came into existence upon the General Assembly’s repeal of a virtually identical legislative provision. There can be no real doubt that the court was free to promulgate such a measure in those circumstances. The Cox court, however, went too far in its claim that the General Assembly was precluded permanently by the mere fact that the rule was in force when the Act took effect. Rather, once the Act went into effect, the rule became incompatible with the express or implied will of the General Assembly. Such a rule may be sustained only by disabling that body from acting upon it.

The Cox court made two efforts to place the rule in that untouchable category. The first was to characterize the General Assembly’s action (and its own rule) as procedural rather than substantive, and thus within the zone of judicial interests subject to the supreme court’s rulemaking authority. The second was to brand it as an attempt to influence how particular cases are decided, and thus invalid as a legislative intrusion into “the area of minimum functional integrity of the courts.”

Both of these positions, however, are factually infirm. As to the first, by any traditional measure, the provision at issue can only be characterized as substantive. On its face, it purports to create a variety of rights innur-

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1984]  

_ILLINOIS’ DETERMINATE SENTENCING_ 693

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the Act’s appellate review provisions. Yet, the only modern case concluding that these legislative judgments could violate the principle of separation of powers was reversed by the Supreme Court on appeal. See People v. Taylor, 115 Ill. App. 3d 621, 629-30, 450 N.E.2d 1256, 1258-63 (1st Dist. 1983) (language in ILL. REV. STAT. ch. 38, § 1005-8-1(a)(1) (1983) that courts “shall” impose sentence of natural life imprisonment on certain murderers not sentenced to death held to be directory rather than mandatory, to avoid invalidating section on separation of powers grounds), rev’d in part, 102 Ill. 2d 201, 207-09, 464 N.E.2d 1059, 1062-64 (1984).


381. Youngstown, 343 U.S. at 637-38 (Jackson, J., concurring).

382. Cox, 82 Ill. 2d at 273-74, 412 N.E.2d at 545.


384. Cox, 82 Ill. 2d at 280, 412 N.E.2d at 547-48.


386. While the distinction between substance and procedure is not always easily drawn, “[i]n general it can be stated that laws which establish duties, rights and responsibilities are substantive, while those which prescribe the manner, e.g., time, place and method of performing an act, in court, are procedural.” Bonaguro, _supra_ note 383, at 4ll.
ing to the benefit of defendants, the state, and the public at large.\textsuperscript{387} Of course, if the subject matter of the provision is indeed substantive, any conflict between it and rule 615(b)(4) must be resolved in favor of the former.\textsuperscript{388}

The Cox court's claim that the provision intrudes on the manner in which cases are decided is also based on a number of faulty factual premises. One premise of that argument, the Act's supposed overturning of the abuse-of-discretion standard, is an outright misconstruction of the legislature's intent.\textsuperscript{389} The other aspect of that contention, the Act's authorization of dispositional alternatives to the appellate court not provided for in rule 615(b)(4), seems irrelevant to a claim of undue legislative "intrusion upon the manner in which cases are decided."\textsuperscript{390} The authorization involved is purely an enabling statute that leaves undisturbed the appellate court's right to decide particular cases however it sees fit. In short, there simply is not any "intrusion" in sentencing matters attributable to the Act's appellate review provisions.\textsuperscript{391}

\textsuperscript{387} For example, the provision confers a "right" on criminal defendants to appeal their sentences. Pub. Act No. 80-1099, § 3, 1977 Ill. Laws 3264, 3302 (codified as amended at ILL. REV. STAT. ch. 38, § 1005-5-4.1 (1983)); see supra note 290. Such a right unquestionably would be substantive under the definition quoted above. The provisions also confer a right on both defendants and the state to have a fair, proportionate sentence imposed. In other words, the Act both requires and enables the appellate court to ensure that such a sentence is imposed. Under either formulation, this appears to be a substantive rather than a procedural matter. Finally, this provision could be conceptualized as advancing a public right—the General Assembly's entirely legitimate interest in seeing that penalties are applied consistently with its intentions. That concern, too, is inherently substantive in nature.

\textsuperscript{388} See authorities cited supra note 383.

\textsuperscript{389} See supra text accompanying notes 211-13, 355-58.

\textsuperscript{390} Cox, 82 Ill. 2d at 276, 412 N.E.2d at 545.

\textsuperscript{391} The Act did affect the distribution of sentencing power within the judicial branch, however, by vesting appellate courts with the power to reduce penitentiary sentences to probation. This aspect of the provision undid a long line of supreme court cases denying this power to the appellate court. Those cases had uniformly decided that an appellate court, confronted with what it believed was an erroneous denial of probation, should vacate the sentence imposed and remand for a further hearing before a different judge. See People v. Bolyard, 61 Ill. 2d 583, 589, 338 N.E.2d 168, 171 (1975); People ex rel Ward v. Moran, 54 Ill. 2d 552, 557, 301 N.E.2d 300, 303 (1973); People v. Sims, 32 Ill. 2d 591, 595-96, 208 N.E.2d 569, 572-73 (1965); People v. Donovan, 376 Ill. 602, 606-08, 35 N.E.2d 54, 57 (1941).

The appellate courts generally were very restrained in their use of these new powers. Most of the cases that reversed trial courts' denials of probation involved first-time offenders of demonstrated rehabilitative potential who, arguably, had been denied probation for legally insufficient reasons. 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). Indeed, in the most famous and influential early appellate court opinion interpreting the new Act, the court upheld the imposed prison sentence despite several mitigating factors. People v. Choate, 71 Ill. App. 3d 267, 274-76, 389 N.E.2d 670, 676-77 (5th Dist. 1979). The same mix of appealing features had existed as in those pre-Act cases where appellate court remands of cases denying probation for possible "abuse of discretion" were not overturned on appeal. See People v. Knowles, 70 Ill. App. 3d 30, 388 N.E.2d 261 (4th Dist. 1979); People v. Brooks, 69 Ill. App. 3d 97, 386 N.E.2d 1160 (4th Dist. 1979); People v. Wilson, 47 Ill. App. 3d 220, 361 N.E.2d 1155 (4th Dist. 1977).

Nonetheless, it is likely that the supreme court was more than a bit piqued by the General
3. Abuse of Discretion After People v. Cox

The abuse of discretion standard promulgated by Perruquet, Cox, and other Illinois Supreme Court precedents has succeeded in dampening the ardor of reviewing courts to alter sentences imposed below. Isolated instances of reductions in prison sentences, as well as vacations of denials of probation, can be found. These cases, however, stand out against vast numbers of sentencing appeals affirmed with little more than a string citation to precedents extolling the deference due to trial judges' sentencing decisions. Because that standard of deference results in the virtually automatic affirmation of any sentence reached below, appellate tribunals understandably have almost totally ceased to concern themselves with broader efforts to rationalize the sentencing process.

A comprehensive approach to sentencing issues might have been achieved despite the barriers created by the abuse-of-discretion standard, if only the Act's intended aids to principled sentencing decisions—data on existing sentencing practices and more detailed sentencing guidelines—had been developed and utilized. For a variety of reasons detailed below, however, the data on sentencing practices contemplated by the Act have not been

Assembly's decision to expand the appellate courts' authority in this fashion. Such institutional indignation is the most likely explanation for the breadth and tenor of its opinion in Cox, a decision that ranged far beyond the issues at hand. A straightforward comparison of the appellate court's action in Cox with the authority interpreting the intended scope of the Act's appellate review provisions would have shown that that court had exceeded its proper role. Cases such as People v. Choate, 71 Ill. App. 3d 267, 274, 389 N.E.2d 670, 675 (4th Dist. 1979), already had established that the Act did not intend that appellate courts retry sentencing matters de novo on appeal, as the appellate court in Cox had done. Indeed, the Cox court had acknowledged that the Act was not intended to permit the rebalancing of cases on appeal that already had been carefully considered below, although its own conduct clearly violated that maxim as well. Cox, 77 Ill. App. 3d at 63-65, 396 N.E.2d at 63-65 (4th Dist. 1979). The supreme court's willingness to overlook that narrow but unassailable basis for reversal in favor of one based on broad constitutional doctrine is, unfortunately, all too typical of its decisions in this area.


393. See People v. Free, 112 Ill. App. 3d 449, 455-56, 445 N.E.2d 529, 533-34 (4th Dist. 1983) (two-year sentence for unlawful use of weapons vacated where record did not reveal that judge had considered probation, even though defendant had a prior murder conviction); People v. Williams, 112 Ill. App. 3d 617, 618-200, 445 N.E.2d 931, 932-34 (3d Dist. 1982) (five-year sentence for voluntary manslaughter vacated where probation may have been denied arbitrarily); People v. Turner, 110 Ill. App. 3d 519, 523-25, 442 N.E.2d 637, 640-41 (1st Dist. 1982) (five-year sentence for forgery vacated where court did not explain what statutory basis it relied on to deny probation).

394. Literally hundreds of sentencing appeals are affirmed each year. As the second article in this series will illustrate, many of them are highly questionable.

395. See supra text accompanying notes 185-88 and infra text accompanying notes 399-425.
As a consequence, even though the Act intended that individual sentencing decisions be influenced by the range of sentences normally imposed by other courts in similar cases, this has not occurred. Likewise, both the CSC and the Illinois Supreme Court have consistently declined to limit or clarify the Act's substantive reach by preparing more detailed guidelines. Thus, significant opportunities to improve sentencing practices in Illinois have been squandered.

a. Anticipated Data-Gathering and Data-Analysis Activities

Under the Act, both the DOC and the CSC were charged with the task of gathering and analyzing data on the application and impact of the new law. Had these data been compiled, it would have been possible to determine with considerable accuracy where a given sentence fit into the overall pattern of sentences for that offense. Such information could have been immensely useful both to the judiciary and to counsel for the parties in arriving at fair sentences. In the context of plea bargains, for example, the data could have served as both a guide to and a direct restraint on the parties' respective bargaining positions by eliminating sentences of wholly unrealistic leniency or severity, given the facts at hand. This data also could have served much the same purpose after a bench or jury trial by permitting counsel to present sentencing alternatives to the court which were at least arguably appropriate in light of the distribution of sentences normally imposed and the circumstances of the particular case.

Such a perspective also would have been of immense value to a sentencing judge. Typically, judges have some familiarity with the charging, plea bargaining, and sentencing practices in their counties and perhaps even in their circuits. But in all probability they would not have a detailed view

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396. See infra notes 399-425 and accompanying text.

397. The author is aware of only one case in which such an argument was even advanced, and it was not successful. See People v. Hoyer, 100 Ill. App. 3d 418, 423, 426 N.E.2d 1139, 1142 (2d Dist. 1982) (data not presented until appeal and deemed waived); cf. People v. Welsh, 99 Ill. App. 3d 470, 470-71, 425 N.E.2d 53, 54 (4th Dist. 1981) (rejecting defendant's attack on prison sentence for reckless homicide, based on claim that others convicted of same offense in same county had received probation).

398. See infra text accompanying notes 426-66.

399. See Pub. Act No. 80-1099, §3, 1977 Ill. Laws 3264, 3302 (DOC to provide extensive information regarding the sentences imposed and time served by inmates committed to the DOC Department) and 3315 (CSC to develop data on offenders committed to the DOC or give alternative dispositions, delineated by offense) (codified at ILL. REV. STAT. ch. 38, §§ 1005-5-4.3, 1005-10-2(4) (1983)).

400. The DOC's obligations included preparation of annual reports which were to contain the rate, frequency distribution, and averages of both prison sentences imposed and time actually served, detailed by offense. ILL. REV. STAT. ch. 38, §§ 1005-5-4.3(1)-(2) (1983). The use of regular term, extended term, and consecutive term sentences were to be reported separately by offense. Id. § 1005-5-4.3(3). All of this information, together with any other data available to the DOC which a court might request to assist it in sentencing, id. § 1005-5-4.3(4), were to be "made available to trial and appellate court judges for their use in imposing or reviewing sentences . . . and to other interested parties upon a showing of need." Id. § 1005-5-4.3.
of how those practices had operated in the aggregate over time, or how they compared to those prevailing in other Illinois courts. By placing their knowledge of particular cases in that broader context, these data would have allowed sentencing judges to exercise more informed oversight of plea bargains and to impose sentences which more closely approximated those imposed on similarly situated offenders.

Regrettably, however, the data that have actually been prepared by the DOC and the CSC have fallen short of these ideals to varying degrees. Through the preparation of annual statistical reports on the populations entering and leaving the prison system, the DOC has come far closer to fulfilling its statutory mandate than has the CSC. From the perspective of their utility for courts or practitioners, however, these reports have a number of serious deficiencies. For one thing, the data do not include sufficient information on extended term and consecutive term sentences, and the information that is presented is not integrated into the DOC’s various statistical presentations. As a result, the data given tend to present a distorted picture of the sentences actually imposed on offenders. Moreover, the reported data generally are not displayed in a way which would permit a sentencing judge to determine just where a contemplated sentence fits into the run of sentences imposed. Many offenses are not treated individually in the DOC’s presentations. Of those offenses that are singled out, the sentencing data often is displayed in irregular and very broad ranges, giving at best a poor estimate of how severe a particular sentence tends to be. And, not surprisingly, no effort is made to correlate sentence length to any other variable that might be expected to affect the choice of an appropriate sentence in a given case. These variables would include, for example, whether convictions were by trial or plea, the extent of the defendants’ prior adult or

401. See generally Policy Development Division, Illinois Department of Corrections, Statistical Presentation [Year] [hereinafter cited as [Year] Statistical Presentation].

402. The DOC presents data on the average regular term and extended term sentences imposed on offenders in different tables, none of which displays the full range of such sentences. See, e.g., Tables 3, 5 in 1982 Statistical Presentation, supra note 401. Except for murder, no information is provided on the distribution of extended term or consecutive term sentences. See Tables 11, 13-25 in 1982 Statistical Presentation, supra note 401.

403. Data on sentence distribution are prepared by offense only for murder, armed robbery, rape, robbery, burglary, aggravated battery, and theft. See Tables 11-25 in 1982 Statistical Presentation, supra note 401. Data on average sentences imposed are also provided for those offenses, as well as attempted murder, voluntary manslaughter, forgery, unlawful use of weapons, and “other” felonies of each felony class. See Tables 3, 5, 10 in 1982 Statistical Presentation, supra note 401.

404. For example, all class X felonies are grouped according to whether the sentence was 6 years, 7-10 years, 11-25 years or 26-30 years. See, e.g., Tables 13-16 in 1982 Statistical Presentation, supra note 401. The only information provided on longer sentences is the percentage that they represent of all prison sentences and the most common such sentence imposed. See Table 5 in the 1982 Statistical Presentation, supra note 401.

405. The Annual Reports, supra note 67, prepared by the Administrative Office of the Illinois Courts, provide data on the percentage of convictions for each felony class disposed of by plea, bench, trial, and jury trial. Those reports, however, make no effort to correlate those dispositions to sentences imposed. See, e.g., Dispositions Chart, supra note 67.
juvenile records, and whether the defendants were sentenced on other charges as well.

These deficiencies have been compounded by the failure of the CSC to develop any data called for by the Act’s mandate. Although the CSC’s early nonfeasance can be attributed to a lack of staff, its continued failure to generate any original data on sentencing practices is both puzzling and disturbing. Whatever the reasons for this state of affairs, no Illinois source has been developed which displays the full range of dispositions imposed on offenders by offense. This failure to comply with the Act, in turn, has greatly hampered efforts by counsel to argue the inappropriateness of particular sentences based on the common run of sentences imposed.

As a result of the CSC’s default, the closest approximation to the information it was intended to generate is contained in the annual reports of the Administrative Office of the Illinois Courts. Since 1979, those reports have provided information concerning the percentages of convicted felons receiving various types of sentences, broken down by the most serious felony class of which the offender was convicted. Chart 6 below examines the frequency with which probation was imposed on offenders convicted of class 2, 3, and 4 felonies since that date.

These high probation rates for all probationable felony classes should have an impact on the excessive sentence claim of a defendant sentenced to prison for a probationable offense. To put that claim in a specific context, suppose that a defendant had been convicted of burglary, a class 2 felony, after a jury trial in 1980 and, although he had no prior record, he was sentenced to five years in prison. He argued on appeal 1) that the trial court punished him for exercising his right to trial by jury, and 2) that his sentence was excessive.

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407. The Illinois Supreme Court has used the occurrence of multiple offenses to justify a somewhat longer sentence for one or more of the crimes involved. See People v. Godinez, 91 Ill. 2d 47, 54-56, 434 N.E.2d 1121, 1125-26 (1982); id. at 57, 434 N.E.2d at 1127 (Simon, J., concurring).


409. This is readily apparent from a comparison of any of the Commission’s annual reports with the DOC’s corresponding Statistical Presentation for that same year. Improvements may be under way in this area.

410. The author believes that this lack of action is deliberate and that a majority of the Commission has no desire to either study or alter existing sentencing practices. This is hopefully a mistaken perception.

411. See supra notes 185-88 and accompanying text.

412. See supra note 397.

413. See supra note 67.


415. Some Class I felonies are probationable as well, but because various changes in the nature and number of felonies so classified occurred during 1979-1981, no data were included in Chart 6 concerning them.
sentence was excessive given the frequency with which probation is imposed for his offense. The typical response to the first argument is that the judge will be presumed not to have taken the defendant's exercise of his rights into account unless the contrary is clearly indicated on the record. The second argument can be rejected by invoking the great deference to be shown to trial judges in matters of sentencing, perhaps coupled with the nostrum that a judge is not required to impose a minimum sentence on a defendant just because the defendant had no prior criminal record.

This treatment of the defendant's arguments, however, ignores how

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417. Occasionally, either a judge will forget himself and remark negatively on the defendant's exercise of his right to a jury trial in sentencing the offender, People v. Moriarty, 25 Ill. 2d 565, 567, 185 N.E.2d 688, 689 (1962), or an appellate court will recognize the obvious and intervene, absent an express admission of that type by the trial judge. See, e.g., People v. Dennis, 28 Ill. App. 3d 74, 77, 328 N.E.2d 135, 138 (5th Dist. 1975) (where minimum sentence imposed after trial was 20 times greater than minimum term offered during plea negotiations, it was reduced).

418. See, e.g., People v. Franklin, 80 Ill. App. 3d 128, 133, 398 N.E.2d 1071, 1075 (1st Dist. 1980) ("Even if we accept defendant's assertion that the 200 to 600 year sentence ... imposed at the end of his jury trial greatly exceeded the [18 to 50 year sentence he claimed was] suggested during plea negotiations, we cannot conclude that the trial court abused its discretion in sentencing defendant.").

419. See People v. Barney, 111 Ill. App. 3d 669, 679, 444 N.E.2d 518, 525 (1st Dist. 1983) ("The [Act] imposes no requirement that the minimum sentence be imposed in the absence of aggravating factors."); cf. People v. Oravis, 81 Ill. App. 3d 717, 719, 402 N.E.2d 297, 299 (4th Dist. 1980) (six-year sentence for burglary reduced to four years where defendant had no prior record and no other aggravating circumstances were present; one judge dissented from what he viewed as a holding that a "six-year sentence for a first conviction [for burglary] should be reduced per se").
statistically odd it is for this defendant to have received the sentence in question. Although the Administrative Office does not keep such records by offense, its 1980 Annual Report shows that over sixty percent of all persons convicted in Illinois of a class 2 felony, such as burglary, received probation.\textsuperscript{420} Perhaps all of those defendants also had no prior records. Nevertheless, the question should be asked: "Why is this defendant more deserving of imprisonment than almost two-thirds of all class 2 offenders sentenced in 1980?"\textsuperscript{421} Beyond that, records maintained by the DOC for 1980 show that of that minority of offenders who were sentenced to prison for burglary, about eighty percent received a sentence of less than five years.\textsuperscript{422} Thus, the hypothetical defendant's sentence was among the twenty percent encompassing the most severely sentenced incarcerated inmates, or in approximately the top 7.5\% of all persons convicted of burglary that year.\textsuperscript{423}

It is submitted that this defendant should prevail on his excessive sentencing claim on these statistical grounds, no matter how rationally and fairly the sentencing issue appears to have been handled below. The hypothetical defendant would have shown that the sentence he received was imposed only in very rare instances, and thus it should have been reserved for cases presenting far greater aggravating circumstances.\textsuperscript{424} The Act's overriding concern for fairness and proportionality in sentencing was clearly intended to treat the severe treatment of a run-of-the-mill offender as an abuse of discretion.\textsuperscript{425}

Given the inadequacies in the present data, it is hardly surprising that neither counsel nor the judiciary have given any real consideration to the light these data would shed on issues of fairness and proportionality in

\textsuperscript{420} See 1980 Dispositions Chart, supra note 67.
\textsuperscript{421} See id.
\textsuperscript{422} Table 19 in 1980 Statistical Presentation, supra note 401.
\textsuperscript{423} The figure is derived as follows. DOC data for 1980 shows that 80.1\% of all burglars sentenced to prison received less severe sentences than our hypothetical defendant. \textit{Id.} Assuming that approximately the same percentages of burglars were sentenced to prison in 1980 as was true of Class 2 offenders generally, then the group of imprisoned burglars, to whom our hypothetical defendant was compared, comprised approximately 37.1 \% of all defendants convicted of burglary that year. 1980 Dispositions Chart, supra note 67. Consequently, our defendant was sentenced more severely than 80.1\% of 37.1\%, or 29.6\%, of all sentenced burglars in 1980. \textit{Id.} That 29.6\%, added to the 62.9\% receiving probation, makes a total of 92.5\% of all persons convicted of burglary in 1980 who were sentenced less severely than our hypothetical defendant.
\textsuperscript{424} Aggravating circumstances may be found in the commission of the offense itself or in the particular offender's background such as a prior history of serious delinquent or criminal activity. See supra text accompanying notes 325-29, 332-67.
\textsuperscript{425} Id.; cf. People v. Cox, 77 Ill. App. 3d 59, 64, 396 N.E.2d 59, 64 (4th Dist. 1979) ("A sentence while not capricious may, nevertheless, be unjustifiably disparate. We believe that the . . . [Act] authorized us to correct such an error.''), rev'd, 82 Ill. 2d 268, 412 N.E.2d 541 (1980); People v. Choate, 71 Ill. App. 3d 267, 273, 389 N.E.2d 670, 675 (5th Dist. 1979) ("If appellate courts continued to defer to the discretion of trial courts whenever a sentence was within the statutory range without regard to whether or not it was appropriate in all the facts and circumstances, then the purpose of the new law would be defeated.'").
sentencing. Efforts should be undertaken at once to insure that properly presented sentencing data are prepared and disseminated.

b. Anticipated Development of Sentencing Guidelines

The Act also anticipated that either the judiciary or the CSC would take affirmative measures to rationalize the sentencing process. As of this writing, however, neither the Illinois Supreme Court nor the CSC has evinced the slightest interest in developing sentencing guidelines. Moreover, it seems likely that both groups are actively hostile to any such effort.

The development of guidelines was an important aspect of the proper implementation of the Act, because of the facially broad substantive sentencing discretion it gave to trial judges. Initially, at least, it seemed possible that a vigorous appellate review procedure eventually might take the place of these guidelines by developing a detailed common law of sentencing on a case-by-case basis. With the evisceration of that sentencing review process on constitutional grounds, however, the Illinois Supreme Court has effectively disabled that mechanism in a way that the General Assembly cannot

426. See supra text accompanying notes 186-90.
427. The hostility of the judiciary is readily inferable from the tone of the many opinions extolling the virtues of granting broad discretion to sentencing judges' decisions, see supra notes 249-64 and accompanying text, as well as the unremitting efforts of the Illinois Supreme Court to prevent interference with those prerogatives. See generally supra notes 332-42 and accompanying text (discussing the court's pervasive view that the trial judge has wide latitude in sentencing matters). For discussions concerning the attitude of the Commission, whose membership—judges and prosecutors—is dominated by persons with a vested interest in a loosely controlled system, see supra note 410 and infra notes 504-06.
428. As will be discussed in detail in a later article, the key legislative compromise struck in enacting Pub. Act No. 80-1099 was to accept a comprehensive regulation of the sentencing process on the one hand, in return for relatively vague and broad grants of substantive sentencing prerogatives on the other. That compromise opened the door to either one of two broad approaches to construing and applying the new law. The first was to recognize that its overriding concerns for consistency and proportionality in sentencing required limitations on those grants of substantive power. This is clearly what the General Assembly hoped would occur, as it is inconceivable that it would have adopted such a complex interlocking set of structural controls on sentencing discretion and, yet remain indifferent to whether the actual sentences imposed were sensible and fair.

But if one ignored the larger significance of those structural controls and focused only on the Act's broadly phrased substantive sentencing provisions, a second course was available—one which, while contrary to legislative intent, was not utterly implausible. That approach would assume that no specific limitations were included in the Act because it was intended that trial judges should be free to resolve such questions as they saw fit, entirely unconstrained by law or by the approach taken by their colleagues.

Such an interpretation, of course, would have made a mockery of the Act's efforts to bring some degree of order to unduly disparate sentencing practices by converting the Act itself into a license to perpetuate those practices. This possibility, coupled with the fact that it would be both easier to implement and more conducive to the prevailing attitudes toward sentencing, made it a real threat to the successful implementation of the Act.

It is the thesis of this author's later article that that threat has become reality.
429. See supra text accompanying notes 291-324, 369-89.
readily repair. It is, therefore, both urgent and peculiarly appropriate that the court exercise its rulemaking authority to bring some order to the present chaotic situation. 430

There is no real doubt that "chaotic" is a proper word to apply to current sentencing practices. This assertion is illustrated by a class of cases in which the lack of teeth in the sentencing review process is particularly apparent: those cases involving codefendant sentencing disparity in which all the defendants either pleaded guilty or all were tried and found guilty. 431 One would expect that these cases would afford the best opportunity to begin sorting out the basic principles of proportionality in sentencing. Two of the variables that bedevil efforts to compare "similarly situated" offenders—the circumstances surrounding the commission of different instances of the same offense and the method of disposition of the offenders 432—are either reduced or eliminated in these cases. As is shown below, however, this promise has not been realized.

One source of error in this class of cases stems from the casual treatment of claims of sentencing disparity when all the defendants received lengthy indeterminate sentences. Apparently influenced by the universal availability of parole in twenty years, less time off for good behavior, courts have repeatedly committed the twin sins of affirming similar sentences of this type for offenders who were very differently situated 433 or affirming substantially disparate sentences for offenders who seemed deserving of quite similar treatment. 434 These decisions also have created procedural barriers to a defen-
dant wishing to raise a claim of sentencing disparity. These barriers unfortunately have spilled over into sentences imposed under the Act. As a consequence, cases continue to multiply in which comparable determinate sentences are imposed upon incomparable offenders and incomparable sentences are imposed upon comparable offenders.

Garza (who was sentenced by a different judge) receiving 15 to 25 years and Schultz (who was sentenced by the same judge as Kline) receiving 20 to 25 years. 99 Ill. App. 3d at 553-54, 425 N.E.2d at 572. The testimony and physical evidence in all three trials was consistent, tending to show that the victim, after a fierce struggle, was clubbed to death, with Garza and Schultz being the actual perpetrators and Kline merely facilitating commission of the crime. Id. at 543-44, 425 N.E.2d at 564-65; see also People v. Schultz, 99 Ill. App. 3d 762, 771-72, 425 N.E.2d 1267, 1273 (3d Dist. 1981); People v. Garza, 92 Ill. App. 3d 723, 726-29, 415 N.E.2d 1328, 1332-34 (3d Dist. 1981) (both discussing evidence linking Garza and Schultz to the striking of blows that contributed to the victim's death).

On appeal, a majority of the appellate court vacated Kline's sentence and remanded for another sentencing hearing. While Kline had a truly egregious prior record when he was sentenced (two convictions for murder, one for attempted murder and one for robbery), which could have justified such a differential, the court noted that those convictions, except the robbery charge, had recently been reversed on appeal, thus removing the only apparent basis for his far lengthier sentence. Id. at 554-55, 425 N.E.2d at 572-73. On further appeal, however, the Illinois Supreme Court reinstated the circuit court's sentence, concluding that Kline had not carried his burden of providing the reviewing court with a rational basis for comparing his sentence to that of his codefendants. People v. Kline, 92 Ill. 2d 490, 508-09, 442 N.E.2d 154, 163 (1982). The Supreme Court also concluded that Kline did not have a right to be re-sentenced because his two murder and one attempted murder convictions had been vacated since his sentence was imposed, because the trial court had explicitly denounced any reliance on those convictions as a basis for enhancing Kline's sentence. Id. at 508, 442 N.E.2d at 162. Left unanswered by this approach, of course, was the rather glaring problem that if Kline's two murder and one attempted murder convictions had been disregarded below, there was no apparent reason for sentencing Kline to three to four times as long a term as either of his codefendants.

See also People v. Hamilton, 100 Ill. App. 3d 942, 956, 427 N.E.2d 388, 399 (1st Dist. 1981) (affirming sentences of 1,250 to 2,500 years and 500 to 1,000 years, respectively, imposed on two defendants who murdered a motorist after an automobile accident). For rather compelling, but futile, criticisms of the practice of imposing such sentences, see People v. Franklin, 80 Ill. App. 3d 128, 134-35, 398 N.E.2d 1071, 1075-76 (1st Dist. 1979) (Johnson, J., dissenting); People v. Short, 62 Ill. App. 3d 733, 737-38, 379 N.E.2d 360, 363-64 (3d Dist. 1978) (Stouder, J., concurring).

435. In People v. Kline, 92 Ill. 2d 490, 442 N.E.2d 154 (1982), the court had rejected Kline's challenge to his sentence in part because he had not brought information concerning his codefendants before the appellate court. Id. at 509, 442 N.E.2d at 163. What the court failed to recognize, however, was that since People v. Carroll, 49 Ill. App. 3d 387, 364 N.E.2d 408 (1st Dist. 1977), such information may not be added to the record on appeal. Id. at 396, 364 N.E.2d at 415. After Kline and Carroll, there appears to be no way for an earlier-sentenced defendant to bring the issue of codefendant sentencing disparity before the appellate court.

436. See, e.g., People v. Church, 102 Ill. App. 3d 155, 167-68, 429 N.E.2d 377, 586-87 (4th Dist. 1981) (codefendants each received 40-year sentences for murder and armed violence although one had perpetrated the crime in this case and had a worse prior record); People v. Rogers, 101 Ill. App. 3d 614, 615-16, 428 N.E.2d 547, 549-50 (5th Dist. 1981) (defendant, who had prior convictions for rape and robbery, and codefendant, who had no prior record, both received 30-year sentences for rape of a stranded motorist; both sentences affirmed).

437. See People v. Bergman, 121 Ill. App. 3d 100, 458 N.E.2d 1370 (2d Dist. 1984) (upholding 25-year sentence imposed on first offender, pursuant to a blind plea, for distribution of one
Perhaps the most striking example of the lack of concern for disparity in this area is People v. Brown.\footnote{439} In Brown, the defendant committed virtually the identically bizarre crime in two counties in the course of a single criminal episode.\footnote{439} As a consequence, it was necessary for him to be tried separately in each county, thus presenting the two trial judges with what was probably a unique situation in Illinois law: two indistinguishable crimes were committed by the same offender. If the new Act were working properly, those two judges would have agreed roughly on what sentence was most appropriate. Alas, it was not to be. One judge imposed concurrent terms of twelve years, while the other judge imposed concurrent terms of thirty years.\footnote{440}

On appeal, the defendant contended that the thirty-year sentences were, inter alia, disproportionately severe compared to his twelve-year sentences.\footnote{441} The appellate court rejected his contention, stating that “the established rule that fundamental fairness and respect for the law require that defendants similarly situated not receive grossly disparate sentences” did not apply to a case in which a single defendant received disproportionate sentences for similar but separate offenses.\footnote{442} The court maintained that such sentencing disparity was indicative of neither the more severe sentence’s excessiveness nor the less severe sentence’s insufficiency.\footnote{443}

It seems clear that Brown was incorrectly decided and that it does a serious disservice to efforts to reduce undue sentencing disparity. If fundamental fairness requires a rational basis for imposing disparate sentences on different individuals who committed the same crime, the requirement of a rational basis for imposing such sentences on a single individual is far more compelling. Although it is true that the existence of a disparity does not show that it is the longer sentence which is inappropriate, the existence of an eighteen-year differential clearly is inappropriate in and of itself. There simply was no way that both sentences in Brown could be right.\footnote{444} The court erred in failing to recognize that fact.

\footnote{438. 103 Ill. App. 3d 306, 431 N.E.2d 43 (2d Dist. 1982).}
\footnote{439. The defendant had approached the home of a DuPage County resident, gained admission under a ruse, and produced a pellet gun. He then ordered the occupants to drive to their bank and withdraw money for him. They complied, but defendant became nervous while waiting in line and ordered the victims to drive off without obtaining any money. With this entourage in tow, he proceeded to Kane County, where much the same process was completed with another victim. The police, however, had been alerted and the defendant was apprehended when the car he was in crashed. No one was harmed. Id. at 307-08, 431 N.E.2d at 44-45.}
\footnote{440. Id. at 307-09, 431 N.E.2d at 44-45.}
\footnote{441. Id. at 309-10, 431 N.E.2d at 46.}
\footnote{442. Id.}
\footnote{443. Id.}
\footnote{444. As between the two sentences, there is little doubt that the 12-year sentences were far closer to the mark. The defendant had a serious prior record, but his youth, nonviolent background and actions on the occasion in question all pointed to a mentally ill but rehabilitatable individual, rather than a vicious and hardened criminal meriting a lengthier term in prison.
The types of shortcomings in treating claims of codefendant sentencing disparity discussed above are not the only problems that have arisen. Rather, the doctrine prohibiting codefendant disparity has been applied in one area where justice and common sense—not to mention the Act itself—would indicate that it should be dismissed out of hand. In what must be regarded as the height of irony, that doctrine has been employed to reduce the fair sentences imposed on some codefendants to the lower penalties imposed on remaining codefendants who, in all likelihood, were punished far too leniently to begin with.

This curious perversion of sentencing principles can be traced to the early pre-Act case of People v. Steg.\textsuperscript{445} In Steg, three defendants, Witt, Steg, and Bravo, eventually pleaded guilty to an armed robbery.\textsuperscript{446} Witt was sentenced first to two-to-ten years to be served consecutively to any other sentence imposed on him in connection with outstanding criminal charges in another state.\textsuperscript{447} Thereafter, Steg and Bravo were sentenced by a different judge to terms of five-to-twenty years. The second judge explained his actions as follows:

\begin{quote}
Now it is true that one of these defendants has been sentenced from two to ten years in the penitentiary. But the fact that this Court made a mistake in the third of this crime doesn't mean I'm going to make a mistake likewise for two-thirds of the crime.\textsuperscript{448}
\end{quote}

Steg and Bravo appealed their sentences. A majority of the appellate court concluded that the appeal involved not only “determining whether [Steg's and Bravo's] sentences are excessive in view of the crime committed,”\textsuperscript{449} but also whether those sentences were “consistent with the basic principle of dispensing equal justice under the law.”\textsuperscript{450} Because Witt had the worst prior record and was the mastermind of the crime,\textsuperscript{451} the majority held that the “ends of justice” required a reduction of the Steg and Bravo sentences to the same two-to-ten year term imposed on Witt.\textsuperscript{452} In the dissent, one justice argued that leniency in one case “did not transform reasonable punishment in another case into an excessive sentence.”\textsuperscript{453}

The dissent in Steg certainly seems to have been the better argument,

\textsuperscript{445} Id. at 307-08, 431 N.E.2d at 45. Even a 12-year sentence would have been more severe than those imposed on more than 74% of the offenders committed to the DOC for armed robbery (the closest analogous offense for which sentencing data are available) in 1980, when Brown was sentenced. See Table 13 in 1980 Statistical Presentation, supra note 401.

\textsuperscript{446} Id. at 189, 215 N.E.2d at 854.

\textsuperscript{447} Id.

\textsuperscript{448} Id. at 190, 215 N.E.2d at 855.

\textsuperscript{449} Id. at 191, 215 N.E.2d at 855. The court found it “obvious” that the 5- to 20-year terms would not have been excessive had all three defendants received them. Id.

\textsuperscript{450} Id.

\textsuperscript{451} Id. at 191, 215 N.E.2d at 856.

\textsuperscript{452} Id. at 193, 215 N.E.2d at 856.

\textsuperscript{453} Id. at 194-96, 215 N.E.2d at 856-57 (Coryn, P. J., dissenting).
especially since the passage of the Act. If undue lenity has been shown to one offender,\textsuperscript{454} showing the same lenity to another does not seem to advance any legitimate interest. The proper approach to this issue, as discussed earlier, appears to be that put forward in the dissent in \textit{People v. King}:\textsuperscript{455} treat the first sentence as a presumptively valid point of departure for later sentences, but one which may be disregarded if explicitly examined and found to have been either unduly lenient or unduly severe.\textsuperscript{456} The Act is concerned with the imposition of an appropriate sentence in each case based on an assessment of the individual offender's circumstances. If some other defendant has received an improper sentence which is beyond recall,\textsuperscript{457} it is far better to acknowledge its erroneous character than to use it to perpetrate still another improper sentence.

It would be useful if the Illinois Supreme Court clarified this situation, because the \textit{Steg} doctrine has apparently gained rather than lost currency since passage of the Act. In \textit{People v. Earullo},\textsuperscript{458} for example, Earullo and his codefendant, Klisz, both police officers, were convicted of involuntary manslaughter and official misconduct in connection with the death of a person they had arrested.\textsuperscript{459} The evidence showed that the two officers had administered a truly savage beating to the arrestee, with Klisz playing a more major role than Earullo.\textsuperscript{460} Apparently in response to that role, the judge sentenced Klisz to an extended term of eight years, while sentencing Earullo to only two and one-half years.\textsuperscript{461}

On appeal, the appellate court recognized that some differential between the sentences imposed on the two defendants was appropriate given their differing degrees of participation in the crime. Nevertheless, the court reduced Klisz's sentence to five years.\textsuperscript{462} The court found that Klisz's extended term could not be sustained "where no such extended term was imposed on

\textsuperscript{454} It should be noted that it is not even clear that Witt's sentence would end up being less severe than that of his codefendants. In effect, by making Witt's sentence consecutive to other punishments, the court was adding those other sanctions to the 2- to 10-year terms it was imposing.


\textsuperscript{456} Id. at 262-64, 430 N.E.2d at 296-97 (Stouder, J., dissenting).

\textsuperscript{457} Under Supreme Court Rule 615(b)(4), only decreases in sentences are allowed on appeal, although the court has entertained claims from prosecutors, by way of a petition for a writ of mandamus, that a sentence was unlawfully lenient. \textit{See People ex rel. Carey v. Bentivenga}, 83 Ill. 2d 537, 416 N.E.2d 259 (1981). In the wake of \textit{People v. Cox}, 82 Ill. 2d 268, 412 N.E.2d 541 (1980), this apparently cannot be varied through legislation. \textit{See supra} text accompanying notes 369-75.

\textsuperscript{458} 113 Ill. App. 3d 774, 447 N.E.2d 925 (1st Dist. 1983).

\textsuperscript{459} Id. at 776, 447 N.E.2d at 926.

\textsuperscript{460} Id. at 776-79, 447 N.E.2d at 926-28.

\textsuperscript{461} Id. at 791-93, 447 N.E.2d at 936-37. Klisz's extended term sentence was predicated, not unsurprisingly, on the finding that his conduct constituted "exceptionally brutal or heinous behavior, indicative of wanton cruelty." \textit{Id. at 792, 447 N.E.2d at 937; see Ill. REV. STAT. ch. 38, § 1005-5-3.2(b)(2) (1983)}.

\textsuperscript{462} \textit{Earullo}, 113 Ill. App. 3d at 791, 447 N.E.2d at 937.
Earullo," even though the court believed that "both defendants acted in an exceptionally brutal and heinous manner." In short, the appellate court apparently believed that both defendants merited extended term sentences, but because only one had received such a sentence, the other's would be reduced as well.

Adherence to the ancient maxim that "two wrongs don't make a right" is the key to reform in this area of the law. The practice in Earullo and numerous similar cases of reducing an appropriate sentence because another might not have been sufficiently severe, is more than unfortunate. Because such a practice associates the Act with what amounts to a perversion of fairness, it has actively undermined many of the Act's legitimate objectives. Consequently, this aspect of the codefendant disparity doctrine should be eliminated at the first opportunity.

E. Possible Remedial Measures Under Judicial Auspices

This canvassing of the Act's efforts to structure the exercise of judicial sentencing discretion has shown that those controls have been largely vitiated by judicial constructions. Running through these decisions is a thread that bears further comment: a belief that many of the Act's proposed solutions to unfair and inequitable sentencing practices constitute dangerous and undue legislative trammeling on judicial prerogatives. This belief is particularly unfortunate because nothing could be further from the truth. Indeed, the

463. Id. at 792-93, 447 N.E.2d at 937.
464. See, e.g., People v. Tate, 122 Ill. App. 3d 660, 462 N.E.2d 662 (1st Dist. 1984); People v. Cook, 112 Ill. App. 3d 621, 445 N.E.2d 824 (2d Dist. 1983). In Cook, the appellate court reduced a seven-year prison sentence for escape to five years, even though Cook's prior criminal record included five felony and 15 misdemeanor convictions, because Cook's two co-escapees had received only three-year sentences. Id. at 623-25, 445 N.E.2d at 825-27. The court did not explicitly examine the appropriateness of the sentence imposed on Cook's codefendants. Moreover, the appellate court was "frank to admit that separate and apart from the sentences imposed upon [Cook's confederates in the escape]... we would uphold the seven-year sentence imposed upon Cook." Id. at 624, 445 N.E.2d at 826.

In Tate, the defendant's 10-year extended term sentence for aggravated assault, growing out of a series of sexually-related beatings extending over two days, was reduced to five years, apparently because a codefendant, who had participated in those beatings to a lesser extent, had received only a four-year sentence. Tate, 122 Ill. App. 3d at 667, 462 N.E.2d at 667-68. A dissenting judge would have affirmed Tate's sentence. Id. at 670, 462 N.E.2d at 669-70 (Romiti, J., dissenting).

465. See supra note 133 and accompanying text.
466. Since this doctrine is entirely judge-made and limited strictly to judicial sentencing considerations, it arguably is a suitable subject for the exercise of the Illinois Supreme Court's rulemaking prerogatives, if not under its general administrative and supervisory authority, then under the Act's special supplemental grant of such powers. See 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 infra text accompanying notes 473-507 for suggestions concerning possible additional areas for the court to exercise such authority.
Act was deferential to those prerogatives. Its basic approach was to let the judiciary develop and implement its own scheme for ensuring that the legislature's broad ranges of penalties were fairly and rationally applied. Direct constraints on the exercise of judicial sentencing discretion were largely avoided by the legislature in favor of facilitative measures designed to increase the likelihood that appropriate sentences would be imposed.

But now that the Illinois Supreme Court has invalidated that approach on constitutional grounds, a further legislative narrowing of judicial sentencing discretion remains the only viable course of action to implement a sentencing system that meets at least minimal standards of consistency, rationality, and fairness. The result of such a legislative endeavor could well be an exceptionally detailed specification of sanctions that is both constitutionally unassailable and extremely confining to sentencing judges. If the legislature were to take this action, cases such as Davis and Cox could become preeminent examples of winning the battle but losing the war. If for no other reason than to forestall such an eventuality, it would be both appropriate and welcome for the court to exercise its rulemaking authority in order to implement the various sentencing reform measures entrusted to the judiciary by the Act. It is respectfully suggested that at least four major areas of activity seem appropriate for the Illinois Supreme Court's attention.

The first of these would be the role to be taken by sentencing judges in connection with plea bargains. The rule should provide that in such cases, as in any other, sentencing remains a judicial act. The rule also should state that it is an abuse of discretion to fail to make an independent assessment of the validity of the plea bargain before imposing it. In that regard, the rule should specify that the extent of deference due to the parties' proposed bargain should depend primarily on the bargain's consistency with other mat-

468. See McAnany, Merritt, & Tromanhauser, supra note 43, at 627-33; cf. People v. Meeks, 75 Ill. App. 3d 357, 366, 393 N.E.2d 1190, 1197-98 (5th Dist. 1979), rev'd on other grounds, 81 Ill. 2d 524, 411 N.E.2d 9 (1980). The Meeks court concluded that [one problem with the new statute is that it makes no provision for weighing the various factors in aggravation and mitigation against each other or for choosing between them in order of importance. *** The danger of too much or too little emphasis on certain factors is handled by giving appellate courts a broader scope of review and inquiry into the underlying bases for any sentencing decision. 75 Ill. App. 3d at 366, 393 N.E.2d at 1197-98.

At least that was the way it was supposed to be.

469. See supra text accompanying notes 214-18.

470. Id.


472. See, e.g., MINN. STAT. ANN. § 244.09 (West 1984); 42 PA. CONS. STAT. ANN. § 9751-81 (Purdon 1982). While this approach would not be superior to judicially established standards, it would represent a substantial improvement on the present state of affairs. For a variety of reasons, the author believes that judicial guidelines will not be developed, thus necessitating such an approach. See infra notes 503-07 and accompanying text.

473. This rule would implement existing law, which requires a judge to make an "independent assessment" of these bargains. See ILL. REV. STAT. ch. 38, § 1005-4-1(b) (1983); supra text accompanying notes 50-53, 59-60.
ters of record bearing on sentencing issues, including information conveyed to the court by the prosecutor concerning the sustainability of particular charges. The rule also should point out that systemic considerations such as court congestion should not be deemed a sufficient basis for imposing an otherwise unjustifiable sentence.

Additionally, this plea-bargaining rule should address the situation where the trial judge entertains doubt as to the propriety of any proposed bargain, either as to charge or as to sentence. The rule should state that, in such a case, the sentencing judge should refuse to accept the bargain without first ordering a pre-sentence investigation. It should also limit a trial judge's ability to accept a plea to what he believes to be a factually inappropriate charge. In such situations, a judge should not accept a plea unless the sentence imposed is commensurate with the offense actually committed.

474. The most important matter is the offender's prior history of delinquency or criminal activity. See Ill. Rev. Stat. ch. 38, §§ 1005-3-1, 1005-3-2(1) (1983). Additional information of this type frequently will come before the court in the course of establishing the existence of a factual basis for the plea. See Supreme Court Rule 402(c), Ill. Rev. Stat. ch. 110A, § 402(c) (1983).

475. This information would be available to the court at least in the more serious cases if other reforms proposed herein were implemented. See supra notes 149-57 and accompanying text.

The court should, of course, also consider any information presented by defense counsel bearing on sentencing. That admonition is not included above because in the present context, the principal concern is unduly lenient bargains, not unduly harsh ones.

476. The sentencing judge is presently free to do this. See Ill. Rev. Stat. ch. 38, § 1005-3-1 (1983). The proposed rule would ensure that power is exercised in appropriate cases.

477. See supra text accompanying notes 160-66. It should be noted that a defendant has no right to have his guilty plea to a particular charge accepted. See Ill. Rev. Stat. ch. 38, §§ 113-4(c), 113-4.1, 115-2 (1983).

Some basis for concern exists over allowing sentencing judges to look beyond the pleaded offense in search of the "true" offense. See People v. Michels, 72 Ill. App. 3d 182, 185-86, 390 N.E.2d 927, 930 (3d Dist. 1979) (sentence imposed on a defendant convicted of involuntary manslaughter would be improper where based on the sentencing judge's belief that the defendant actually was guilty of murder); People v. Hill, 14 Ill. App. 3d 20, 23, 302 N.E.2d 373, 375 (5th Dist. 1973) (improper to consider in sentencing that defendant could have been charged with a felony, when he was only charged with a misdemeanor).

Weighed against this, however, is the unanimity of the available literature in concluding that sentencing judges do look beyond the pleaded offense and that they should do so. See D. Newman, supra note 142, at 98-99; Gifford, supra note 46, at 56. This body of authority is supported by a variety of Illinois cases permitting consideration, for sentencing purposes, of other criminal acts committed by the defendant on the occasion in question, even where the defendant was never charged with those other "crimes." See, e.g., People v. Ely, 107 Ill. App. 3d 102, 107-08, 437 N.E.2d 353, 357 (4th Dist. 1982) (extended term of imprisonment for burglary could be based on fact that woman was sexually assaulted in the course of the crime, even though no charges related to the assault were lodged); People v. Harris, 40 Ill. App. 3d 204, 206-07, 351 N.E.2d 890, 893 (3rd Dist. 1976) (six-year minimum sentence for burglary affirmed where individual died in the course of the crime).

The author believes that this latter group of cases represent the proper resolution of the court's role in the context of a plea bargain. The proposed rule does not require the judge to sentence a defendant pleading to one crime as if he were guilty of another. But it does require the judge to be satisfied that, when the information before the court clearly establishes
Finally, a rule addressed to plea bargaining should address the degree of leniency that may be shown by the court in return for a defendant's willingness to plead guilty. All sentences, including those imposed on pleading defendants, must be within a zone of reasonableness surrounding the sentence the judges would have selected had the defendants been convicted after trial on the charges to which they are pleading guilty. The rule should contain some concrete limits, expressed in relatively narrow terms of years, specifying the permissible gap for various felony classes between the proposed bargain and what the trial judge would otherwise be inclined to impose. The rule should further provide for the routine ordering of a full pre-sentence investigation in an effort to resolve any difference that might arise between the parties and the court.

A second major area for the court's rulemaking authority relates to providing a statement of reasons for imposing sentence and reviewing sentences that, without objection, were imposed without providing a statement. There apparently has been a strong judicial reaction to the statement-of-reasons requirement in those cases in which the trial judge merely imposed a bargained-for sentence. Much can be said for the position that the reasons requirement has little value in such cases. Instead, it probably would be more appropriate to substitute a brief statement of compliance with the "independent assessment" requirement of the Act and with the proposed rule just discussed, if it were adopted. Additionally, it would seem to be entirely proper to disallow sentencing appeals in cases involving bargained-for sentences on the grounds of waiver if a defendant fails to request that a statement be furnished.

the defendant's guilt of a substantially more serious offense than the pleaded offense, the ends of justice will be served by imposition of the bargained-for sentence.

478. See supra text accompanying notes 158-74.
479. See supra text accompanying notes 158-66.
480. See supra note 476.

Pre-sentence investigations undertaken prior to a defendant's plea of guilty and without his consent raise a variety of complicated issues which are deemed beyond the scope of this article, but which would require at least careful consideration before implementing any such procedure. See People ex rel. Kunce v. Hogan, 37 Ill. App. 3d 673, 675-80, 346 N.E.2d 456, 460-63 & n.1 (5th Dist. 1976) (holding that convicted defendant has absolute right to refuse to make any statement to probation officer pending appeal, but indicating that investigation could continue utilizing other sources), rev'd on other grounds, 67 Ill. 2d 55, 364 N.E.2d 50 (1977).
481. This observation is based on conversations that the author has had with a number of Illinois judges and other knowledgeable officials.
482. See supra text accompanying notes 473-80. Such a rule presumably could not displace the statutory requirement of a full statement of reasons for the sentence imposed in those cases where the defendant requested one, see supra note 315, but in many cases where bargained-for sentences were imposed, an abbreviated statement would be a simpler and more sensible requirement.
483. After People v. Davis, 95 Ill. 2d 1, 447 N.E.2d 353 (1983), only the Illinois Supreme Court seems to be empowered to act in this area, although, as argued above, the General Assembly also should be free to legislate concerning these matters. See supra text accompanying notes 301-15.
With regard to all other cases, however, the rule should partially abrogate the effect of *Davis* by requiring that a statement of reasons for imposing sentence must be given by the trial judge, in conformity with the Act's requirements. The rule should also modify the waiver principle announced in *Davis* to allow appellate review of some unexplained sentences. In those cases in which the defendant makes a colorable showing, based solely on the information presented in the trial court, that a lesser sentence was appropriate, the appeal should be allowed even though the defendant never requested the statement nor objected to its omission. Finally, the rule should affirm what was apparently implicit in *Davis*: that a defendant has an absolute right to be furnished with a judicial statement of the basis for his sentence, if one is requested, and that the failure to provide such a statement is reversible error.

Because *Davis* prohibited only legislative—not judicial—efforts to require mandatory statements of reasons for imposing sentence, these actions could be undertaken without modifying the constitutional principles enunciated in *Davis*.

The third major area requiring the Illinois Supreme Court's rulemaking authority is the appellate review of sentencing decisions. The heart of any such rule would be a reformulated definition of the abuse-of-discretion standard of review traditionally applied to these decisions. This redefinition is necessary in order to accommodate the fact that the Act requires far more of trial judges in sentencing matters than did prior law, and that consequently, it is easier for trial judges to abuse their discretion in sentencing. It should be emphasized, again, that this rule could be fashioned without retreating from the constitutional principle enunciated in *People v. Cox*, that it is for the judiciary rather than the legislature to define the standard of review in these cases. Indeed, the court could even take this action without abandoning the abuse-of-discretion standard.

Any reformulated definition should incorporate the Act's overriding concern that sentences not only be consistent with its literal strictures but also that they be appropriate in light of both the defendant's particular situation and the sentences typically imposed in comparable circumstances. The rule could make it clear that a *de novo* review is not proper by carrying forward

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484. 95 Ill. 2d at 1, 447 N.E.2d at 353.
486. See supra text accompanying notes 273-90.
487. See supra note 315.
488. See supra text accompanying notes 296-99.
489. See, e.g., *People v. Cox*, 82 Ill. 2d 268, 275, 412 N.E.2d 541, 545 (1980) (standard of review for sentencing is whether discretion has been abused); *People v. Perruquet*, 68 Ill. 2d 149, 153, 368 N.E.2d 882, 883-84 (1977) (trial court's sentence not to be altered absent abuse of discretion); see also supra text accompanying notes 332-67.
490. See supra text accompanying notes 343-67.
491. 82 Ill. 2d 268, 412 N.E.2d 541 (1980).
492. See supra text accompanying notes 369-75.
493. See supra text accompanying notes 357-58.
494. See supra text accompanying notes 343-50.
some provision patterned after the Act's rebuttable presumption of a sentence's validity. \textsuperscript{495} Supplementation of the record on appeal should be permitted in the interests of justice; \textsuperscript{496} but if additional information seems to tip the balance against the decision reached below, the proper course should be to remand for a new hearing rather than impose a reduced sentence on appeal. This course would permit full development of any such new matters in the trial court. \textsuperscript{497}

In that regard, the supreme court might also reexamine its decision to withhold from reviewing courts the power to reduce prison terms to sentences of probation. \textsuperscript{498} As the court itself has frequently noted, such a change constitutes a drastic alteration in the character of the sanction imposed. \textsuperscript{499} This observation certainly justifies a rule that the usual course would be to remand the matter to the trial judge for a fuller explanation of his reasons for initially denying probation. A remand would ensure that there were no factors considered, but not articulated, below which make such lenity inappropriate.

There are, however, two problems with requiring a remand when probation was improperly denied. First, there is no reason to disable the appellate courts from acting directly to reduce a prison sentence to probation in those cases in which its denial was clearly erroneous. Moreover, the appellate courts are authorized at present to reduce the severity of penitentiary sentences on appeal without limitation. \textsuperscript{500} Nevertheless, many such cases also might benefit from a remand for fuller factual development of sentencing issues.

These observations suggest that the present supreme court rules governing appellate review of sentences are both over- and under-inclusive in the powers


\textsuperscript{496} This provision is needed to undo the effects of People v. Kline, 92 Ill. 2d 490, 442 N.E.2d 154 (1982) and People v. Carroll, 49 Ill. App. 3d 387, 364 N.E.2d 408 (1st Dist. 1977), which when read together require that additional information be furnished to the appellate court and then preclude its submission. See supra note 435.

\textsuperscript{497} This provision is designed to bolster the Illinois Supreme Court's view that trial courts should play a preeminent role in sentencing matters. These courts, of course, are also far better suited to exploring factual issues.

\textsuperscript{498} See People v. Cox, 82 Ill. 2d 268, 275, 412 N.E.2d 541, 545 (1980) (Rule 615 does not authorize reviewing court to reduce sentence of imprisonment to one of probation); People ex rel. Ward v. Moran, 54 Ill. 2d 552, 556, 301 N.E.2d 300, 302 (1973) (reviewing courts lack authority to reduce prison sentence to probation).

\textsuperscript{499} See People ex rel. Ward v. Moran, 54 Ill. 2d 552, 556, 301 N.E.2d 300, 302 (1973) (probation and imprisonment are "qualitatively distinct"); People v. Bolyard, 61 Ill. 2d 583, 588, 338 N.E.2d 168, 170-71 (1975) (adherence to Moran decision drawing distinction between imprisonment and probation).

\textsuperscript{500} See ILL. REV. STAT. ch. 110A, § 615(b)(4) (1983). Indeed, appellate courts have the even greater power to reduce the degree of the offense of which the defendant was convicted in appropriate cases. See People v. Coleman, 78 Ill. App. 3d 989, 993-94, 398 N.E.2d 185, 187 (3d Dist. 1979) (exercise of powers granted in Rules 615(b)(3) and (4) to reduce degree of offense and sentence); People v. Plewka, 27 Ill. App. 3d 553, 559, 327 N.E.2d 457, 461 (1st Dist. 1975) (reduction in degree of offense and remand for resentencing); ILL. REV. STAT. ch. 110A, § 615(b)(3) (1983).
conferred on the appellate courts in matters of sentencing reduction. It is submitted that these rules should be recast to allow the outright imposition of reduced sentences on appeal (whether to lesser penitentiary terms, periodic imprisonment, or probation) only if the reviewing court is satisfied that the following criteria are met: all factual matters pertinent to sentencing were fully explored below; the trial judge’s reasons for imposing the sentence are clear; those reasons do not provide a legally sufficient basis for the sentence selected; and the appellate court has sufficient information available to impose an appropriate sentence to which the state has had a fair opportunity to respond. In all other cases, a remand to the trial court judge for resentencing should be required. In order to promote uniformity in sentencing generally and to act as a guide to both the parties and the trial judge on remand, the rule should also require the appellate court to state in its opinion the range of dispositions that it believes to be appropriate on the then-existing record.

The final major area in which the court should consider exercising its rulemaking powers is even more vexing than those already mentioned: developing substantive guidelines for the exercise of sentencing discretion. This is an immensely complicated subject, a detailed discussion of which is postponed to the next article in this series. For now it suffices to note that action by the Illinois Supreme Court probably should include elaboration on the following subjects: the circumstances (over and above minimal statutory criteria) in which discretionary sentences of death or natural life should be imposed; when consecutive or extended term sentences should be imposed; how prison sentences should be selected within a given range; whether different weights should be given to different factors in mitigation and aggravation contained in the Act and, if so, what those weights should be; and a variety of other matters of great consequence to efforts to develop a rational and consistent sentencing system.

This will be a tedious, time-consuming, and probably unwelcome task.

501. See supra text accompanying note 496.
503. This would be a particularly appropriate area for the Illinois Supreme Court to consider, given its unusual involvement in death penalty cases. See 1970 Ill. Const. art. 6, § 4(b) (providing defendants sentenced to death a direct appeal, as a matter of right, to Illinois Supreme Court); Ill. Rev. Stat. ch. 38, § 9-1(i) (1983); id. ch. 110A, §§ 603, 606(a).
504. The author realizes that this suggestion asks a good deal of the judiciary and that quite apart from the burdensomeness of the task, there are several reasons why the judiciary could be reluctant to become involved in these matters. For one, the judiciary could well desire to avoid the appearance of acting in a legislative capacity by prescribing penalties for offenses generally. For another, the judiciary probably would wish to avoid the far more public posture on sentencing matters that would flow from publishing such guidelines. See infra notes 505-06. Nonetheless, in view of the judiciary’s insistence on complete sovereignty over sentencing, it should be willing to accept its fair share of the responsibility for making the sentencing system as rational and equitable as possible.
505. The psychological determinants behind judicial opposition to reforms of its sentencing function have not received the attention they deserve. For a very perceptive commentary on this phenomenon, see Robin, Judicial Resistance to Sentencing Accountability, 21 CRIME AND
which is sure to be viewed in some quarters as fundamentally misguided. Yet, if such a task should be undertaken, no one is better suited to carry it out than the judiciary, acting under the guidance and leadership of the Illinois Supreme Court. Limitations on judicial sentencing discretion ideally should be both pragmatic and conducive to promoting just sentencing in the great run of cases. The prospect of developing guidelines without tapping the reservoir of judicial sentencing experience is minimal. There is much to be done, and an urgent need for considered action.

DELINQUENCY 201 (1975). That author asserts that such judicial opposition is entirely rational from a psychological point of view: Judges desire to preserve their advantageous position in the criminal justice system and will take extraordinary measures to avoid or minimize any infringements upon their highly prized discretionary domain that could result from reform measures. Robin stated:

[1] It is at least a viable hypothesis that the judiciary perceives sentencing accountability as an intrusion, a modification of authority that would appreciably reduce its sacred tradition and life style. The court confirms and reinforces its definition of self, service and office in the process, circumstances, and art of sentencing. A significant manifestation of the power and identity of the office and its incumbent is to be found in sentence imposition and the associated judicial degrees of freedom surrounding that function.

In addition . . . there is another interesting . . . status' impediment to judicial acceptance of intrusion upon its sentencing domain. . . . It is vested by tradition, precedent and legislation as the ultimate arbiter of the disputes and conflicts of others, including those of other segments of the criminal justice community; but the court is rarely the recipient of such dispositional judgment by others. . . . Thus when proposed reform of the criminal justice establishment includes the suggestion by otherwise subservient system representatives and those outside it that the court's sentencing power be curtailed in the name of improvement of the system, it is understandable that the court views the proposal as particularly offensive, with insult (the inappropriateness of the source of the suggestion) being added to injury (the curtailment of its sentencing power).

Id. at 211, 213 (emphasis in original).

This is not to suggest that such attitudes, if they existed, would be unique to the judiciary. Prosecutorial and correctional officials undoubtedly would be equally desirous of protecting the perquisites of their positions in a criminal justice system that provides them broad discretionary powers.

506. Defenses of unfettered judicial sentencing discretion and broad sentencing ranges frequently emphasize the desirability of being free to consider all pertinent circumstances in each offender’s case and to impose whatever sentence that examination seems to require. While the author has no quarrel with either proposition, that concession does not invalidate the argument for the reforms proposed. Granting such discretion in no way weakens the argument that it should be exercised in a consistent, even-handed manner from one case to the next so as to impose sentences on offenders that are proportionate to their blameworthiness, as assessed through objective criteria. This is, of course, what the Act sought to provide and what this proposal seeks to implement.

507. This is not to say that the needs and desires of prosecutorial and correctional authorities, among others, should be excluded. From both an informational and a pragmatic, consensus-building perspective, the court probably would be well advised to utilize the recommendations of a widely representative "blue ribbon" committee—or perhaps the existing Criminal Sentencing Commission (if it were willing to accept the responsibility) as a basis for any new rules it might enact in this area.
IV. Structural Controls on the Discretion of Correctional Officials

A. An Historical Overview

From the outset of the legislative process leading to the enactment of the Act, it was recognized that a rational sentencing scheme could not be established merely by controlling judicial and prosecutorial discretion in the sentencing process. Of equal importance was eliminating or guiding the exercise of discretion by correctional officials in administering prison sentences. The overriding goal in this regard was fairness. It would do no good to develop a sensible, even-handed method for imposing criminal sanctions on offenders if those sentenced to prison were placed in an atmosphere rife with discrimination, arbitrariness, and injustice. To this end a variety of reforms affecting the DOC were proposed in the earliest reform legislation. Insofar as they related directly to sentencing issues, these reforms were passed into law largely unchanged. The principal measures are discussed below.

1. Abolishing Parole

The most profound restructuring of the discretion of correction officials proposed by the reform group was, of course, replacing parole with good-conduct credit. Prior to the Act’s passage, the Illinois Parole and Pardon Board and, to a lesser extent, clinicians within the DOC, had discretion to lengthen or shorten an inmate’s prison stay based on their perception of the inmate’s “clinical readiness” for release. By divorcing any release issue...
from an inmate's choice of, or degree of "success" in, any given rehabilitation program, the reform group sought to eliminate what it saw as the vast, unreviewable,' and standardless exercise of this discretion. Curtailing correctional discretion in this area, however, highlighted the importance of assuring that the formulation and administration of policies concerning the award and revocation of good-conduct credits also were subject to meaningful checks and limitations. The Act's measures in those areas are discussed below.

2. Establishing Statutory Rates for the Accumulation of Good-Time Credits

At the initiation of the process that culminated in the Act, Illinois followed a common pattern of providing the DOC with statutory authorization to establish rates administratively for the accumulation of good-time credits." Pursuant to this authorization, the DOC had developed three types of good-time credit: good conduct, meritorious service, and work performance.

Good conduct was available to all inmates merely for not breaking prison disciplinary rules. The departmental regulations then current established a sliding scale whereby one month off the first year of a sentence was earned, two months off the second year, three months off the third year, and so on until the sixth and each succeeding year, for which six months credit were subtracted from each year." This schedule was unacceptable for four
reasons. First, it had the anomalous effect of compelling offenders sentenced to shorter terms of imprisonment—individuals who presumably had committed less serious offenses—to serve a far greater proportion of any given sentence than those sentenced to longer terms. Second, this very characteristic seriously distorted the intent of the judiciary in imposing sentences on offenders by mitigating those sentences in precisely the reverse order sentencing judges would have recommended. Third, the DOC’s regulation was quite complicated, and its effect on the judicially-imposed sentence, if known to the sentencing judge at all, was very difficult to calculate and to allow for in sentencing. Finally, the existence of any administrative latitude to develop good-conduct schedules created the possibility that once an equitable sentencing schedule was established, a change in that schedule could introduce new inequities based on the system then in force for awarding good-conduct credits. Consequently, the earliest legislation called for the replacement of this complicated, administratively-derived schedule of good-conduct credits with a simple statutory formula which provided for the award of one day of “good-conduct” good-time credit for each infraction-free day spent in prison. This approach ultimately was adopted in the Act.

Over the years, the DOC has had a variety of other schedules in force. See, e.g., DOC A.R. 813 (June 1, 1977). DOC A.R. 813 replaced the sliding-scale regulation with one that allowed inmates three months off each year of their sentences from the outset of their incarceration. Thus, during the period the reform group’s proposals were under consideration, inmates were earning good-conduct credits at different rates. See Proposal Commentary, supra note 27, at 19. See S.B. 1885, 79th Ill. Gen. Assembly, 1976 Sess., ¶ 3-6-3(a) at 15; H.B. 1500, 80th Ill. Gen. Assembly, 1977 Sess., ¶ 3-6-3(1) at 19. See Pub. Act No. 80-1099, § 3, 1977 Ill. Laws 3264, 3289 (codified at Ill. Rev. Stat. ch. 38, § 1003-6-3(a)(1) (1983)).

At least one authority has suggested that this prisoner-control feature of good-time is undesirable because it inevitably leads to abuses by prison officials. Jacobs, supra note 512, at 219-21, 258-70. The reform legislation, perhaps unwisely, rejected such an absolutist view, preferring instead to confine the exercise of discretion by prison officials so as to minimize improper actions. See infra text accompanying notes 558-627.

<table>
<thead>
<tr>
<th>Sentence Imposed (Mos.)</th>
<th>Good Conduct Credit Mos.</th>
<th>Time Served Mos.</th>
<th>%</th>
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<tr>
<td>12</td>
<td>1</td>
<td>11</td>
<td>92</td>
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<td>240</td>
<td>105</td>
<td>135</td>
<td>56</td>
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Id.
In addition to good conduct, however, Illinois law also provided for the award of similar credits either for meritorious service or for performing a work assignment. Traditionally, meritorious service good-time credits had been awarded only sporadically, for activities such as a prisoner intervening to save a guard from injury in the course of a prison disturbance. Since it was deemed desirable to leave the DOC with the flexibility to reward such exceptional behavior, the power to award this type of good-time credit was not affected by either the Act or its legislative predecessors. Work-assignment credit, however, was slated for abolition. This was done because of the belief that linking an offender's release date to any sort of programmatic activity would merely create a "false demand" for that kind of program, and that its quality and effectiveness would deteriorate markedly as it was inundated by insincere applicants.

3. Regulation of the Revocation of Good-Time Credits

Any good-time lost because of disciplinary infractions assuredly would result in lengthening the inmates sentence. With the proposed abolition of parole as a release mechanism for prisoners sentenced under the new law, good-time credits took on increased importance. Consequently, it became necessary to insure that initially fair and equitable sentences could not be undermined through the arbitrary actions of lower-level correctional personnel.

The Act adopted three proposals directed toward this issue, all of which have their roots in either the legislative proposals advanced by the reform group or in H.B. 1500, their immediate successor. The first of these proposals, directly traceable to the reform bill, proposed a panoply of procedural due process protections against arbitrary disciplinary actions. This proposal required that inmates be advised in writing of the nature of prison infractions, the possible penalties, the disciplinary procedure by which those penalties could be imposed, and the rights of prisoners in connection therewith. As further safeguards against abuse, the Act adopted two pro-
proposals which had originated in H.B. 1500. The first of these limited the maximum loss of good-conduct credits for a single disciplinary infraction to one year. The second created a Prisoner Review Board (PRB), which was to be independent of the DOC, and was to act as the board of review for cases involving the revocation of good-conduct credits or a suspension or reduction in the rate at which such credits were accumulated. In addition to this review function, the PRB was mandated to "hear and decide" all disciplinary cases in which the DOC sought to revoke more than thirty days of good-conduct credits, whether arising from a single incident or accumulating from a series of infractions occurring within a year's time.

B. Implementation of the Act's Structural Controls

The Act's one year cap on the loss of good-conduct credits weakened the absolute protections against such losses provided by the earliest reform legislation. Nonetheless, the Act contemplated a thorough, independent review of major disciplinary actions by the DOC in order to insure that the presumably rational sentences imposed by the judiciary would be served out in a fair and nonarbitrary manner. The system that has been implemented, however, bears very little resemblance to that just described. As discussed in more detail below, the DOC's system for awarding good-conduct credits did not operate in conformity with the Act until very recently. Moreover, while the data are not conclusive, there are good reasons to believe that the Act's intended checks against arbitrary imposition of disciplinary sanctions have not been effective.


527. See H.B. 1500, 80th Ill. Gen. Assembly, 1977 Sess., ¶ 3-6-3(c) at 19-20; Pub. Act No. 80-1099, § 3, 1977 Ill. Laws 3264, 3289 (codified at ILL. REV. STAT. ch. 38, § 1003-6-3(c) (1983)) (same language in both H.B. 1500 and enacted Pub. Act No. 80-1099). The earliest legislation had proposed a maximum loss of 30 days of good-conduct credits for a single offense, but had not called for an independent review of disciplinary determinations. S.B. 1885, 79th Ill. Gen. Assembly, 1976 Sess., ¶ 3-6-3(c) at 15-16. This expansion of the DOC's discretion, coupled with a more intensive review of the exercise of that discretion, first appeared in the Subcommittee Bill, supra note 38, ¶¶ 3-2-6.1(a), 3-2-6.2(a), 3-6-3(c) at 5, 6-7, 21-22.


530. Pub. Act No. 80-1099, § 3, 1977 Ill. Laws 3264, 3274 (codified at ILL. REV. STAT. ch. 38, §§ 1003-3-2(a)(4), 1003-6-3(c)(2) (1983)). The legislation extended to violations resulting in more than 30 days of lost time within 12 months, even though no single revocation exceeded the 30-day figure. Id. Presumably this was done to prevent the DOC from nibbling away at an inmate's good-time through a series of petty sanctions while evading independent review of its actions. See Proposal Commentary, supra note 27, at 20.

531. See infra text accompanying notes 533-56.

532. See infra text accompanying notes 558-627.
1. Good-Time

In deciding how to implement the Act's good-time provisions, the DOC initially took the position that the only inmates who were entitled to earn the new statutory good-conduct credits were those sentenced under the new law. All other inmates were to receive whatever system of good-conduct credits was in force at the time they were sentenced, including the now-banned compensatory work and program-related good-time which had been available under prior law.

This decision was clearly contrary to the provisions of the Act. The Act amended section 1005-8-7(b) of the Unified Code of Corrections, providing for the accumulation of good-conduct credits against a maximum term as well as a determinate sentence, with the minimum period of imprisonment to be calculated at the day-for-a-day rates specified in the Act. Since there were no minimum or maximum terms under the new sentencing scheme, the only possible interpretation of this language was that the legislature intended the new good-time provisions to apply to indeterminate sentences imposed under prior law. In *Johnson v. Franzen*, the Illinois Supreme Court put the matter to rest, holding that all inmates were entitled to day-for-a-day good-conduct credits for all time served after the effective date of the Act. Credits for time served prior to that date, however, were to be awarded pursuant to the old good-conduct credit system.

As soon as the court put this aspect of the good-conduct system in order, another problem arose. There were massive increases in the number of persons committed (or recommitted) to the DOC after the passage of the Act.


534. See supra text accompanying notes 522-24.


536. 77 Ill. 2d 513, 397 N.E.2d 825 (1979).

537. *Id.* at 517-22, 397 N.E.2d at 827-29.

538. *Id.* at 521-22, 397 N.E.2d at 829.

539. Lower courts have dealt with various other questions related to the good-time issue. In *Williams v. Irving*, 98 Ill. App. 3d 323, 424 N.E.2d 381 (1981), the court concluded that defendants were entitled to only a pro rata share of "old" good-conduct credits on their sentences that had accumulated prior to February 1, 1978 (the effective date of the Act) rather than all credits that could possibly be earned over the entire sentence plus day-for-a-day credits beginning February 1, 1978. *Id.* at 328-29, 424 N.E.2d at 385. Other cases have held that inmates held by the Department of Mental Health, *In re Coppersmith*, 108 Ill. App. 3d 161, 164, 438 N.E.2d 1267, 1269 (1st Dist. 1982), or in local jails prior to being transmitted to the DOC, *People v. Garlin*, 101 Ill. App. 3d 716, 723, 428 N.E.2d 697, 703 (5th Dist. 1981), must be awarded good-conduct credits on the same basis as if they had been in the custody of the DOC during those periods. These decisions seem sensible and correct.

540. The precise reasons for this are not clear. The increase, though, seems to have stemmed primarily from an increase in the rate of felony convictions statewide and an upsurge in the number of parole violators recommitted to the DOC. Longer sentences for murderers and Class X felons, coupled with their presence in the incoming population in ever-increasing percent-
In 1980 and 1981 alone, nearly four thousand more persons entered the DOC than were released.\textsuperscript{441} Such a trend seemed likely to continue for the foreseeable future. This desperate situation tempted the DOC to take desperate measures. In an effort to stem the tide, beginning in 1981 it began using "meritorious service" good-time as a basis for making reductions in prison sentences rather than merely as a special reward for exceptional cases.\textsuperscript{442} By 1982, literally hundreds of thousands of days of additional good-conduct credit were being awarded in this manner. As a consequence, judicially imposed sentences were being reduced to about thirty percent of their slated lengths, rather than being halved as the Act intended.\textsuperscript{443}

Notwithstanding the straits in which the DOC found itself, this action was clearly contrary to the Act. As discussed in detail earlier, the Illinois General Assembly specifically intended to divest the DOC of all authority to vary the statutorily established day-for-a-day good-conduct rate.\textsuperscript{444} Thus, this blanket use of meritorious service good-conduct credits to alter the statutory formula was precisely the kind of conduct the Act sought to prohibit.

The early releases engendered by this policy caused considerable (and understandable) concern among judges and prosecutors. For a time, no effective challenge to them could be found. Eventually, however, in \textit{Lane v. Sklodowski}\textsuperscript{445} those two groups managed to get the issue before the Illinois Supreme Court. A number of state attorneys instituted proceedings against DOC Director Michael Lane, alleging that the early release policy was resulting in an illegal shortening of sentences.\textsuperscript{446} Various judges had issued show-cause orders against Lane in response to these actions. He responded by seeking a writ of mandamus and prohibition or a supervisory order directing the judges to dismiss those proceedings.\textsuperscript{447}

The court granted Lane's petition but concluded that the Act allowed a cumulative award of only ninety days of meritorious good-conduct credits


\textsuperscript{442} See Tables 2-16, 2-19 in \textit{Human Services Report}, supra note 540. The tables reveal that a total of 19,098 persons were admitted to the DOC in 1980 and 1981 combined, while only 15,087 were released in those years.

\textsuperscript{443} In one publication, the DOC claimed that it had begun this process in June, 1980. \textit{Human Services Report}, supra note 540, at 39-40. This program, however, was not used extensively until the spring of 1981, when the number of days of such credits awarded per month, which had ranged between 500 to 4,000 days per month from July 1980 through March 1981, increased to 30,474 days in April, 96,536 days in May and 135,860 days in June, 1981. See Table 2 in IDOC, \textit{Good Time Monitoring}, FY 1981 Report (1981) [hereinafter cited as \textit{Good Time Monitoring}].


\textsuperscript{445} See \textit{supra} text accompanying notes 512-17.

\textsuperscript{446} 97 Ill. 2d 311, 454 N.E.2d 322 (1983).

\textsuperscript{447} Id. at 313-15, 454 N.E.2d at 323-24.
during an offender's sentence. The court noted that the Act had "carefully circumscribed the Director's authority to grant, revoke, and restore good-conduct credits." The court correctly discerned that this was done to insure that, with very limited exceptions, the length of an offender's sentence would be determined by operation of law rather than by discretionary decisions. Consequently, it was "inconceivable" that the General Assembly had intended "to grant the Director unlimited authority to award any number of days of credit for meritorious service he saw fit."

The Lane court wisely decided to give its ruling only prospective application. Nevertheless, its decision left the DOC in a very difficult position. Stripped of its power to vary the rate of accumulation of good-conduct credits as a safety valve to alleviate overcrowded conditions, the DOC is now largely reduced, in the words of Tennessee Williams, to "depend[ing] on the kindness of strangers." The prospects of the entire prison system slipping into an unconstitutionally overcrowded condition is a very real one, as the Lane court recognized, and both short- and long-term remedial measures are an urgent necessity. It would be a tragedy if the integrity of judicial sentencing decisions were restored only at the price of utterly disabling the DOC.

2. Prison Discipline

While Franzen and Lane seem to have finally brought the process of awarding good-conduct credits into conformity with the Act, there are strong indications that the process involved in revoking those credits has not functioned as the Act intended. The best available evidence is that all three of the Act's checks on such arbitrary action have been ineffective. First, the creation and dissemination of written disciplinary rules have had little if any effect because of the vague text of the rules. Second, the requirement that penalties be specified has also been of little use in curtailing abuses of discretion because no criteria for selecting sanctions of any particular length have been established. Finally, it appears that for a variety of reasons, the PRB has not carried out its statutory duty to conduct a thorough, independent review of the DOC's decisions to impose substantial disciplinary sanctions

548. Id. at 315-18, 454 N.E.2d at 324-25.
549. Id. at 317-18, 454 N.E.2d at 325.
550. Id.
551. Id.
552. Id. at 319, 454 N.E.2d at 325-26.
553. Such policies have frequently been changed in the past for precisely this reason, both in Illinois and elsewhere. See Jacobs, supra note 512, at 267-69.
554. See T. Williams, A Streetcar Named Desire, Scene 11.
555. 97 Ill. 2d at 318, 454 N.E.2d at 325.
556. See infra text accompanying notes 628-42 (some proposals in this regard).
557. See supra text accompanying notes 536-38 and 545-51.
558. See infra text accompanying notes 561-94.
559. See infra text accompanying notes 595-602.
on inmates. For all of these reasons, the Act’s checks on arbitrary exercise of discretion by correctional officials have not been effective.

a. The DOC’s Internal Disciplinary Procedures

By way of background, it is necessary to describe briefly how the DOC’s internal disciplinary procedures operate. An allegation that an inmate has committed an infraction is initiated by the filing of a Resident Disciplinary Report (RDR or ticket), detailing the circumstances of the alleged violation. This RDR is reviewed by a shift supervisor, who must determine whether the reported facts justify a disciplinary hearing. If so, the matter is referred to an Adjustment Committee (AC), a group of three correctional officials appointed by the Chief Administrative Officer (CAO) of each prison facility. After notice to the inmate, the AC holds a hearing at which the inmate may testify on his or her own behalf and, with the consent of the AC, may present other favorable testimony or documentary evidence. If the AC sustains the charges, it imposes sanctions within the permissible range for the violation in question. Those sanctions, in turn, are subject to review at the inmate’s request by the CAO. The CAO may, but need not, refer the case to a standing three-member institutional inquiry board for its advisory view. If the inmate remains dissatisfied with the CAO’s actions, he or she may appeal to the Director of the DOC. The Director, in turn, refers all arguably meritorious appeals and all cases in which more than thirty days of good-conduct credits are sought to be revoked, to an administrative review board before taking final action.

560. See infra text accompanying notes 603-27.
561. The DOC’s disciplinary rules and procedures have been amended in various versions of its Administrative Regulation 804. The DOC amended this regulation, effective February 1, 1978, in an effort to bring it into conformity with the Act’s requirements. That amended regulation was revised further into a version that became effective January 26, 1979, and still later into a version which became effective July 1, 1981, into its current form. That version is itself undergoing further revision as this article goes to press.
This article will discuss DOC A.R. 804 (Jan. 26, 1979) rather than the current regulation primarily because the only available detailed data concerning the DOC’s disciplinary practices relate to the period when DOC A.R. 804 (Jan. 26, 1979) was in effect. DOC A.R. 804 (July 1, 1981) did make a number of important revisions in DOC A.R. 804 (Jan. 26, 1979), however, which will be noted passim.
563. Id. ¶ II. C.
564. Id. ¶¶ II. D, II. E.
565. Id. ¶ II. G.
566. Id. ¶ II. G.13.
569. Id. ¶¶ II. J, II. K, II. L, II. M, II. N.
The process has been modified in some respects by the current version of DOC A.R. 804. RDRs, now called “inmate disciplinary reports” or IDR, must be prepared for all but minor violations and forwarded to a designated reviewing officer. DOC A.R. 804 ¶ II. B (July 1, 1981). The reviewing officer then determines whether any offense should be processed further.
b. The Written Rules Requirement

The DOC's response to the requirement that it disclose disciplinary offenses to inmates was to revise and disseminate its Administrative Regulation 804 (A.R. 804).\footnote{570} An early 1979 revision of that rule listed twenty-eight offenses that could result in loss of good-conduct credits, with six of these carrying maximum penalties of up to one year.\footnote{571} Among the more minor offenses, involving maximum losses of one month's good-conduct credits, were such offenses as "being disrespectful,"\footnote{572} exhibiting "carelessness or negligence of work,"\footnote{573} employing "indecency in language, action or gesture at any time,"\footnote{574} "gambling of any type,"\footnote{575} "giving away unauthorized food,"\footnote{576} "refusing to keep person or housing assignment clean and tidy,"\footnote{577} and "tattooing the body or piercing the ears."\footnote{578} Two months could be lost for the unauthorized possession of money\footnote{579} or of the property of other residents,\footnote{580} without the necessity of showing that such items were stolen. It takes no great insight to discern the possibilities for abusive or selective enforcement of such provisions.\footnote{581}
Turning to the six provisions carrying maximum penalties of twelve months, different problems emerge. Most of those infractions, when serious, would merit stern actions by correctional officials. They are so loosely worded, however, that they hold great potential for being arbitrarily applied. The first such offense, "assaulting an employee or fighting with a resident or employee," provides a good example of this phenomenon.

An enormous variety of conduct is embraced within this rule, ranging from vicious physical attacks upon guards by inmates at one extreme to an inmate's resistance to such an attack by a fellow inmate at the other. A similar problem is presented by the twelve-month sanction for "engaging with others in or pressuring others to engage in any unnatural sexual activity." Vagueness problems aside, this rule covers everything from brutal gang rapes and terroristic threats to wholly consensual activity which would not even be a crime in Illinois, at least outside of prison. Likewise, it would belabor the obvious to discuss the potential for capricious enforcement of the twelve-month penalty for "gathering around an employee in

by a loss of good-conduct credits. Id. ¶ II. A.1(402). Again, however, vagueness in the regulation arguably would permit such violations to be treated as "willfully refusing to comply with an order," which is punishable under another provision of the regulation by a loss of up to 15 days good-conduct credit. Id. ¶ II. A.1(403).

583. The revised regulation is not a great deal more helpful in this respect. It now includes seven provisions dealing with specific offenses—arson, assault, bribery and blackmail, dangerous contraband, dangerous disturbance, escape, and bestiality or nonconsensual sexual conduct, DOC A.R. 804 ¶ II. A.1(101)-(107) (July 1, 1981), as well as a catchall provision relating to any "violation of state or federal law." Id. ¶ II. A.1(501).

This revision obviously increased the range of conduct subject to severe disciplinary sanctions. Moreover, it did so without significantly narrowing the discretion of the DOC to "pick and choose" between major and minor violations. For example, a variety of actions under the regulation's prohibition of assault, carrying a 360-day maximum penalty, could also be treated as gang activity, carrying a 180-day maximum penalty, intimidation or threats, carrying a 90-day maximum penalty, or "insolence," carrying a 30-day maximum penalty. DOC A.R. 804 ¶ II. A.1(102), (205), (206) (304) (July 1, 1981).

585. This problem persists in large part under the current regulation as well. See supra note 583. Some other relief has been provided, however, by making unauthorized but consensual fighting a minor offense, punishable by a maximum loss of 30 days good-conduct credit. DOC A.R. 804 ¶ II. A.1(301) (July 1, 1981).

586. Id. ¶ II. A.1(24).

588. See generally ILL. REV. STAT. ch. 38, §§ 11-2, 11-3, 11-9 (1983) (defining various sexual offenses and not prohibiting such conduct if undertaken between consenting adults in a non-public place).

The current version of DOC A.R. 804 works a marked improvement in this respect by distinguishing between voluntary sexual conduct, with a maximum penalty of 30 days lost good-conduct credit, and nonconsenting sexual conduct, punishable by a loss of up to 360 days of good-conduct credits. See DOC A.R. 804 ¶ II. A.1(107.A), (107.B) (July 1, 1981).
a threatening or intimidating manner." The DOC's regulations, however, do not even mention the need for distinguishing between the extremes of conduct that could fall under these various rules, much less establish criteria for doing so.

A different type of problem is presented by the availability of numerous lesser charges arguably covering the same conduct prohibited by a serious charge. For example, a forbidden "gathering around an employee" or "mutinous act" can be readily characterized as merely "disobeying any order from any institutional employee or any prison rule," "being disrespectful to [that] employee," or being "abusive, insolent, [or] threatening" to the employee, all of which carry only one month penalties. Thus, the chameleon-like character of this language gives the DOC substantial discretion in the area of charging as well as punishment. While some flexibility in these matters obviously is desirable, the possibilities for abuse offered by such language are obvious. The Act recognized that possibility and addressed it by requiring a thorough review of discretionary PRB determinations whenever an inmate's sentence was affected to any significant extent.

It seems likely, however, that such a probing review never has been available and that, absent corrective legislative action, it never will be. Instead, data on the nature and distribution of the DOC's disciplinary sanctions suggest that those penalties are imposed in an arbitrary manner and are affected significantly by divergent administrative policies among various correctional institutions.5 Beyond that, additional data on the activities of the PRB strongly suggest that it has not been able to serve in the capacity of the strong, independent check on the DOC's actions contemplated by the Act. This failure has occurred at least in part because of deficiencies in resources that will require legislative action to correct.

c. Penalties

In examining the frequency and severity with which disciplinary procedures

589. DOC A.R. 804 ¶ II. A.1(25) (Jan. 26, 1979); see also supra note 583 (discussing revisions in DOC A.R. 804 that increased the types of prisoner conduct subject to severe disciplinary sanctions).

590. The DOC also has made a modest improvement in this area by providing in the current version of DOC A.R. 804 as follows:

Listed after each offense is the maximum penalty that the Adjustment Committee may impose if the inmate is found guilty of the violation after a disciplinary hearing. The maximum penalty need not be imposed. In determining the appropriate sanctions, the Adjustment Committee, Chief Administrative Officer and Director may consider, among other things, mitigating or aggravating factors such as the individual's mental state at the time of committing the offense, the extent and degree of participation in the commission of the offense, the amount and/or nature of stolen property and/or contraband, and the inmate's prior disciplinary record.


591. Id. ¶ II. A.1 (1), (2), (4), (8).

592. See supra text accompanying notes 525-30.

593. See infra text accompanying notes 595-602.

594. See infra text accompanying notes 603-27.
are invoked, disturbing and inexplicable disparities emerge. The available data, although not conclusive, strongly suggest that disciplinary procedures are invoked at substantially different rates from one institution to another and, when invoked, result in substantial differences in the severity of sanctions imposed. Moreover, those variations are not explicable in terms of differences in the inmate populations housed at those institutions.

Data gathered by the DOC indicate substantial variation in the rate at which good-conduct credits were revoked at the various correctional institutions. Charts 7 and 8 below show the number of instances in which good-conduct credits were revoked at each institution during a two-year period.

CHART 7
NUMBER OF DISCIPLINARY SANCTIONS
AT ADULT DOC INSTITUTIONS — FISCAL YEAR 1980

<table>
<thead>
<tr>
<th>Institution</th>
<th>Average Daily Pop. (ADP)</th>
<th>No. of Tickets</th>
<th>% of ADP</th>
<th>Days Revoked Total</th>
<th>Avg.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dwight</td>
<td>367</td>
<td>82</td>
<td>22</td>
<td>3,215</td>
<td>39.2</td>
</tr>
<tr>
<td>Joliet</td>
<td>1,382</td>
<td>491</td>
<td>36</td>
<td>16,899</td>
<td>34.4</td>
</tr>
<tr>
<td>Logan</td>
<td>813</td>
<td>313</td>
<td>38</td>
<td>5,931</td>
<td>18.9</td>
</tr>
<tr>
<td>Menard</td>
<td>2,514</td>
<td>751</td>
<td>30</td>
<td>31,620</td>
<td>42.1</td>
</tr>
<tr>
<td>Menard Psych.</td>
<td>372</td>
<td>38</td>
<td>10</td>
<td>6,464</td>
<td>170.1</td>
</tr>
<tr>
<td>Pontiac</td>
<td>1,861</td>
<td>253</td>
<td>14</td>
<td>31,892</td>
<td>126.1</td>
</tr>
<tr>
<td>Sheridan</td>
<td>490</td>
<td>1,134</td>
<td>231</td>
<td>7,103</td>
<td>6.3</td>
</tr>
<tr>
<td>Stateville</td>
<td>2,199</td>
<td>1,429</td>
<td>65</td>
<td>97,482</td>
<td>68.2</td>
</tr>
<tr>
<td>Vandalia</td>
<td>770</td>
<td>571</td>
<td>74</td>
<td>6,600</td>
<td>11.6</td>
</tr>
<tr>
<td>Vienna</td>
<td>721</td>
<td>97</td>
<td>13</td>
<td>1,248</td>
<td>12.9</td>
</tr>
<tr>
<td>TOTAL</td>
<td>11,489</td>
<td>5,159</td>
<td>45</td>
<td>208,454</td>
<td>40.04</td>
</tr>
</tbody>
</table>

595. For chart 7, average daily population (ADP) figures are approximated (in a way which overstates them) by taking the DOC's published head-count for those institutions as of July 12, 1981, because actual ADP data were not available for that fiscal year. The source of the data used is Table 3-13 in IDOC, POPULATION & CAPACITY REPORT, at 177. All other data in that chart are derived from Table 2 in a special report to the DOC director from its Policy Development Division entitled, "Illinois Adult Institutional Population: Time Revoked and Restored in Fiscal Year 1980." All data in chart 8 are derived from table 5 in GOOD TIME MONITORING, supra note 542.

The reason such old data are utilized is that the DOC has consistently refused to release its studies of conduct revocation practices to the public. Although the author was able to obtain the information set out in charts 7 and 8 from other sources, they did not have more recent information and the DOC declined to furnish it. A more current assessment of the DOC's disciplinary practices is desirable; and it can only be hoped that the DOC will reconsider its policy so as to permit it to be undertaken.
As these two charts show, there are very substantial variations in the frequency of tickets written (expressed as a percentage of each institution's average daily population) ranging from over two hundred percent at Sheridan to under five percent at Centralia, East Moline, and Graham. Nothing in the prison populations at these institutions offers an explanation of why this should be so. Indeed, both Centralia and Graham have higher percentages of inmates who had committed the most serious felonies (murder and class X) than Sheridan, yet they have consistently lower disciplinary rates.  

596. The percentages of inmates from each felony class at these three institutions during fiscal year 1981 are set out below. Percentages do not add up to 100% because misdemeanant and miscellaneous categories are not included.

597. See Chart 8 in text, at 728.
The same spreads appear if one looks at those prisons with the highest percentages of inmates convicted of murder and class X felonies—Stateville, Menard, and Pontiac. Despite roughly comparable prison populations, these three institutions, as shown in Chart 9 below, exhibited wide variations in both the rate and severity of disciplinary measures.

**CHART 9**

**COMPARISON OF DISCIPLINARY SANCTIONS AT MENARD, PONTIAC AND STATEVILLE FOR FISCAL YEARS 1980 AND 1981**

<table>
<thead>
<tr>
<th>Institution</th>
<th>Violations as % Of Avg. Daily Pop.</th>
<th>Average Sanction Imposed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Menard</td>
<td>30</td>
<td>44</td>
</tr>
<tr>
<td>Pontiac</td>
<td>14</td>
<td>13</td>
</tr>
<tr>
<td>Stateville</td>
<td>65</td>
<td>44</td>
</tr>
</tbody>
</table>

As this chart shows, in 1980 a Pontiac inmate was only half as likely to get written up as a Menard inmate and only about one-fifth as likely as a Stateville inmate. In 1981, a Pontiac inmate continued to be only about one-third as likely to get a ticket as was a Menard or Stateville inmate. On the other hand, if an inmate were unfortunate enough to be punished, Menard rather than Pontiac was definitely the place to be. At Menard, the average violation resulted in a sanction of only about forty-five days, substantially below the prevailing rate at either Pontiac or Stateville.

It is difficult to explain variations of this magnitude in terms of prison population. Instead, it seems more likely that disparities are due to a cause that the DOC itself has acknowledged as possible: “differences in the nature of disciplinary measures.”

---

598. The percentages of inmates from each felony class at those three institutions during fiscal year 1981 are set out below. Percentages do not add to 100% because misdemeanant and miscellaneous categories are not included.

<table>
<thead>
<tr>
<th>Felony Class</th>
<th>Menard</th>
<th>Pontiac</th>
<th>Stateville</th>
</tr>
</thead>
<tbody>
<tr>
<td>M</td>
<td>22.3</td>
<td>22.2</td>
<td>22.2</td>
</tr>
<tr>
<td>X</td>
<td>45.0</td>
<td>45.0</td>
<td>46.0</td>
</tr>
<tr>
<td>1</td>
<td>4.1</td>
<td>3.2</td>
<td>3.2</td>
</tr>
<tr>
<td>2</td>
<td>25.6</td>
<td>25.6</td>
<td>21.6</td>
</tr>
<tr>
<td>3</td>
<td>8.0</td>
<td>5.2</td>
<td>4.0</td>
</tr>
<tr>
<td>4</td>
<td>0.9</td>
<td>0.6</td>
<td>0.6</td>
</tr>
</tbody>
</table>

*GOOD TIME MONITORING, supra note 542, at Table 4.*

599. Data are derived from charts 7 and 8, which in turn are derived as discussed *supra* note 595.
The Act had anticipated, of course, that such differences might arise. It thus created a mechanism designed to keep them in check: PRB oversight of the good-conduct revocation process. As shown below, however, the DOC thus far has resisted effective PRB oversight of its disciplinary decisions. For a variety of reasons, that resistance has been largely successful.

d. PRB Involvement in Disciplinary Matters

The written specification of offenses and penalties was not seen as the principal check on the DOC's use of its disciplinary powers. Instead, the linchpin of these controls was the requirement that the PRB "hear and decide" cases in which the DOC sought to revoke over thirty days of good-conduct credits within a twelve-month period. This procedure, however, did not operate as intended. Rather, the DOC has adopted a series of unjustifiably narrow constructions of the Act which have sharply curtailed the PRB's authority. The PRB, for a variety of reasons, has acquiesced in these constructions. As a consequence, there is no effective check at present on the DOC's use of its disciplinary power.

Disciplinary matters are referred to the PRB only after elaborate administrative procedures have been exhausted. However, not all sanctions in excess of thirty days are forwarded to the PRB as required by the Act. Instead, the DOC consistently has taken the position that the PRB has no role in connection with disciplinary sanctions imposed on inmates sentenced under prior law, and the PRB has accepted this limitation on its authority.

This interpretation parallels the DOC's discredited view on the applicability of the Act's revised good-conduct provisions and, for similar reasons, is clearly in error. The Act explicitly states that the PRB is to "hear and decide cases" brought by the DOC to revoke over thirty days of good-conduct credits. This language is not limited to inmates sentenced pursuant to the Act. The Act also explicitly provides that the DOC "shall bring charges"

600. Good Time Monitoring, supra note 542, at 1.
601. See supra text accompanying notes 525-30.
602. See infra text accompanying notes 603-27. Much of the analysis in the next section is attributable to a 1979 publication of the Chicago Law Enforcement Study Group, authored by Paul Bigman, entitled "Discretion, Determinate Sentencing and the Illinois Prisoner Review Board: A Shotgun Wedding." Although dated in some respects, this work remains the most thorough and thoughtful study of the working of the Prisoner Review Board.
605. Bigman, supra note 602, at 19, 26, 28. The PRB continues to adhere to this position.
606. See supra text accompanying notes 533-37.
before the PRB in such cases.\textsuperscript{608} It is difficult to conceive of a more universal and more clearly obligatory phrasing.\textsuperscript{609}

The DOC's complete exclusion of certain cases from PRB consideration has not been its only effort to trim the PRB's sails. In perhaps an even more far reaching decision, the DOC has taken the position that the PRB does not have "the power to determine the guilt or innocence of the resident or make any other disposition" other than reviewing the number of days of good-conduct credit sought to be revoked by the DOC.\textsuperscript{610} This position is based primarily on section 1003-3-1(a)(2) of the Unified Code of Corrections, as amended by the Act, declaring that the PRB "shall be the board of review for cases involving the revocation of good-conduct credits or a suspension or reduction in the rate of accumulating such credit."\textsuperscript{611} The DOC's position, however, fails to accommodate the more specific language of section 1003-3-2(a)(4), granting the PRB the power to "hear and decide cases brought by the DOC against a prisoner . . . in which the Department seeks to revoke good-conduct credits;"\textsuperscript{612} and the language of section 1003-6-3(c)(2), instructing the DOC to "bring charges . . . against the prisoner sought to be so deprived of good-conduct credits before the PRB."\textsuperscript{613}

Admittedly, these provisions are somewhat contradictory. A "board of review" is not, in general, a body before which one brings charges. But neither are the PRB's powers to revoke good-conduct credits those of a mere board of review. The PRB has the power to subpoena witnesses for hearings on revocation of good-conduct credits, as well as for other hearings.\textsuperscript{614} Moreover, the inmate charged has the right to testify on his or her own behalf at such hearings.\textsuperscript{615} The PRB has reserved the right to consider other evidence as well.\textsuperscript{616} The existence of these powers strongly supports the conclusion that the PRB should determine the innocence or guilt of prisoners against whom charges are brought, and not just the equity of the sanction sought by the DOC. As one perceptive authority has noted, both the legislative history of the Act and the more cogent interpretation of its


\textsuperscript{609} For a more elaborate analysis of this issue, which also concludes that the PRB and DOC's position is wrong, see Bigman, \textit{supra} note 602, at 26, 28.

\textsuperscript{610} \textit{Id.} at 22, 24, Appendix C.


\textsuperscript{615} Bigman, \textit{supra} note 602, at 21; Prisoner Review Board Rules, § XVII.C.2.

\textsuperscript{616} Bigman, \textit{supra} note 602, at 21; Prisoner Review Board Rules, § XVII.C.3.
language persuasively demonstrate that the broader view of the PRB authority was intended.\textsuperscript{617}

In this instance, however, the PRB has not been ousted from its rightful role by the DOC. Rather, the PRB has gracefully retired from the field on its own initiative. The PRB has never asserted the broader authority argued for above.\textsuperscript{618} Nor is it likely to assume such a role unless it is provided with an investigative and support staff commensurate with the task. As of this writing, the PRB is entirely dependent on the staff of the DOC to assemble the records and information pertinent to disciplinary cases.\textsuperscript{619} Although a disciplined inmate may be expected to present objections to earlier administrative procedures and penalties, only the record compiled by the DOC will be before the PRB. If the PRB wished to initiate its own inquiry, it

CHART 10

<table>
<thead>
<tr>
<th></th>
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<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>DOC Revocation Requests</strong></td>
<td></td>
<td></td>
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<td></td>
<td></td>
<td>5340</td>
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<tr>
<td><strong>PRB Revocations In Full Amount</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>#</td>
<td>80</td>
<td>580</td>
<td>1613</td>
<td>1527</td>
<td>1375</td>
<td>5175</td>
</tr>
<tr>
<td>%</td>
<td>90.9</td>
<td>99.0</td>
<td>96.3</td>
<td>96.3</td>
<td>97.8</td>
<td>96.9</td>
</tr>
<tr>
<td><strong>PRB Revocations In Lesser Amount</strong></td>
<td></td>
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<td></td>
<td></td>
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</tr>
<tr>
<td>#</td>
<td>6</td>
<td>4</td>
<td>36</td>
<td>31</td>
<td>15</td>
<td>92</td>
</tr>
<tr>
<td>%</td>
<td>6.8</td>
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<td>2.1</td>
<td>2.0</td>
<td>1.1</td>
<td>1.7</td>
</tr>
<tr>
<td><strong>PRB Refusals To Revoke</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>#</td>
<td>2</td>
<td>2</td>
<td>26</td>
<td>27</td>
<td>16</td>
<td>73</td>
</tr>
<tr>
<td>%</td>
<td>2.3</td>
<td>0.3</td>
<td>1.6</td>
<td>1.7</td>
<td>1.1</td>
<td>1.4</td>
</tr>
</tbody>
</table>

* The "year" 1978 consists of February through December of 1978, while the "years" 1979 and 1980 consist of February 1979 through January 1980 and February 1980 through January 1981 respectively. This non-calendar-year reporting system apparently was initiated because of the 2/1/78 effective date of the Act. It was discontinued in favor of a calendar-year approach beginning with the 1981 Annual Report.

\textsuperscript{617} Bigman, \textit{supra} note 602, at 24-25.

\textsuperscript{618} \textit{Id.} at 24. Bigman gives this as the PRB's position as of 1979. The author understands that the Board continues to adhere to that view.

\textsuperscript{619} \textit{Id.} at 25-26.
would have to either rely on DOC personnel or do the investigatory work itself. The latter alternative is highly unlikely, given the many duties of the PRB.\footnote{See ILL. REV. STAT. ch. 38, § 1003-3-2(a)(1), (3), (5), (6) (1983).}

In light of the limitations in both the jurisdiction and the resources of the PRB, it would be surprising indeed if the DOC's disciplinary decisions were overturned with any regularity. As Chart 10 shows, the PRB's actions are entirely consistent with these expectations. The PRB has sustained the DOC's position in the overwhelming majority of cases, agreeing to revocations of good-conduct credits in the amounts requested by the DOC in almost all of the matters heard during the five-year period examined. Revocations were denied altogether by the PRB in a mere 1.407% of all cases reviewed.\footnote{The principal sources of these data are the Annual Reports prepared by the Prisoner Review Board. Prior to 1982, the Board published only two categories of data of this sort: Cases in which they granted the DOC's request in full and cases in which they did not. They maintained the three categories of data displayed in chart 10 throughout the period, however, and supplied it to the author upon request.}

These data show rather convincingly that the PRB review mechanism is not having any appreciable impact on the DOC's disciplinary decisions, either as to the merits or as to the choice of sanctions. Wholesale reversals of departmental actions would not be expected, given the elaborate administrative appeals process before reaching the PRB.\footnote{See supra text accompanying notes 561-69.} Nonetheless, the DOC's success rate before the PRB seems suspiciously high. The PRB's failure to equalize the sanctions chosen by the DOC also seems unjustified, given the widespread variance existing in that area.\footnote{See supra text accompanying notes 595-600.}

One long-time observer of the DOC and the PRB has argued that this record clearly establishes that the vagaries and abuses of the prison disciplinary process sought to be controlled by the Act remain unchecked, and that broad-based reforms are necessary before the situation will improve.\footnote{Bigman, supra note 602, at 45-50, Appendix E. The author suggested reforms, which parallel those proposed herein, but are more limited. See infra text accompanying notes 643-49.} This assessment is accurate in large part. It is possible, despite all appearances, that the prison disciplinary system is determining violations and allocating sanctions in some principled, consistent manner. If this is so, however, it is not because of the features of the Act directed to that end. The DOC's specifications of disciplinary infractions still permit the imposition of substantial sanctions for relatively minor acts.\footnote{See supra notes 581-85 and accompanying text.} Moreover, a substantial number of prisoners fall outside of the PRB review procedure altogether\footnote{See id.} and the remainder receive a less intensive scrutiny than that contemplated by the Act.\footnote{See supra text accompanying notes 610-17.} Thus, if the system is working as planned, no reason exists to credit the PRB's supposed independent check on departmental disciplinary action.

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621. The principal sources of these data are the Annual Reports prepared by the Prisoner Review Board. Prior to 1982, the Board published only two categories of data of this sort: Cases in which they granted the DOC's request in full and cases in which they did not. They maintained the three categories of data displayed in chart 10 throughout the period, however, and supplied it to the author upon request.
622. See supra text accompanying notes 561-69.
623. See supra text accompanying notes 595-600.
624. Bigman, supra note 602, at 45-50, Appendix E. The author suggested reforms, which parallel those proposed herein, but are more limited. See infra text accompanying notes 643-49.
625. See supra notes 581-85 and accompanying text.
626. See id.
627. See supra text accompanying notes 610-17.
C. Proposals for Remedial Action

The Act's efforts to structure correctional discretion in sentencing matters have been affirmed in the area of awarding good-conduct credits but have been largely ignored or rendered ineffective in the area of revoking such credits. Enforcing the Act's limitations concerning awards of good-conduct credits, however, has had the unfortunate consequence of exacerbating the DOC's severe prison overcrowding problem. The succeeding materials will briefly discuss some of the measures that could be undertaken to alleviate prison overcrowding and to improve prison disciplinary procedures.

1. Prison Overcrowding

The multitude of problems facing the DOC in the wake of Lane v. Sklodowski\(^{\text{628}}\) is staggering indeed. Deprived of the meritorious good-conduct mechanism for expediting the release of current inmates, and inundated with increasing numbers of new inmates having longer sentences than their predecessors, the DOC faces a difficult and uncertain future. At present, groups such as the Governor's Task Force On Prison Crowding\(^{\text{629}}\) are addressing varied approaches to alleviate these problems in the short term. No attempt will be made to duplicate those efforts here. Several observations on approaches directly related to sentencing matters, however, seem appropriate.

First, the duration of the present overcrowding crisis indicates that it is a particularly bad time to send anyone to prison whom the sentencing judge, after a thorough and conscientious review of the pertinent circumstances, believes does not belong there. For that reason, the Illinois General Assembly should consider expanding the range of sentencing alternatives for those offenses currently carrying mandatory minimum sentences. One possibility would be to authorize sentences of periodic imprisonment in any cases presenting exceptionally mitigating circumstances.\(^{\text{630}}\)

\(^{\text{628}}\) 97 Ill. 2d 311, 454 N.E.2d 322 (1983).

\(^{\text{629}}\) The Adult Corrections Subcommittee of the House Judiciary II Committee also has been considering a broad range of criminal justice issues, including prison overcrowding. The subcommittee is preparing a report on its activities, which will be issued shortly. The John Howard Association, a prison reform organization, also has been very active in this area, as has the League of Women Voters.

\(^{\text{630}}\) The reform group's original legislation contained such a proposal. See S.B. 1885, 79th Ill. Gen. Assembly, 1976 Sess., ¶ 5-5-3(d)(1)-(2) at 25-26. It should be noted that many such offenses were probationable in the not too distant past. See Ill. Rev. Stat. ch. 38, § 117-1 (1969) (only capital offenses, rape and sale of narcotics nonprobationable); id. § 1005-5-3(d) (1973) (only murder, rape, armed robbery, four offenses under the Illinois Controlled Substances Act and one under the Cannabis Control Act nonprobationable). Thus, the proposal to revive periodic imprisonment but not probation as a sentencing option in a limited class of cases is hardly a radical measure. Given the pace at which new nonprobationable offenses have been created in recent years, however, it does not seem to be in tune with the times.

If a general grant of authority to impose non-incarcерative sentences were deemed unadvisable, the General Assembly might want to consider reclassifying specific offenses so as to
Second, the current crisis also serves as a pointed reminder that there are limits to how many persons can be punished through commitment to prison, as well as to how severe their prison sentences can be. Due primarily to plea bargaining, the present system does a rather poor job of determining who should be incarcerated and how severe a sentence should be imposed. Reforms needed in that area will probably increase both the number of prison commitments and the lengths of sentences imposed in more aggravated cases. Moreover, as the next article in this series will argue, the present system has not selected who should receive the most severe sentences, nor what those sentences should be, in a fair and rational manner. Instead, the Act's more severe penalties frequently have been imposed in a haphazard manner on offenders who were indistinguishable from those punished far less severely. The resulting injustice and disparity have contributed substantially to prison overcrowding and will do so at ever-increasing rates without any offsetting advantage to the public. Reforms in this area may result in reducing the number and duration of prison commitments.

Both of these observations lead to the same conclusion: If the people of Illinois want a sentencing system that will permit a sensible differentiation between offenders, protect the public, and still permit the DOC to function, it is imperative that the average prison sentence be reduced significantly from present levels. The most appropriate way to do this, it is submitted, is allow offenders eligibility for probation. The offenses that come immediately to mind, based in large part on the difficulties they have occasionally caused the judiciary, are: (1) Class 2 offenses committed while on probation for a class 2 offense, see People ex rel. Carey v. Bentivenga, 83 Ill. 2d 537, 540, 416 N.E.2d 259, 261 (1981) (probation imposed where second offense was burglary of $1.55 item); People v. Konrad, 117 Ill. App. 3d 555, 559, 453 N.E.2d 831, 834 (1st Dist. 1983) (trial judge originally had imposed probation in spite of statute); ILL. REV. STAT. ch. 38, § 1005-5-3(c)(2)(F) (1983); (2) Distribution of relatively small amounts of certain nonaddictive, nonhallucinogenic drugs, see People ex rel. Daley v. Schreier, 92 Ill. 2d 271, 275, 442 N.E.2d 185, 187 (1982) (overturning probation imposed for conviction of class X felony where trial court believed defendants only guilty of class 3 felony); People ex rel. Daley v. Limperis, 86 Ill. 2d 459, 466, 427 N.E.2d 1212, 1215 (1981) (upholding probation imposed by trial court which found defendants guilty of class 2 felony rather than class X felony); (3) Residential burglary, see People v. Berry, 123 Ill. App. 3d 1042, 1047, 463 N.E.2d 1044, 1048-49 (4th Dist. 1984) (appellate court defers to legislature's setting penalties); ILL. REV. STAT. ch. 38, § 19-3(a) (1983); (4) Armed violence, see People v. Griswald, 111 Ill. App. 3d 454, 455-56, 444 N.E.2d 267, 268-69 (4th Dist. 1983) (noting that breadth of statute permitted punishment of perjury committed by police officer while armed, as an armed violence offense and questioning wisdom of same); People v. Alejos, 97 Ill. 2d 502, 511-13, 455 N.E.2d 48, 52-53 (1983); concluding, contrary to a number of appellate court opinions, that armed violence statute did not apply to voluntary manslaughter, a class 1 offense, for which probation is allowed); ILL. REV. STAT. ch. 38, §§ 33A-1, 33A-2 (1983); (5) Armed robbery, see People v. Coleman, 78 Ill. App. 3d 989, 398 N.E.2d 185 (3d Dist. 1979) (appellate court reduced conviction to robbery because of dissatisfaction with imposing class X penalty); ILL. REV. STAT. ch. 38, §§ 18-2(a), 1005-5-3(c)(2)(c) (1983). The very length of this list is a potent argument for a general reform.

631. See supra text accompanying notes 140-41.
632. This claim will be treated at length in the second article in this series.
633. As already noted, however, some sentences can be expected to increase. See supra text accompanying note 631.
to lower sentencing minima and to shrink sentencing ranges in some orderly manner. 634

For the sake of discussion, three alternative sentencing schedules are proposed. The first, Alternative I, utilizes the regular-term minima provided by present law but substantially reduces the present maxima. 635 The second, Alternative II, utilizes the same reduced maxima as Alternative I and also reduces the regular-term minima below those presently provided by law for all but class 4 felonies. Finally, Alternative III utilizes the same regular term minima as Alternative II but makes further reductions in regular maxima and extended term ranges. A reformulation of penalties along such lines, 636 whether or not accompanied by other suggested reforms, 637 merits careful study by the Illinois General Assembly and other interested constituencies. 638

634. These proposals will be further elaborated in the second article in this series. To briefly summarize that discussion, it will be argued that any such reform should be accompanied by additional measures—under either judicial or legislative sponsorship—to facilitate selection of a presumptively appropriate type and/or length of sentence from within the range of available alternatives. Although judges would be free to impose a sentence of a different type or length, they would be required to state their reasons for doing so. In addition to sentencing appeals by defendants, the state would be permitted to appeal sentences which are below the minimum "guideline" sentence. After Davis and Cox, of course, these latter two measures would require the approval of the Illinois Supreme Court. See supra text accompanying notes 290-324 and 369-85 (discussing Davis and Cox cases).

635. The regular and extended term sentencing ranges for Illinois' various felony classes are set out below:

<table>
<thead>
<tr>
<th>FELONY CLASS</th>
<th>REGULAR TERM</th>
<th>EXTENDED TERM</th>
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<tbody>
<tr>
<td>M</td>
<td>20-40 or 40-80</td>
<td>40-80</td>
</tr>
<tr>
<td>X</td>
<td>6-30</td>
<td>30-60</td>
</tr>
<tr>
<td>1</td>
<td>4-15</td>
<td>15-30</td>
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<tr>
<td>2</td>
<td>3-7</td>
<td>7-14</td>
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<td>3</td>
<td>2-5</td>
<td>5-10</td>
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<td>4</td>
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<td>3-6</td>
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See ILL. REV. STAT. ch. 38, §§ 1005-8-1, 1005-8-2 (1983). All three proposals set out in the text also eliminate an anomaly of present law which permits natural life sentences to be imposed under regular term provisions for certain types of murders, but only an 80-year maximum extended term for those same crimes. The proposals would make those natural life provisions available only where an extended term would be warranted.

636. While none of these alternatives would need to be enacted in its entirety, it should be noted that each has a degree of internal consistency not found in present law: the most serious extended term penalty for a given felony class equals the most serious regular term penalty for the next higher felony class. Such proportionality in the ranges of sanctions would reinforce the Act's general concerns for fairness and rationality in sentencing.

637. See supra text accompanying notes 132-75, 467-507, 628-36 and infra notes 638-50. The second article in this series will propose significant additional reforms.

638. Chief among such constituencies, of course, are the various components of the criminal justice system most directly affected by them—prosecutorial, judicial and correctional officials.
Finally, the issue of how to respond to *Lane v. Sklodowski* must be faced. Presumably, the General Assembly could restore the DOC's authority to award meritorious good-time or its equivalent. Although it has been asked to do so, the General Assembly wisely has resisted such pleas thus far. The use of meritorious good-time prior to the *Lane* case generated hostility in prosecutorial and judicial circles and posed a danger to rational sentencing practices. An approach other than this correctional wild card should be employed in the future.

A possibly fruitful alternative would be the creation of some body (hereinafter the Authority) to devise policies for the expedited release of inmates in certain circumstances. The Authority should have a broadly based membership drawn from criminal justice, governmental, academic, and public sources. In general terms, it would be empowered to act in a statutorily defined “correctional emergency” to authorize the release of a sufficient number of inmates pursuant to a pre-approved plan.

Such a plan would have several virtues. First, it would minimize any adverse consequences or reactions to an early release of inmates. Second, it would permit the development of a general consensus on the best approach to a sensitive situation. This consensus, in turn, might prove to be a springboard to other positive reforms. Third, it would minimize the distortion of judicial sentencing choices. Finally, it would promote a sensitivity to the limitations and interdependencies of the various components of the criminal justice system. Hopefully, this sensitivity would inspire and infuse judicial or legislative proposals in other areas of sentencing reform. For all of these reasons, the creation of the Authority seems worth pursuing.

2. Prison Discipline

The measures that would be necessary to implement the Act’s structural controls on the exercise of discretion by correctional officials are rather straightforward. Although continued narrowing and refining of the disciplinary regulations are desirable, a more significant reform would be to enlarge and to strengthen the PRB’s oversight of the DOC’s disciplinary actions. Several measures appear necessary in that regard.

The first two proposals are facilitative changes which will enable the PRB to assert the full scope of its jurisdiction and to take effective remedial action when necessary. First, the PRB should be provided with the staff necessary to investigate disciplinary matters. Second, administrative law judges should be authorized to act as hearing officers in such matters. It is unrealistic to expect overworked PRB members to unearth any errors or improprieties that might have arisen in earlier proceedings when the PRB must rely on administrative records developed in DOC hearings and depend on the DOC’s own employees for support services. The changes proposed are the minimum necessary to make effective oversight a realistic possibility.

641. This is much like a procedure currently utilized in Michigan to deal with prison overcrowding.
642. See supra text accompanying notes 132-75 and 467-507.
643. Such efforts are underway. See supra note 561.
644. Additional measures have been proposed by others. See generally Bigman, supra note 602, at 45-50, Appendix E (recommending removal of power to revoke good-conduct credits from PRB, abolishing mandatory supervised release, informing prisoners of PRB’s guidelines and procedures, restricting PRB by limiting number of terms Board members can serve and mandating proportionate sexual and racial makeup of the PRB, and providing full-time counsel to the PRB).
645. See supra text accompanying notes 618-20.
In addition, the PRB should assert jurisdiction over disciplinary actions involving inmates serving indeterminate as well as determinate sentences. It clearly has this power under present law.\(^{646}\) In addition, the PRB should assert and exercise its right to determine the guilt or innocence of alleged violators, not merely the extent of their punishment. This power, too, clearly belongs to the PRB under existing law.\(^{647}\)

Finally, the PRB should take a leading role in examining the significant and inexplicable variations in the frequency and amount of good-conduct revocations at different DOC institutions.\(^{648}\) Rather than merely react on a case-by-case basis to disciplinary matters, the PRB should attempt to unearth the causes of disparities and to develop policies to curtail them without sacrificing the DOC's legitimate needs. Such a pro-active role would be far more valuable than any actions the PRB might take in individual cases. Furthermore, such a role may result in a long-term reduction in the PRB's own caseload as fairer, more even-handed policies are implemented. Once again, this role seems to be within the PRB's existing authority.\(^{649}\)

V. CONCLUSION

The Act's efforts to structure the exercise of discretion by prosecutorial, judicial, and correctional officials in the bargaining for, imposing, and serving of criminal sentences have been systematically ignored, subverted, or invalidated. While remedial measures for these various shortcomings have been proposed, one very significant issue has been addressed only briefly and peripherally: the real-world necessity for these measures. It is at least theoretically possible that sentences are being chosen in some fair and rational manner consistent with the Act's purposes and substantive restrictions, even though the structural measures designed to facilitate that result have not functioned as intended. If that were so, this article's call for reform could be dismissed as being of possible academic importance but of no practical significance.

But as a succeeding article will show, precisely the opposite is true. With the invalidation of the Act's structural controls, development of a coherent—indeed, even a legally correct—approach to its substantive provisions has also foundered. As a consequence, a thorough reworking of both the structural and substantive aspects of the Act is necessary in order to implement the type of fair, rational sentencing scheme that the Illinois General Assembly envisioned.

\(^{646}\) See supra text accompanying notes 604-09.

\(^{647}\) See supra text accompanying notes 610-17.

\(^{648}\) See supra text accompanying notes 596-602.

\(^{649}\) The PRB is authorized by statute to "review" the DOC's rules and regulations concerning good-conduct credits. Ill. Rev. Stat. ch. 38, §§ 1003-1-2(i), 1003-2-2(n) (1983).