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ILLINOIS RECONSIDERS "FLAT TIME": AN ANALYSIS OF THE IMPACT OF THE JUSTICE MODEL

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Legislation has been introduced which would return Illinois to "flat time" prison sentences. Though there is popular confusion as to the exact meaning of this term, to professionals in law and corrections it proposes a return to a system that Illinois and most other states abandoned at the turn of the century. The proposal represents a growing sentiment throughout the country by the very professionals who for years have accepted the indeterminate sentence and parole as a given of the criminal justice system. It seems likely that the major shift from indeterminate to determinate sentencing will occupy the Illinois General Assembly and other legislatures in debate for some years to come. It is the purpose of this article to examine in detail the proposals of the Justice Model bills and indicate the changes they will introduce.

The first section summarizes the criticisms which have overtaken the present system of indeterminate sentencing. It has been a gradual, historical

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1. Governor Walker introduced the package of legislation under the title of "Justice Model" in his State of the State address in January, 1975. The title "Justice Model" is taken from D. FOGEL, WE ARE THE LIVING PROOF: THE JUSTICE MODEL FOR CORRECTIONS 204 (1975) [hereinafter cited as FOGEL]. Dr. Fogel has served as the chairman of the drafting committee for the proposed legislation. He serves as the Executive Director of the Illinois Law Enforcement Commission. The text of the bills is taken from the most recent drafts dated February, 1976 which may be subject to further change. From an examination of all drafts over the past year, the authors have found a high degree of consistency and consider the present drafts as final.


2. For instance, many people seem to think that flat time sentences mean mandatory prison sentences.


process in which the weaknesses of the system have worked their way into public view. The shocking disparity in sentences imposed on convicted felons, which results in long prison terms for some and brief periods of probation for others, lies at the heart of the problem.

A review of several major issues which the Justice Model bills raise in regard to present sentencing and corrections structure follows the first section. The introduction of sentencing criteria, flat time prison terms, and appellate review of sentences will be considered. This section also discusses the abolition of parole, the impact of determinate sentences on size of prison population and the interrelated issues of good time, discipline, and grievance procedures. Finally, the effect of determinate sentences on programs and the de-emphasis on rehabilitation is examined.

The final section summarizes the critique of the Justice Model bills and presents some suggested alternatives to Justice Model proposals which the authors consider critical for improvement over present structure.

**Some Historical Notes on the Decline of the Indeterminate Sentence**

The indeterminate sentence which is being questioned today by a wide spectrum of critics has been the cornerstone of American corrections since the turn of the century. It consists of a prison term whose maximum and minimum are set to provide a period during which a releasing authority may act. The indeterminate term reflects the discretion to release which resides in the authority, usually a parole board. Opposed to this is the determinate, or flat time, sentence in which only a maximum term is set. Its name

5. The group of critics is expanding rapidly and the listing we give is only partial, but it represents persons with substantial reputation in the field of criminal justice law. AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA (1971) [hereinafter cited as STRUGGLE FOR JUSTICE]; FOGER, supra note 1, at 238-49; McGee, A New Look at Sentencing Part I, 38 FED. PROB. 3 (June 1974); McGee, A New Look at Sentencing Part II: A Plan for Maximum Justice with Minimum Capriciousness, 38 FED. PROB. 3 (Sept. 1974); J. MITFORD, KIND AND USUAL PUNISHMENT: THE PRISON BUSINESS (1973) [hereinafter cited as MITFORD]; N. MORRIS, THE FUTURE OF IMPRISONMENT (1974) [hereinafter cited as MORRIS]; L. ORLAND, PRISONS: HOUSES OF DARKNESS (1975) [hereinafter cited as ORLAND]; J.Q. WILSON, THINKING ABOUT CRIME (1975) [hereinafter cited as WILSON].

6. An exact definition of the indeterminate sentence is difficult to fashion since there are a number of variations by which states achieve the indeterminacy. See Rubin, supra note 3, at 159. All systems essentially provide for a period of time during which the prisoner may be released on a discretionary basis.

7. All states currently have parole boards which function both in the capacity of releasing authorities and frequently as agencies which review and recommend clemency to the governors. Rubin, supra note 3, at 622-24.

8. As noted above in the text following note 2 supra, there is a lack of understanding of the distinction between a determinate sentence and a mandatory one. An example of a sentence which is mandatory and yet not determinate is the sentence for murder in Illinois. Illinois law requires a prison sentence in murder cases. ILL. REV. STAT. ch. 38, § 1005-5-3(d)(1) (1975). But because the statute provides for a fourteen
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derives from the fact that the maximum is the term the prisoner will have to serve.

Prior to the development of the indeterminate sentence in Illinois in 1897, two other early release devices, parole and good time, had been devised. These were combined with the setting of maximum-minimum terms to form the indeterminate sentence system in effect today. As early as 1863, Illinois introduced a schedule of diminutions from prison terms for good behavior (thus the term "good time"), discretionary on judgment of the warden. This was thought of as an incentive to prisoners to conform to institutional discipline and provided some relief from the harsh prison terms established by law and meted out by judges. Parole, introduced in 1867 for young offenders and 1895 for adults, was the early release of prisoners considered good risks, again on recommendation of the warden. Inmates released to the community were still considered prisoners and subject to be returned at any time for violation of conditions placed on their release from prison. This power to release early was a modified type of executive clemency which the governor exercised on advice of the wardens. Again, it was intended both as an incentive for good behavior and a mitigation of harsh sentences.

These two early ameliorative remedies were found inadequate by themselves for the correctional philosophy that was developing. While rehabilitation had been an ideal of the Anglo-American criminal justice system for several centuries, it was not promoted as a goal until after the middle of the nineteenth century. The Positivist School of Criminology in Italy proposed that restraint and rehabilitation replace punishment as the goal of criminal law. It was believed that since human behavior in

year minimum term and no fixed maximum, the sentence is not determinate. ILL. REV. STAT. ch. 38, § 1005-8-1 (b)(1) (1975). Under the Justice Model murder would be both mandatory and determinate, i.e. with a fixed term such as 25 years. Proposed ILL. REV. STAT. ch. 38, § 1005-5-3(d)(1) and § 1005-8-1(b)(1).

9. Act of April 21, 1899, Ill. Laws 1899, 142. For an excellent review of this development, see Bruce, Burgess & Harno, A Study of the Indeterminate Sentence and Parole in the State of Illinois, 19 J. CRIM. L. & CRIMINOLOGY 1 No. 1, Part II (1928) [hereinafter cited as Bruce]. This comprehensive study was undertaken as part of a review of sentencing policy and parole by the State of Illinois.

10. Act of March 19, 1872, Ill. Laws 1871-72, 294. For commentary, see Bruce, supra note 9, at 48-49.

11. Act of March 5, 1867, § 17, Ill. Laws 1867, 42. For commentary, see Bruce, supra note 9, at 42-43, 50.


13. For the legal history of the attempt to conceptualize the constitutional line between the power of the governor to pardon and the legislature to establish penalties for offenses, see Rubin, supra note 3, at 624-25.

14. One of the major watersheds was the "Declaration of Principles" at the Congress of 1870. TRANSACTIONS OF THE NATIONAL CONGRESS ON PRISON AND REFORMATORY DISCIPLINE 1-8 (1871; reprinted 1970). An excerpt of the "Declaration of Principles" is reprinted at Fogel, supra note 1, at 32-34.

general was reducible to deterministic causes and subject to scientific inquiry in such new fields as psychology and sociology, criminal behavior was subject to similar scientific analysis. This provided a knowledge base for what had been a sentiment of humanitarianism expressed by prison reformers. Quickly, the new philosophy of rehabilitation and social defense was absorbed by a system eager for an answer to the difficult problems of crime and corrections.\textsuperscript{16}

For sentencing, the key concept was individualization.\textsuperscript{17} There was a need to discover as much as possible about the behavior and background of individual offenders in order to sentence them to appropriate treatment. In terms of prison sentences, there was no need—indeed very little sense—in sentencing all offenders to similar terms simply because they had committed similar offenses.\textsuperscript{18} Each offender was to be judged on the basis of the danger which he presented to the community, that is, the likelihood that he would commit another offense. Since the court had little time or training for this sort of determination, it was felt that the widest margin of time should be provided during which experts could determine what had caused the offender to commit crime, the likelihood that he would undertake future criminal activity and the program best suited to rectify the problem. Thus was born the indeterminate sentence in which the court selected a minimum and maximum sentence based on considerations of punishment, leaving the actual release date to the parole board, pursuing goals of restraint and rehabilitation.

This approach satisfied several system needs at once. The public was comforted by still impressive maximum sentences, while being assured that release after the minimum term was controlled by scientific experts. The prison warden was given a control mechanism beyond mere good time, since his negative recommendation to the parole board assured denial of release. The social reformer was confident that the incentive of early release would push most prisoners into rehabilitative programs, thus coercing them to a virtue that had escaped them previously. Finally, the social scientist had a natural field experiment for isolating and identifying the causes of crime and recidivism.\textsuperscript{19} That these explicit and implicit functions of the new system

\textsuperscript{16} For critical evaluation of the effect that such absorption had on the system, see Allen, \textit{Criminal Justice, Legal Values and the Rehabilitative Ideal}, 50 \textit{J. Crim. L.C.} & P.S. 226 (1959).

\textsuperscript{17} RUBIN, \textit{supra} note 3, at 134-36; Dershowitz, \textit{supra} note 3, at 304-15.

\textsuperscript{18} For an example of such an approach, see NATIONAL COUNCIL ON CRIME AND DELINQUENCY, \textit{Model Sentencing Act} (2d ed. 1972) [hereinafter cited as \textit{Model Sentencing Act}].

\textsuperscript{19} All of these expectations are reflected in the 1927 study cited at note 9 \textit{supra}. In assessing the indeterminate sentence and parole structure in Illinois, the panel of experts gave what may have been the sustaining thrust to the present system. It was the last time that the basic structure in Illinois was so carefully examined. Professor Burgess offered a classic statement for the social scientist in Burgess, \textit{Can Scientific Method Be Applied To Parole Administration?} 19 \textit{J. Crim. L. & Criminology} at 283-86. He answers his question with a modest but firm “Yes.”
were frequently frustrated by the vagaries of history seemed not to deter the indeterminate sentencing concept from gaining widespread popularity and support. Indeed, it became the defining element of felony corrections and was sustained until the present by all of those social forces which had a vested interest in it.20

The repudiation of the indeterminate sentence has barely achieved respectability. It is too early to say whether its critics will have their day. But the criticism has been sharp and the critics widely dispersed on the social spectrum.21 To date, no one has attempted a comprehensive restatement of their charges, and the following is only a sketch of several of their themes.

First, the critics all agree the problem of goal conflict implicit in the indeterminate sentence has never been resolved.22 On the one hand, restraint and rehabilitation are based on non-punitive theories of justice, akin to social welfare. On the other, prison sentences bespeak a punitive purpose. One cannot ignore the conflict implicit in a system in which a man is punished while being told that he is receiving help or, put another way, that he is being punished for past crimes but will not be released because of possible future ones.

The critics also point out that even if the system concentrated on a determination of dangerousness, as the parole boards certainly seem to do, there is no adequate way to predict what individual offenders will do in the future.23 While there are certain factors which have been isolated that in global terms have predictive relevance,24 these are far from accurate and leave room for margins of error intolerable when dealing with human freedom. The other side of the coin is the failure of rehabilitation. If programs could be created which would reduce recidivism for persons released from prisons, perhaps the failure in prediction of dangerousness could be disregarded. But studies have begun to demonstrate what many had thought, that rehabilitation programs when seriously evaluated produced insignificant results in reduced recidivism.25 Thus, the hope of social control exercised through the mechanism of indeterminate sentence and parole release is false.

20. STRUGGLE FOR JUSTICE, supra note 5, at 20-33.
21. See note 5 supra.
22. See, e.g., MORRIS, supra note 5, at 18-20.
23. Rubin, Prediction of Dangerousness in Mentally Ill Criminals, 27 ARCH. GEN. PSYCHIATRY 397 (1972); MORRIS, supra note 5, at 62-73; STRUGGLE FOR JUSTICE, supra note 5, at 76-82.
A third common theme shared by critics is the result of the failure of parole on inmates.\textsuperscript{28} They perceive the arbitrariness of the decision-maker. Since the parole board member has no real guidelines, he falls back on conservative instincts for punishment and protection of the public. But he speaks in terms of rehabilitation. The hypocrisy of this double-talk is not lost on inmates who rebel under prolonged denial of release without being told the reasons for this denial. Prison riots could possibly be an expression of this frustration.\textsuperscript{27}

All of this criticism has support among widely divergent groups in the community. The conservative element sees in the present system a weakness in favor of early release by parole boards and wishes to do away with this loophole for crime.\textsuperscript{28} On the other hand, radical theorists see in the indeterminate system a covert way for a dominant society to control minorities.\textsuperscript{29}

Many of the critics go on to point out that the system also rests on discretionary powers placed elsewhere than the parole board. Prosecutors enjoy tremendous powers to bind and loose, especially in plea bargaining where disparity is bound to result.\textsuperscript{30} Further, judges who are not constricted by agreed-to-bargains wield broad powers of choice, ranging from fines and unsupervised release to severe prison terms, all for the same offense.\textsuperscript{31} Since judges have few if any guides in the exercise of this discretion, disparity is inevitable.

The determinate sentence appears to many critics to be a satisfactory answer to the problems. It would eliminate the necessity for a parole decision. It would give a narrower range of choice against which both the prosecutor and judge would exercise their discretion. It would provide a solution to the goal-conflict issue by resolving it in favor of punishment. It would thereby provide offenders with a better sense of certainty and justice since all would be treated in a similar manner.

**Some Major Issues in the Justice Model's Flat Time Proposal**

The Justice Model bills propose a return to determinate sentences for Illinois. While other changes are also proposed, the return to flat time is a defense of the rehabilitative approach, see Palmer, *Martinson Revisited*, 12 J. Research in Crim. & Delinquency 133 (1975).

\textsuperscript{26} Fogel, *supra* note 1, at 122-26; *The Official Report of the New York State Special Commission on Attica* (1972) [hereinafter cited as *Attica Report*].

\textsuperscript{27} For a discussion of the frustrating aspects of the indeterminate sentence on prisoners, see *Struggle For Justice*, *supra* note 5, at 93-96.


\textsuperscript{29} *Struggle For Justice*, *supra* note 5, at 145-53.

\textsuperscript{30} Morris, *supra* note 5, at 45-47, 50-57.

\textsuperscript{31} For a discussion of the judicial sentencing processes, see generally M. Frankel, *Criminal Sentences: Law Without Order* (1973).
The bills thus make more explicit legislative policy choices regarding sentencing alternatives, narrow judges' discretion by creating guidelines for choice of alternatives and create flat time prison terms with narrow margins of flexibility. They further provide broader appellate review of sentences and abolish parole. They offer an increased use of good time, provide improved disciplinary hearings, and eliminate rehabilitation as a goal of imprisonment. It is these major changes which will be the subject of the analysis in the present part of the article.

**Sentencing: Narrowing the Scope of Judicial Discretion**

**Sentencing Criteria**

Judges in Illinois presently have a broad range of choices in selecting a sentencing alternative for offenders. For most serious offenses, the judge may choose among alternatives that run from terms of imprisonment, periodic imprisonment, probation, and conditional discharge to fines. The problem with this range of alternatives is that it invites disparity of outcome. Thus, a burglar may be sentenced to a maximum term of imprisonment of 6 to 20 years, or to a few days of unsupervised release in the community. Inevitably disparity lurks in such broad choices.

The Code of Corrections of 1973 created a new system of penalty structure and sentencing. Prior Illinois law had penalties defined for each

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32. The Justice Model bills have tended to include different things at different times. In the 1975 version of Justice Model legislation, the package included such things as bail reform, grand jury reform, support for public defender offices, as well as the three basic reforms of return to determinate sentencing, creation of appellate review of sentences, and creation of a Bureau of Community Safety. Letter from the Springfield Office of the Illinois Law Enforcement Commission, February, 1975. The central lines of the reforms intended are outlined in Dr. Fogel's book. FOGEL, supra note 1, at 209-265. It should be noted that many notions for the improvement of prison life, as suggested by Fogel, are not part of the Justice Model bills. The explanation which the drafters give for these omissions is that they require administrative rather than statutory changes.


34. There are certain limitations on the use of probation or periodic imprisonment for felony sentences. Murder and certain class 1 felonies (rape, armed robbery, armed violence, and narcotics sales) are excluded. ILL. REV. STAT. ch. 38, § 1005-5-3(d)(1) (1975). Probation is also prohibited for class 1 felonies committed while on probation or conditional discharge for a prior felony conviction. ILL. REV. STAT. ch. 38, § 1005-5-3(g) (1975). Fines may not be used as the sole disposition for felony offenses. ILL. REV. STAT. ch. 38, § 1005-5-3(d)(3) (1975).

35. Burglary is a class 2 offense, ILL. REV. STAT. ch. 38, § 19-1(b) (1975), for which the term of imprisonment is 1-20 years. ILL. REV. STAT. ch. 38, § 1005-8-1(b)(3) (1975). Such an offender may be placed on conditional discharge for any length of time up to 5 years, ILL. REV. STAT. ch. 38, § 1005-6-2(b)(1) (1975), with the ability in the court to discharge at any time. ILL. REV. STAT. ch. 38, § 1005-6-2(c) (1975).

36. ILL. REV. STAT. ch. 38, §§ 1005-5-1 et seq. (1975). See also 38 S.H.A. § 1005-
substantive offense which roughly reflected the seriousness of that offense. That meant, however, that there were as many penalties as there were crimes, each slightly different from another. There was no relationship among penalties, and disparity was encouraged since legislators defined or reformed offenses separately and attached new penalties to them. The purpose of the nine-grade classification system\(^3\) which the Code of Corrections introduced was to produce some uniformity in grading for seriousness.\(^8\)

But having achieved that reform, the Code went on to create a very broad category of alternative penalties attached to each classification. Thus, apart from fines, any of the other sentencing alternatives were available for any felony offense, except five of the most serious offenses.\(^9\) The judge was now able to tell which general grade of seriousness the offense fell into, but he was still allowed—indeed, forced—to choose among alternatives.

The Code offered several control mechanisms to channel the judge's choice. First, it intended to make probation the preferred sentencing choice, though the language of the statute as drafted was ambiguous.\(^4\) It also excluded fines as a sole disposition for felony offenses.\(^5\) Further, it excluded five major offenses from probation, thus mandating prison terms.\(^6\) These were all legislative choices imposed on the judges. But the central control mechanism for sentence selection was the "informational base" which the Code provided.

Under the Code, the philosophy of rehabilitation was pursued.\(^7\) The ideal was to individualize sentences according to the circumstances of each case. The "informational base" for such individualization lay in the presen-

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37. The classification in order of seriousness is: murder; felony classes 1, 2, 3, and 4; misdemeanor classes A, B, and C; and petty and business offenses (violations). ILL. REV. STAT. ch. 38, § 1005-5-1 (1975).


39. ILL. REV. STAT. ch. 38, § 1005-5-3 (1975), with limits as noted in note 34 supra.

40. ILL. REV. STAT. ch. 38, § 1005-6-1 (1975). But the language appears to require the judge to make a finding based on evidence that a prison sentence, rather than probation, is required. ILL. REV. STAT. ch. 38, § 1005-6-1(a).

41. ILL. REV. STAT. ch. 38, § 1005-5-3(d) (3) (1975).

42. See note 34 supra.

43. The Code of Corrections of 1973 was based largely on the work of the American Bar Association, contained in STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES (1968) [hereinafter cited as SENTENCING ALTERNATIVES]. This report was itself an extension of the indeterminate sentencing philosophy. Id. at § 2.1. For a helpful comparison of the Illinois statutes and the American Bar standards, see S. SCHILLER, AMERICAN BAR ASSOCIATION STANDARDS FOR THE ADMINISTRATION OF CRIMINAL JUSTICE: ILLINOIS COMPLIANCE (1974) [hereinafter cited as SCHILLER].
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tence reports and sentencing hearings at which all relevant information in mitigation and aggravation was brought forward, tested, and entered into the record. The judge, apprised of all of this, was then to make his selection. The original draft of the Code added a duty to state the reasons for selection of any term of imprisonment, but it was later stricken. The theory was that most judges would make similar sentencing choices when provided with adequate information. Disparity arose because judges were not equally well-informed.

The Justice Model accepts the basic framework of present judicial sentencing in Illinois. It amends the law, however, in several crucial aspects. First, it provides for a wider scope of presentence reports. It eliminates the right of the defendant to waive a presentence report, a practice which apparently is common among felony defendants who have entered into a plea bargain. Further, presentence reports are mandated, not only for felony offense sentences, but for any sentence of imprisonment of 90 days or more. Thus, if a judge decides to sentence a misdemeanant to 90 days, he would have to order a presentence report. The quality of the reports should improve since probation officers attached to the courts will be relieved of supervision of probationers by the Justice Model.

A second major amendment is the requirement that judges follow stated criteria of mitigation and aggravation when selecting a sentencing alterna-

44. The Code requires that a presentence investigation and written report be made in all felony cases and that the report be made available to the parties. ILL. REV. STAT. ch. 38, § 1005-3-1 (1975) (requirement of report for all felony cases); ILL. REV. STAT. ch. 38, § 1005-3-4 (1975) (disclosure of report to parties).

45. The sentencing hearing specified a broad range of information which the court was to invite or order: presentence reports, evidence from trial, other information offered in mitigation and aggravation, sentencing proposals from the parties, and words from the defendant. ILL. REV. STAT. ch. 38, § 1005-4-1 (1975).

46. The record did not make the presentence report itself a public document accessible to the public, though it was part of the record for review. ILL. REV. STAT. ch. 38, § 1005-3-4 (1975).

47. One of the authors served as Reporter for the Code of Corrections from 1969-71. The rationale given for the removal of the requirement to state reasons for the imposition of a prison sentence was the feeling among judges that such reasons could not be adequately expressed and that there were no guidelines for them. The recommendation of such a requirement was drawn from the American Bar Association's Standards. SENTENCING ALTERNATIVES, supra note 43, at § 2.4(c).


49. Id. The practice of waiver of presentence reports in Illinois is based on discussion that the authors have had with various court personnel from a variety of circuits. We know of no published documentation of the extent of this practice, but estimates range upwards to 90% of all felony pleas.

50. Id.

51. The Bureau of Community Safety would be created as a division of the Department of Corrections and would provide a statewide agency directed to the supervision of probationers in local communities, Proposed ILL. REV. STAT. ch. 38, § 1006-5-1. For text, see note 169 infra. This would free the probation officers currently attached to the circuit courts of the State to devote full time to the preparation of presentence reports.
This is new to Illinois and, indeed, a feature that few if any jurisdictions now have. There are eleven listed factors of mitigation which tend to reflect such common sense elements as provocation by victim, situational reaction by defendant, and the like, all pointing to an offender who is not dangerous. On the aggravation side, there are four criteria. The first two indicate a highly dangerous (physically violent) offender. The third is an habitual offender criterion (one or more repeated separated

52. Proposed ILL. REV. STAT. ch. 38, § 1005-5-3.1 (mitigation); § 1005-5-3.2 (aggravation).

53. Though recommended as early as 1968 by the American Bar Association, SENTENCING ALTERNATIVES, supra note 43, at § 2.5(c) and commentary "O" and since, FRANKEL, supra note 31, at 113, only New York has adopted anything similar. NEW YORK PENAL CODE § 65.00(1) (1968).

54. Factors in Mitigation.) (a) The following grounds shall be accorded weight in favor of withholding a sentence of imprisonment;

(1) the defendant's criminal conduct neither caused nor threatened serious harm;

(2) the defendant did not contemplate that his criminal conduct would cause or threaten serious harm;

(3) the defendant acted under a strong provocation;

(4) there were substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense;

(5) the victim of the defendant's criminal conduct induced or facilitated its commission;

(6) the defendant has compensated or will compensate the victim of his criminal conduct for the damage or injury that he sustained;

(7) the defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present crime;

(8) the defendant's criminal conduct was the result of circumstances unlikely to recur;

(9) the character and attitudes of the defendant indicate that he is unlikely to commit another crime;

(10) the defendant is particularly likely to comply with the terms of a period of mandatory supervision;

(11) the imprisonment of the defendant would entail excessive hardship to him or to his dependents.

Proposed ILL. REV. STAT. ch. 38, § 1005-5-3.1. These criteria are borrowed almost verbatim from the AMERICAN LAW INSTITUTE, MODEL PENAL CODE § 7.01(2) (1962).

55. Factors in Aggravation.) (a) The following factors shall be accorded weight in favor of imposing a term of imprisonment, and in the instances specified shall mandate a term of imprisonment.

(1) that in the commission of a felony offense, or in flight therefrom, the defendant inflicted or attempted to inflict serious bodily injury to another. "Serious bodily injury" as used in this Section means bodily injury which creates a substantial risk of death, or which causes death or serious disfigurement, serious impairment of health, or serious loss or impairment of the function of any bodily organ.

(2) that the defendant presents a continuing risk of physical harm to the public. If the court so finds, it shall impose a sentence of a term of imprisonment and in addition finds the factors specified in subsection (a)(1) of this Section are present, and that an additional period of confinement is required for the protection of the public, the defendant may be sentenced as provided in Section 5-8-2(a) of this Code whether or not the defendant has a prior felony conviction. However, a sentence under that Section shall not be imposed unless the defendant was at least 17 years of age at the time he committed the offense for which sentence is to be imposed.

Proposed ILL. REV. STAT. ch. 38, § 1005-5-3.2(a)(1) & (2).
The fourth is a violation of trust criterion. These four factors not only serve to aggravate the sentence, but in the case of the habitual offender mandate the choice of prison. In addition, persons found to present a continuing risk of physical harm and habitual offenders may have their sentences increased by use of the same criteria.

Under the Justice Model the judge must support his selection of a sentencing alternative and its particular severity by citing in the record what evidence he used and what weight he gave to it. This all must be done by an "independent" assessment of the evidence, indicating that judges must disregard prearranged bargains between prosecutor and defense counsel.

56. (3) that the defendant is a repeat offender whose commitment for an extended term is necessary for the protection of the public. A defendant of this type shall have sentence imposed pursuant to Section 5-8-2 of this Code. Provided, however, a sentence shall not be imposed pursuant to this Section unless:

(A) the defendant was at least 17 years of age at the time he committed the offense for which sentence is to be imposed;

(B) the defendant has been convicted of at least one other class 1 or class 2 felony or two or more lesser felony offenses within the 5 years immediately preceding commission of the instant offense, excluding time spent in custody for violation of the laws of any state or of the United States.

Proposed ILL. REV. STAT. ch. 38, § 1005-5-3.2(a)(3).

57. (4) that the defendant committed a felony offense that occurred under one or more of the following circumstances:

(A) the defendant, by the duties of his office or by his position, was obliged to prevent the particular offense committed or to bring the offenders committing it to justice;

(B) the defendant held public office at the time of the offense, and the offense related to the conduct of that office;

(C) the defendant utilized his professional reputation or position in the community to commit the offense; or to afford him an easier means of committing it, in circumstances where his example probably would influence the conduct of others.

Proposed ILL. REV. STAT. ch. 38, § 1005-5-3.2(a)(4).

58. "A defendant of this type shall have sentence imposed pursuant to Section 5-8-2 of this Code [imprisonment]." Proposed ILL. REV. STAT. ch. 38, § 1005-5-3.2(a)(3) (emphasis added).

59. Proposed ILL. REV. STAT. ch. 38, § 1005-8-2 states:

Sec. 5-8-2. Extended Term—Dangerous or Repeat Offenders.) (a) Whenever the court, pursuant to subparagraphs (a)(2) and (a)(3) of Section 5-5-3.2 of this Code, finds that a felony offender should serve an extended term of imprisonment, the following schedules of sentences shall be applicable:

(1) For the conviction of a class 1 felony, the term of imprisonment shall be 15 years, with up to 3 years added or subtracted for aggravating or mitigating circumstances;

(2) For the conviction of a class 2 felony, the term of imprisonment shall be 9 years, with up to 2 years added or subtracted for aggravating or mitigating circumstances;

(3) For the conviction of a class 3 or class 4 felony, the term of imprisonment shall be 6 years, with up to 2 years added or subtracted for aggravating or mitigating circumstances.

60. In imposing a sentence for commission of a felony offense, or a sentence to a term of imprisonment for commission of a misdemeanor, in excess of 90 days, the trial judge shall specify on the record the particular evidence, information or factors that weighed most heavily in his sentencing determination, including insofar as practical the weight given those various elements.

Proposed ILL. REV. STAT. ch. 38, § 1005-4-1(c).

61. Proposed ILL. REV. STAT. ch. 38, § 1005-4-1(b). For such an explanation, see
In making its reforms, the Justice Model recognizes that present Illinois structure invites disparity of sentencing outcome. It attacks the problem, however, by imposing criteria on selection of sentence and by making prison sentences more certain as to length, and ignores the real villain of disparity—plea bargaining. While it is true that judges enjoy enormous discretion in selection of sentence, in many circuits this discretion is eliminated in up to 90 percent of serious cases by plea bargains conducted without direct judicial control. Thus, the Model may be suggesting an exercise in futility.

Assuming that a significant number of cases do depend on judicial selection of sentences, the question arises as to the effect the criteria will have. While one may admire the drafters of the Model for attempting a new and needed reform, one cannot fail to recognize several serious blunders. First, both sets of criteria are exclusive and mandatory, indicating that judges cannot look to other factors in deciding. This is unrealistic and unnecessarily limiting. Second, there is no indication of an order of importance among the criteria nor an indication of how judges should weigh each one against another. Thus, while the criteria appear highly specific, they will allow the same discretion that they are thought to control. Further, although the aggravating factors also mandate and enhance prison sentences, no indication is given as to how these latter functions are to be carried out.

COMMENTARY ON DETERMINATE SENTENCING BILL 25 [hereinafter cited as COMMENTARY], issued by the drafting committee.

62. See note 61 supra. The drafters seem to feel that by eliminating the waiver of presentence reports by defendants and directing the judge to examine the sentencing evidence "independently," that they have precluded the disparity resultant from plea bargains. Obviously, this touches directly only a plea arrangement for sentencing leniency, and not a bargain for charge reduction. Further, there is no solid reason to believe that judges won't continue to abide by agreements between counsel when it is their own docket that the prosecutor is protecting. For a general overview of the problem, see R. DAWSON, SENTENCING: THE DECISION AS TO LENGTH, TYPE AND CONDITIONS (1967); D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 90-94, 103-30 (1966).

63. The language in the introductory paragraphs uses the word "shall". See notes 54 and 55 supra. There is no indication in the further language of the statutes of an ejusdem generis classification, which would allow other factors to be considered.

64. Sentencing is too complex a process to suppose we can list all factors that might enter the judgment to mitigate or aggravate. A recent study of sentencing practices has indicated that there are over eighty factors involved in determination of sentence selection and length. LEAA News Release, Feb. 29, 1976, at 1. The American Bar Association warned against this very mistake of rigidity. "It would be unwise to attempt the codification of a rigid set of principles which must be employed in an unbending fashion in each case; such an attempt would suffer from many of the same defects which accompany mandatory sentences set in advance by the legislature." SENTENCING ALTERNATIVES, supra note 43, at 109.

65. Or they could be used in a totally rote fashion by courts looking for a peg to hang their decisions on. Since these factors are themselves rather vaguely worded, this practice of citing to certain factors should prove no problem.

66. See notes 58 and 59 supra.
Another serious problem of a more general nature is also raised. Because several of the aggravating criteria depend on the notion of dangerousness, the goal conflict between punishment and social defense mentioned above re-enters here. The judges are asked to select a sentence according to the aggravating circumstances of an offense, an objective and historical exercise. But they will also be asked to make a judgment of the dangerousness of the offender, that is, make a prediction of future behavior. Clearly, the Justice Model suggests a system based on equality in terms of offense and punishment. Dangerousness in such a system is a misplaced concept which is potentially destructive of this equality since it does not regard past offenses, but future risk based on personal condition of each offender.  

Flat Time Prison Terms

The heart of the Justice Model changes lies in the return to determinate or flat time prison sentences. The proposal is amendatory in nature and tends to leave the legislative landscape deceptively similar, except for the major substitution of determinate for indeterminate sentences.

Illinois presently has relatively few mandatory prison sentences. Murder and four Class 1 felonies are excluded from probation and periodic imprisonment. Apart from these, the judge may choose any of the sentencing alternatives except fines, which must be combined with another disposition in felony sentences. Where the judge chooses imprisonment, there are maximum and minimum terms for each class of felony. Within the very broad ranges provided for each class, the judge may set a maximum and minimum for each case, with some limits placed on the use of higher minima. For each

Aggravating factors one and two indicate an appeal to prediction, though factor one (infliction of serious bodily harm) could be taken as a factor increasing the seriousness of the offense. The language for factor one is borrowed from current Illinois law. ILL. REV. STAT. ch. 38, § 1005-8-2 (1975). This section of the Code of Corrections was the only concession the drafters were willing to make to the concept of dangerousness. Council Commentary, supra note 36, at 481.


See note 34 supra.

Id.

Id.

Id.

Id.

Id.
felony class, added to the term of imprisonment selected by the judge, is a mandatory parole term fixed by law.\textsuperscript{73} Thus, an individual has both prison term and parole term to serve before he is finally discharged. But where he is released early from prison and successfully completes his parole term, the total sentence is terminated by discharge from parole.\textsuperscript{74} A special rule applies to all minimum sentences which makes an offender eligible for parole in twenty years, regardless of his actual minimum sentence.\textsuperscript{75} There are good time provisions that diminish both maximum and minimum sentences.\textsuperscript{76} Finally, there is a general rule favoring concurrent sentences over consecutive ones.\textsuperscript{77}

The Justice Model accepts the general classification of present law, together with the other rules as set out above. It does, however, eliminate parole altogether by returning to a determinate, or maximum-sentence-only, prison term.\textsuperscript{78} It establishes length for these flat time terms according to class and provides a small flexibility for mitigating and aggravating circumstances.\textsuperscript{79} It provides for enhancement of any term on the basis of two of the four aggravating sentencing criteria.\textsuperscript{80} It also creates a good time schedule of 50 percent reduction, or a day off for every day of good

be set closer than one-third of actual maximum sentence. \textit{Ill. Rev. Stat.} ch. 38, § 1005-8-1(c)(3), (4) (1975). The statutory one year may not be set higher for class 4 felonies. The reason murder and class 1 felonies are not restricted by the one-third rule of indeterminacy is that their higher mandatory minimum sentences would force the maximum upward if the rule were applied to them. Thus, in regard to these two classes of felonies, courts may exclude parole board consideration by setting minima close to maxima, \textit{e.g.}, for murder, 14 to 14 and a day.

73. For murder and class 1 felonies, 5 years; for classes 2-3, 3 years; for class 4, 2 years. \textit{Ill. Rev. Stat.} ch. 38, § 1005-8-1(e) (1975).
74. \textit{Ill. Rev. Stat.} ch. 38, § 1003-3-8(a) (1975). The parole term itself is subject by this section to termination early by the parole board when it decides that the parolee is no longer dangerous. But should the parole be revoked, the parolee faces not only the remainder of his prison term less the time period during which he was released on parole, but the remainder of his parole term \textit{in prison}, thus turning the parole term into a potential prison sentence. \textit{Ill. Rev. Stat.} ch. 38, § 1003-3-9(a)(3)(1) (1975). This law has been challenged unsuccessfully in Illinois. \textit{People v. Wills}, 61 Ill. 2d 105, 330 N.E.2d 505 (1975).
76. \textit{Ill. Rev. Stat.} ch. 38, § 1003-6-3(a) (1975). For the schedule of actual diminution, see \textit{Illinois Department of Corrections, Adult Division, Administrative Regulations} § 813 (1973, as amended). For discussion of the good time provisions, see notes 168-188 \textit{infra} and accompanying text.
77. \textit{Ill. Rev. Stat.} ch. 38, § 1005-8-4 (1975). Subparagraph (b) requires the court to make a finding based on the nature or circumstances of the offense or the history or character of the defendant for protecting the public for the imposition of consecutive sentences.
78. For discussion of the elimination of parole, see text accompanying notes 147-154 \textit{infra}.
79. Proposed \textit{Ill. Rev. Stat.} ch. 38, § 1005-8-1. For the actual terms, see Table 1 in text accompanying note 82 \textit{infra}.
80. See notes 55-57 \textit{supra}.
behavior. Table 1 sets out the present law and proposed changes in length:

**COMPARISON OF PRISON TERMS UNDER PRESENT ILLINOIS LAW AND UNDER THE JUSTICE MODEL**

<table>
<thead>
<tr>
<th>Offense</th>
<th>Present Law</th>
<th>Justice Model</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Indeterminate</td>
<td>Flat</td>
</tr>
<tr>
<td>Murder</td>
<td>14 to Life</td>
<td>25 Years ±5</td>
</tr>
<tr>
<td>Felony 1</td>
<td>4 to Life</td>
<td>8 Years ±2</td>
</tr>
<tr>
<td>Felony 2</td>
<td>1-20 Years</td>
<td>5 Years ±2</td>
</tr>
<tr>
<td>Felony 3</td>
<td>1-10 Years</td>
<td>3 Years ±1</td>
</tr>
<tr>
<td>Felony 4</td>
<td>1-3 Years</td>
<td>2 Years ±1</td>
</tr>
</tbody>
</table>

*Natural life sentences would earn no good time.
**Aggravation/mitigation factors for enhanced sentences.
***Good time shown here is for average enhanced sentences, without regard to aggravation or mitigation.

Under the proposed legislation the judge is the first and only arbiter of length of a prison term. What he fixes on the day of sentencing will be, within parameters of fluctuation based on good time earning and loss, the time that the offender must serve. This places a new burden on judges. The rationale for this burden can only be in terms of the equality which the Justice Model seeks, based on seriousness and proportionality. The parole board presently provides backup in the event of judicial sentencing error through the policy of early release, although their primary function is control of dangerous offenders.

The Justice Model is based on a return to equal punishment for equal crimes. The inconsistency between this philosophy and the use of enhanced sentences based on dangerousness is evident. The man who burglarizes a home and is a "continuing physical danger" to the community should be judged no differently in terms of his offense than the ordinary offender.

81. Proposed ILL. REV. STAT. ch. 38, § 1003-6-3(a). For discussion of this good time provision, see text accompanying notes 179-82 infra. While the day-for-day may be considered a radical departure from present practice, the differences may be negligible. When one takes into consideration compensatory good time the total amount of good time earnable evens out after 4 years. After that the present system allows faster accumulation.

82. Capital murder is not listed here because of its invalidation by the Illinois Supreme Court. See note 33 supra. The Justice Model includes it in their schema of penalties. Proposed ILL. REV. STAT. ch. 38, § 1005-5-3(b).

83. For discussion, see text accompanying notes 179-82 infra. This element of indeterminacy may be significant in a system where it alone affects inmate behavior. Up to 30 days for a single infraction may be taken under the Justice Model provisions. Proposed ILL. REV. STAT. ch. 38, § 1003-6-3(c).

84. The concept of proportionality is a requirement of the Illinois Constitution. ILL. CONST. art. I, § 11. The thrust of the Justice Model is toward fairness to offenders by dealing with them equally, on the basis of their offenses. FOGEL, supra note 1, at 179-271.

85. The parole process is based on determination of danger or risk to the community. MODEL SENTENCING ACT, supra note 18, § 9 and commentary.

86. See, e.g. MORRIS, supra note 5, at 62-77.
home burglar. A consideration of personal condition is at odds with basic proportionality by the offense committed.\textsuperscript{87}

The other issue of importance is length of terms. At first blush, taken together with their good time discount the terms seem terribly short.\textsuperscript{88} They are based, according to the drafters, on present \textit{actual average time served} by offenders in Illinois.\textsuperscript{89} The theory was to determine a term whose length approximates practice rather than attempting to define an ideal. The problem with this is that it is impossible to assess all the variables that have to be considered, including all potential convicted felons who were not sentenced to prison. This seems not to be the case with the present figures.\textsuperscript{90} Whatever the method used in arriving at these suggested lengths, it seems mandatory that before adoption the projected lengths be compared accurately with present sentencing outcomes to determine what effect these lengths will have on prison populations.\textsuperscript{91} Unless Illinois wants to build more prisons—unthinkable in both fiscal and humane terms—these lengths should be scrutinized and the legislature effectively warned as to their impact on an already overcrowded system.\textsuperscript{92}

Clearly the advantage of flat time sentences in the eyes of prison inmates is the predictability of outdate. They may even be willing to risk slightly longer terms for a "day certain" for release.\textsuperscript{93} Further, inmates will surely welcome the abolition of parole supervision so that they can go free in the community.\textsuperscript{94}


\textsuperscript{88.} For example, a sentence for a class 2 felony under the Justice Model would be 5 years, 25\% of the maximum sentence under current law. A sentence for a class 3 felony would be 3 years, 33\% of the current maximum sentence; for a class 4 felony, the Justice Model sentence would be 2 years, 66\% of the current maximum. This gives the misleading impression that the Justice Model is reducing penalties for the more serious offenses.

\textsuperscript{89.} The explanation of the figures is based on a computation of average actual time served under present law in Illinois for persons in the Department of Corrections during 1973 and 1974. Fogel, \textit{supra} note 1, at 307-11.

\textsuperscript{90.} The drafters have indicated in statements later than the computations of the analysis cited in note 90 supra, that there will be an increase in time served for class 1 and class 2 felony sentences. \textit{Commentary, supra} note 61.

\textsuperscript{91.} The John Howard Association has disputed the claim by Dr. Fogel that there will be no substantial increase in prison population under the projected schema of the Justice Model. \textit{See} The John Howard Association, Governor Walker's Proposed Justice Model: An Analysis Of Its Impact 4 July, 1975 (unpublished publication of the John Howard Association). They assert that its effect would be to have added approximately 6,400 man years over a three-year period, 1971-73. \textit{Id.} at 4-5.

\textsuperscript{92.} For discussion of population effects of the Justice Model, \textit{see} text accompanying notes 155-187 infra.

\textsuperscript{93.} One of the authors has begun to test inmate opinion on just such a proposition. In a preliminary survey of opinion, approximately two-thirds of the inmates preferred the flat time sentence.

\textsuperscript{94.} Another finding of this preliminary survey was the strong feeling among
ILLINOIS RECONSIDERS "FLAT TIME"

Appellate Review of Sentences

The Justice Model departs from its amendatory approach to present law with appellate review of sentences. It adds an entirely new article to the Code of Corrections which provides a radically altered review process.95

Under current Illinois law, sentences are subject to review for illegality, as well as for excessiveness.96 This sets Illinois apart from many jurisdictions which do not provide for review of sentences except for strict illegality.97 While Illinois enjoys this broader scope of review, the practice of Illinois appellate courts is to respect the trial judge's discretion unless clearly abusive.98 The Code of Corrections has provided appellate courts with more complete records of sentencing inputs than existed under prior law and perhaps has induced more careful attention to this duty of review for excessive sentences.99

The Justice Model article envisions a broad approach to the equalization of sentences. Goals are established for the statewide equalization of sentences according to seriousness of offense, danger to the community, and rehabilitation of the offender.100 Appellate courts are provided with statistics which will collate all dispositions by type, length, and class of offense.101 The appeal of a sentence may be part of any regular appeal from the conviction by the defendant or from sentence only by both the defendant

inmates interviewed that parole supervision was at least as vexing as parole decision-making. See McAnany, Policy Input for Criminal Justice: The Utilization of Offenders (a paper delivered at the annual meeting of the American Academy of Criminal Justice Sciences, Dallas, Texas, March 24-26, 1976).

95. Proposed ILL. REV. STAT. ch. 38, § 1005-10. The Article provides for "Appellate Review of Sentences" in accord with rules that the Supreme Court may adopt to cover such new jurisdictional power by adding an amendment to that effect to ILL. REV. STAT. ch. 37, § 12 (1975).

96. ILL. REV. STAT. ch. 110A, § 615 (1975).

97. For a listing of the jurisdictions, together with statutes, that provide for some appellate review of sentences, see AMERICAN BAR ASSOCIATION, STANDARDS FOR APPELLATE REVIEW OF SENTENCES, Appendix A, (1967) [hereinafter cited as APPELLATE REVIEW OF SENTENCES].

98. SCHILLER, supra note 43, at 263-64. For similar findings in Massachusetts, see Bart, Criminal Sentence Appeals in Massachusetts, The Appellate Division, Appendix 2 (unpublished paper in Harvard Law School Library).

99. For discussion of the record at sentencing hearings under the Code, see note 45 supra.

100. Proposed ILL. REV. STAT. Ch. 38, § 1005-10-1(a).

Sec. 5-10-1. (Purposes.) (a) It is the express policy of the State of Illinois that sentences imposed pursuant to this Code be:

(1) commensurate with the offense committed as aggravated or mitigated by the nature and circumstances of the particular case;

(2) consistent with the public interest and safety of the community and most likely to work a full measure of justice between the offender and his victim(s), if any; and

(3) commensurate with those sentences imposed upon other offenders for similar offenses committed under similar circumstances.

101. Proposed ILL. REV. STAT. ch. 38, § 1005-10-8. The Department of Corrections is mandated to collect and publish these statistics annually.
Appellate courts will be able to open the record for *de novo* hearings on mitigation and aggravation and can select and impose any sentence which they consider fair in the circumstances. They may also take the more traditional route of remanding the case for resentencing by the trial court.

The Justice Model has clearly enhanced the scrutiny of trial court judges' selection of sentence. This by itself will have an impact on the exercise of discretion which the judges still enjoy under the Model. Having provided sentencing criteria, the Model has created automatic guidelines for review since appellate courts must look to the criteria to test both legality and fairness. The criticism of the criteria set out above, however, will affect their value to the review process. Overall, with the addition of useful statistics and the increased ability to inquire *de novo* at the appellate level, the Model has great merit in the reduction of disparity.

Several problems which this new appellate process involves need consideration. First, the general problem of goals reappears. It was suggested above that the sentencing goals of punishment, social defense and rehabilitation tended to be conflicting, a matter which the indeterminate sentencing system had disregarded. In that system, individual judges and parole board members were left relatively free to decide for themselves how to reconcile the conflict. But in the Justice Model, where official discretion is curtailed and clarification is demanded, the issue of conflict is forced into the open. In the only clear statement of goals in this new article on appellate review the authors of the Justice Model demonstrate that they have not understood the goal conflict. The statement sets out all major goals and requires appellate courts to *equalize* sentences according to all of them, without

102. Proposed ILL. REV. STAT. ch. 38, § 1005-10-2 (appeals by defendant); § 1005-10-3 (appeals by State).
103. Proposed ILL. REV. STAT. ch. 38, § 1005-10-5(b).
104. Proposed ILL. REV. STAT. ch. 38, § 1005-10-6(a)(3); § 1005-10-6(b)(1)(A).

But the court may not impose another sentence where the State appeals and wins unless defendant consents. Otherwise it must remand. Proposed ILL. REV. STAT. ch. 38, § 1005-10-6(b)(1)(A).
106. See text accompanying notes 63-66 supra.
107. Though the Justice Model appears to be based on a clarification of the goals issue, FOGEL note 1 supra, at 180-87, there is no recognition of this in the text of the bills. By being amendatory and leaving the present goal statement of the Code of Corrections intact, ILL. REV. STAT. ch. 38, § 1001-1-2 (1975), one gains the impression that the drafters have decided to leave well enough alone—until they come to the Sentencing Equalization bill where they add a very clear goal statement of their own.
108. See note 100 supra. The subparagraph on rehabilitation seems to have been added only because the Illinois Constitution appears to require it. ILL. CONST. art. I, § 11. There is a persistent, though latent, theme in the Justice Model against rehabilitation. See amendments deleting statutory language referring to rehabilitation. Proposed ILL. REV. STAT. ch. 38, § 1005-3-2(a)(2); § 1005-6-1(a)(2). For a strong statement of the case against rehabilitation, see FOGEL, supra note 1, at 122-24.
recognizing that they are mutually exclusive. Had the Justice Model pursued its inherent logic of "equality" and punishment, it would have come out with a limited but satisfactory goal of equal punishment for equal crime. But in suggesting that courts now explicitly pursue equalization on grounds not only of punishment, but public protection and rehabilitation as well, it demands the impossible.

Assuming one could resolve the goals problem, the new article suffers other deficits. To allow the state to appeal a sentence on the basis of leniency is a sharp departure from past Illinois history, as well as general practice in the country. There seems little advantage to balance against this distortion of power enjoyed by the prosecutor. It will surely have serious impact on plea bargains when the prosecutor may "have his cake and eat it too," by bargaining for a sentence and then appealing it. Further, lenient judges will be subject to censure in the sentencing process itself since the prosecutor will have the sentencing criteria to point to in opposing inappropriate judicial selection of sentence. Other elements, such as sentencing councils, and the pressure from citizens groups can force trial judges to "obey the law."

But if the concept of state appeal of lenient sentences is accepted, certain inequalities favoring the state should be removed from the language of the article. For instance, the defendant can appeal only from incarceratory sentences, while the state may appeal all sentences. Further, the state is given a general mandate to appeal all inappropriate sentences, whereas the defendant is limited to types of inappropriate sentences. This balance toward the state is unacceptable and may even violate constitutional guarantees.

Finally, the use of statewide statistics on dispositions is problematic. The goals issue clouds it. Furthermore, is it possible to ascertain the reasons for sentence selection through even the most sophisticated statistical analysis? Perhaps it is, but surely such use of statistics must bear very

109. Appellate Review of Sentences, supra note 98, Appendix A.
110. While it is true that nonappeal would ordinarily be part of any bargain, the prosecutor would now have the out under the Justice Model of insisting on appeal because the judge is interposed as an "independent" third party.
111. It is curious that the Justice Model does not incorporate the use of sentencing councils among circuit judges. This approach has been backed by the American Bar Association. See Sentencing Alternatives, supra note 43, at § 7.1. For an analysis of results of such a practice, see Diamond & Zeisel, Sentencing Councils: A Study in Sentencing Disparity and its Reduction, 43 U. CHI. L. REV. 109 (1975).
112. Proposed ILL. REV. STAT. ch. 38, § 1005-10-2(b).
113. Proposed ILL. REV. STAT. ch. 38, § 1005-10-3(c).
117. See note 64 supra.
careful scrutiny lest the appellate courts attempt to level off all sentences merely by class of offense.\textsuperscript{118}

This raises the problem of how much equality justice can really absorb. Put bluntly, is it not acceptable to have community standards of judgment which differ within the state? Can not Peoria determine to assess, within limits, different degrees of punishment on different types of offenders because it judges them differently from Chicago or East St. Louis? That type of question has not been directly raised under present law. Under the Justice Model it would be raised and perhaps decided to the detriment of local community appraisal.\textsuperscript{119}

\textit{Parole}

\textbf{Parole Release}

The Justice Model bills undertake to abolish the parole release decision on the assumption that the release decisional process is arbitrary and tends to create problems within the correctional institutions without offering the public any benefits. Parole is the status of being released to the community under supervision prior to the expiration of the sentence.\textsuperscript{120} It must be differentiated from the decision whether to release on parole. Initially, the parole release decision will be considered.

Presently, all inmates committed to the Illinois Department of Corrections are eligible for release on parole after they have served the minimum term of their sentence, or twenty years, whichever is less.\textsuperscript{121} The Illinois Parole and Pardon Board may, in its discretion, undertake to release any inmate who is eligible for parole and must consider every eligible inmate for release not less than once each year.\textsuperscript{122} No legislative criteria exist to indicate when parole should be granted and the Illinois Parole and Pardon Board has not exercised its authority to establish such criteria by regulation.\textsuperscript{123} Present statutes provide criteria indicating when parole should be denied. They provide the board with the sole guidelines for determining whether to release an inmate on parole.\textsuperscript{124}

\begin{itemize}
\item[118.] There appears no way that present statistical capabilities could reach to the level of the kinds, weight, and amount of evidence bearing on each factor which entered into a judge’s decision. Even for judges themselves, this is an impossible task.
\item[119.] For a discussion of loss of local community prerogatives to a total state approach to punishment, see Kennedy, \textit{Beyond Incrimination: Some Neglected Facets of the Theory of Punishment}, CATALYST (Summer 1970).
\item[120.] RUBIN, supra note 3, at 622-23.
\item[121.] ILL. REV. STAT. ch. 38, § 1003-3-3 (1975).
\item[122.] ILL. REV. STAT. ch. 38, § 1003-3-5(f) (1975).
\item[123.] ILL. REV. STAT. ch. 38, § 1003-3-2(d) (1975) provides that the parole board shall promulgate rules for the conduct of its work. Criteria for release certainly would seem to fall within this provision. However, the board has not promulgated any criteria as of this writing.
\item[124.] ILL. REV. STAT. ch. 38, § 1003-3-5(c) (1975) provides:
\end{itemize}
The release process is not provided with elaborate procedural safeguards. By statute, the parole board is to be supplied with a number of items of information. This information is not revealed to the inmate prior to the determination whether to grant parole. In practice, it is not revealed after the decision is rendered. The inmate does have a right to appear before one or more members of the board determining whether he should be released. Such appearances are relatively short in duration. By statute and judicial decision, the inmate is entitled to a statement of the decision of the board and a written statement setting forth the basis of that decision. Precisely what that decision must consist of is presently a matter of dispute. There is no administrative review of the decision of the parole board and judicial review is extremely limited.

Under the Justice Model bills, parole release would be abolished. It would, of course, be retained for those who committed their crimes prior to the effective date of the new legislation. As to those individuals there would be a presumption created in favor of the granting of parole.

(c) The Board shall not parole a person eligible for parole if it determines that:

(1) there is a substantial risk that he will not conform to reasonable conditions of parole; or
(2) his release at that time would deprecate the seriousness of his offense or promote disrespect for the law; or
(3) his release would have a substantially adverse effect on institutional discipline.

125. ILL. REV. STAT. ch. 38, § 1003-3-4(d) (1975). The members of the board are also given access to all the data in the files of the Department of Corrections.

126. ILL. REV. STAT. ch. 38, § 1003-5-1(b) (1975) requires the board to advise every individual denied parole and his counsel of the factual information relied upon by the board in determining to deny parole. Arguably, this should afford the inmate who has been denied parole access to the data considered by the parole board in reaching the decisions. Upon a request being made for the "factual information relied upon," the parole board is presently producing the full rationale of the denial of decisions dictated by board members after the parole hearing. Formerly the parole progress report prepared by the institutional staff was being released in substantial part as the "factual information relied upon."

127. ILL. REV. STAT. ch. 38, § 1003-3-5(b) (1975).

128. The length of the Illinois Parole and Pardon Board hearings is not precisely known. Dawson reports hearings ranging from five to twenty minutes. R. Dawson, Sentencing: The Decision As to Length, Type & Conditions of Sentence 254 (1969).

129. ILL. REV. STAT. ch. 38, § 1003-3-5(f) (1975).

130. Prior to the decision in Morrissey v. Brewer, 408 U.S. 471 (1972), it was accepted that the actions of the paroling authority were not reviewable. See Rose v. Haskins, 388 F.2d 91 (6th Cir.), cert. denied, 392 U.S. 946 (1968); Menechino v. Oswald, 430 F.2d 403 (2nd Cir. 1970), cert. denied, 400 U.S. 1033 (1971). This did not preclude judicial reversal of parole board rules and decisions which were clearly in violation of the constitution. Smartt v. Avery, 370 F.2d 788 (6th Cir. 1967). Since Morrissey, a number of courts have determined that the parole release decisions and the decisional process are reviewable. See, e.g., United States ex rel. Richerson v. Wolff, 525 F.2d 797 (7th Cir. 1975); Leonard v. Mississippi State Probation and Parole Bd., 509 F.2d 820 (5th Cir. 1975); Childs v. United States Bd. of Parole, 511 F.2d 1270 (D.C. Cir. 1974); Farries v. United States Bd. of Parole, 484 F.2d 948 (7th Cir. 1972).

131. Proposed ILL. REV. STAT. ch. 38, § 1003-3-5(c) (1975) reads:
those individuals committed to the Department of Corrections within six months of the effective date of the Act or sentenced within nine months of the effective date of the Act, the parole board would be mandated to establish a release date. All terms of parole would expire two years after

(c) The Board shall parole a person eligible for parole unless it determines that:
(1) there is a substantial risk that he will not conform to reasonable conditions of parole; or
(2) his release at that time would deprecate the seriousness of his offense or promote disrespect for the law; or
(3) his release would have a substantially adverse effect on institutional discipline.

The sentence attaches at the time of commission of the crime and the application of new sentencing law to one committing a crime before the effective date of the new law would violate the prohibition against ex post facto laws. People ex rel. Carlstrom v. David, 336 Ill. 353, 168 N.E.2d 264 (1929).

Sec. 5-8-2A. Duties of Parole and Pardon Board.

(a) The Parole and Pardon Board, after notice and hearing, shall review the sentences imposed on all institutionalized offenders with the Illinois Penitentiary System sentenced to an indeterminate term of imprisonment within 9 months of the effective date of this 1975 amendatory Act or within 6 months after an offender is committed to the Bureau of Prisons, whichever is later.

(b) Based on the information set forth in Section 3-3-4 of this Code, the intent of the Court in imposing the offender's sentence, the present schedule of sentences for similar offenses provided by Sections 5-8-1 and 5-4-2 of this Code, the rate of accumulating good time credits provided by Section 3-6-3 of this Code, and the behavior of the offender since his commitment to the Department, the Board shall set a tentative release date for each offender.

The Board shall render its decision within a reasonable time after hearing and shall state the basis therefor both in the records of the Board and in written notice to the person on whose case it has acted. In its decision, the Board shall set the person's time for release, subject to the restrictions set forth in this Section.

(c) The tentative release date set by the Board shall take into account the possibility that the offender can accumulate good time credits at the rate specified in Section 3-6-3 of this Code, and shall be contingent thereon.

(d) The notice and hearing procedures of the Board shall meet the following standards.

(1) Each offender shall be given at least 30 days notice of the date and purpose of said hearing, in a form substantially as follows:

Dear (name of offender):

Pursuant to Public Act ——, the Parole and Pardon Board will meet on (date of hearing) to fix a definite date for your release from prison. The date set supposes that you will continue to accumulate good time credits at the maximum rate so if you do not do that, you will have to stay in prison for a longer time than indicated. The Board will base its determination on the following data:

(1) The material the Board normally would examine in connection with your parole hearing, as set forth in paragraph (d) of Section 3-3-4 of the Unified Code of Corrections;

(2) the intent of the court in imposing sentence on you;

(3) the present schedule of sentences for similar offenses provided by Sections 5-8-1 and 5-8-2 of the Unified Code of Corrections, as amended;

(4) the rate of accumulating good time credits provided by Section 3-6-3 of the Unified Code of Corrections, as amended;

(5) your behavior since commitment. This hearing is not a parole hearing. Instead it is designed to fix a definite release date, beyond which
the effective date of the Act.\textsuperscript{133} The board would retain its discretion in determining conditions of parole, except that there would be a mandatory prohibition against the possession of firearms by the parolees.\textsuperscript{134}

The Illinois Parole and Pardon Board would continue under the Justice Model legislation to administer the supervision of parole for those sentenced under prior law.\textsuperscript{135} It would continue to determine when an individual should be released from the Department of Corrections, although this would be a mere ministerial act.\textsuperscript{136} Presently, the parole board serves as the screening body for pardon and clemency petitions to the governor, a function which would be retained. The clemency function would gain in importance since it would be the only administrative device available to reduce a long

\begin{itemize}
  \item You will not be held by the Department. In effect, your present indeterminate sentence will be changed into a flat-time sentence by this procedure. You will remain eligible for parole on the same terms as were in effect at the time you were sentenced, but now you will also know that if you accumulate good time at the maximum rate, you will be released no later than the date determined as a result of this hearing. You may submit material to the board which you believe helpful in deciding the proper date for your release. The Department is obligated to assist you in that effort, if you ask it to do so. When the Board has made its decision you will be informed of it and of the reasons therefor.
  \item At least one member of the Board shall interview each offender prior to the date of hearing, and a report of that interview shall be made available to the Board for its consideration.
  \item The release date established by the Board shall not be sooner than the earliest date that the offender would have been eligible for release under the sentence imposed on him by the court, less time credit for good behavior, nor shall it be later than the latest date at which the offender would have been eligible for release under such sentence, less time credit for good behavior.
  \item Should any offender be eligible for parole or release on a date earlier than that established pursuant to this Section the Board shall schedule a parole hearing for such offender as presently provided by law. Based on that hearing, the Board may either parole or release the offender or deny parole and release and set a date for rehearing, as presently provided by law. The date of rehearing shall be no later than the release date established pursuant to this Section.
  \item No defendant paroled by the Board more than 2 years after the effective date of this amendatory Act of 1975 shall be subject to a parole term. The parole terms of all other defendants shall expire 2 years after the effective date of this amendatory Act of 1975 or at the time prescribed by the Board or by the law under which they were sentenced, whichever is soonest.
\end{itemize}

\textsuperscript{133} Proposed ILL. REV. STAT. ch. 38, § 1005-8-2A(g).

\textsuperscript{134} Proposed ILL. REV. STAT. ch. 38, § 1003-3-7(a) reads: Section 3-3-7. Conditions of Parole.)

\begin{itemize}
  \item The conditions of parole shall be such as the Parole and Pardon Board deems necessary to assist the parolee in leading a law-abiding life. The conditions of every parole are that the parolee:
    \begin{enumerate}
      \item not violate any criminal statute of any jurisdiction during the parole term; and
      \item refrain from possessing a firearm or other dangerous weapon except where the person was convicted of a Class 4 felony or lesser offense and such possession is required as a condition of employment.
    \end{enumerate}
\end{itemize}

\textsuperscript{135} Proposed ILL. REV. STAT. ch. 38, § 1003-3-7(a) is substantially the same as the present section. The proposal includes a limitation of the applicability of that section to individuals serving a term of imprisonment under ILL. REV. STAT. ch. 38, § 1005-8-1 (1975) as it presently exists.

\textsuperscript{136} The proposal leaves ILL. REV. STAT. ch. 38, § 1003-3-2(b) (1975) unchanged.
sentence whether as a result of public sentiment, particularly good institutional conduct or a need to reduce the institutional population.

If one assumes the reduction of crime to be a principal goal for the parole system, one cannot evaluate the effectiveness of the parole system, since data which exists as to performance is contradictory. The decision whether to release an individual on parole encompasses a determination by the paroling authority that the individual has been "rehabilitated," that is, he is no longer a danger to society. This process assumes that it is possible to determine when an individual is "rehabilitated" and no longer dangerous. There is a serious question whether such a determination is possible with any degree of accuracy. The composition of the paroling authority generally is not one that would tend to bring the expertise of behavioral science to bear. Finally, there is a serious question whether society can or should accept the making of such a decision unless it can be made with more accuracy.

Institutional unrest is not infrequently attributed to the parole release


138. This is the basis of the decision as understood by most inmates and by a number of critics. See Kastenmeier & Eglit, Parole Release Decision Making: Rehabilitation, Expertise and the Demise of Mythology, 22 AM. U.L. REV. 477, 503-06 (1973); MORRIS, supra note 5, at 31. For a discussion of the history and theory of parole granting, see notes 9-19 supra and accompanying text. There is considerable room to question whether the legislatures or the parole boards themselves view their role as being one of controlling dangerousness or promoting rehabilitation. The legislative criteria for denial of parole established by ILL. REV. STAT. ch. 38, § 1003-3-5(c) (1975) are not solely based on a lack of rehabilitation or present dangerousness. To deny parole because release would deprecate the seriousness of the offense or promote disrespect for the law seems to be a consideration of deterrence and retribution rather than rehabilitation. The regulations adopted by the United States Board of Parole likewise place great weight on the offense indicating a retributinal or deterrent basis. 28 C.F.R. § 2.18 and § 2.20 (1975).

139. Some works suggest that it is possible to predict dangerousness with some degree of success, KOZOL, supra note 24. The John Howard Association in its published criticism of the Justice Model bills cites statistics from the NCCD Research Center, Unified Parole Reports, "Newsletters 'Number on Parole'—1974" indicating a low rate of recidivism while on parole. One study indicates that the rate of recidivism for those released by a parole release decision was not significantly lower than that of those released by force of statute under mandatory supervision at the end of their sentences. CITIZENS' INQUIRY ON PAROLE AND CRIMINAL JUSTICE REPORT ON NEW YORK PAROLE 268 (1974).

140. Under ILL. REV. STAT. ch. 38, § 1003-3-1(b) (1975) the parole board is to be composed of individuals with at least 5 years of actual experience in the fields of penology, corrections work, law enforcement, sociology, law, education, social work, medicine, psychology, or other behavioral sciences. There is nothing inherent in the practice of these fields that would insure that the individual can predict recidivism, if that is what they are supposed to do. It would seem that the "expertise" of this group would be subject to the same types of criticism which Frankel levels at the sentencing "expertise" of judges, FRANKEL, supra note 30, at 13-14.

141. Norval Morris has argued the moral questions well. MORRIS, supra note 5, at 80-84.
decision. However, while the parole release decision is the subject of inmate complaints, this should not be taken as an indication that it is the principal cause of inmate unrest. It may well be that inmates fasten on the parole release decision as a symbol of the arbitrariness of the entire correctional system and the removal of this symbol would only minimally reduce inmate frustration.

Until recently the paroling authorities had not developed a statement of the criteria which they utilize in reaching their decision. Parole boards have admitted, and studies have confirmed, that members reach decisions to grant or deny parole for entirely different reasons. Recent judicial decisions have injected procedural due process into the parole release decision. These decisions are too recent to determine what will ultimately be determined to be required by procedural due process. Presently, it would appear that the decisions will require the paroling authority to reveal the data upon which it is going to make its decision prior to the parole hearing with an opportunity for the inmate to amplify, clarify or correct the contents thereof, require the adoption of written published criteria for determining whether to grant parole and require the paroling authority to provide a written statement of the reasons for parole denial.

Parole Supervision

Together with the abolition of the parole release decision, the Justice Model bills would abolish parole itself. Parole is supervision in the commu-

142. FOGEI, supra note 1, at 301-03; ORLAND, supra note 5, at 129, 134-36; R. MINTON, INSIDE PRISON AMERICAN STYLE 157-93 (1971). See also ATTICA REPORT, supra note 26, at 97.

143. This distinction is similar to that noted by Vernon Fox with regard to prison riots. He suggests that the precipitating cause of the riot may not be the actual cause or predisposing cause. So too, the parole granting system may be the symbol of the frustration rather than the cause of the frustration. See Fox, Why Prisoners Riot, 35 FED. PROBATION 9, 10 (1971).


145. United States ex rel. Richerson v. Wolff, 525 F.2d 797 (7th Cir. 1975) (must give written reasons for denial of parole); United States ex rel. Johnson v. Chairman, 500 F.2d 925 (2d Cir. 1974), vacated as moot, 419 U.S. 1015 (1974) (must give written reasons for parole denial); Childs v. United States Bd. of Parole, 511 F.2d 1270 (D.C. Cir. 1974) (must give written reasons for denial of parole); Haymes v. Regan, 394 F. Supp. 711 (S.D.N.Y. 1975) (must develop criteria for parole granting); Franklin v. Shields, 399 F. Supp. 309 (W.D. Va. 1975) (must give access to data upon which decision based, a written decision for parole denial and promulgate criteria for determining whether to grant parole); Cooley v. Seigler, 381 F. Supp. 444 (D. Minn. 1974) (must give access to data upon which parole decision based); In re Prewitt, 8 Cal. 3d 470, 503 P.2d 1326, 105 Cal. Rptr. 318 (1973) (must give access to data upon which decision based); Monks v. New Jersey State Parole Board, 277 A.2d 193 (Sup. Ct. N.J. 1971).
nity under rules and regulations established by the paroling authority and the legislature\textsuperscript{146} after a period of incarceration.

Presently, there is a strong commitment to community supervision programs in the Illinois system. Prisoners have mandatory terms of parole established by the legislature which require that the individual spend some period of time under supervision after his release from prison before the jurisdiction of the Department of Corrections is terminated.\textsuperscript{147} If the individual is released on parole prior to the termination of the sentence imposed, the mandatory parole term established by statute constitutes the maximum term which he may spend on parole. If the individual is not released before the expiration of his prison sentence, then upon such release he will still be required to serve a term of parole not exceeding that established by statute. Violation of the terms and conditions of parole can result in the individual being returned to the institution to serve a portion of his remaining sentence and possibly the loss of good time earned while in the institution.\textsuperscript{148}

Commentary prepared for the Justice Model spends considerable time dealing with the reasons for the abolition of the parole release decision, but does not seriously discuss the abolition of parole.\textsuperscript{149} The abolition of parole is somewhat inconsistent since the proposals retain probation and vest supervision thereof in the Department of Corrections.\textsuperscript{150}

Parole does provide protection to the community through providing supervision of the individual’s activities during the immediate post-release period. In addition, it provides the inmate with a source of services, counseling and assistance which he is, to some extent, coerced into utilizing by the power of the parole officer to initiate the parole revocation process.

\textit{Illinois Prison Population}

Large penal institutions tend to become warehouses for human beings rather than places for the provision of rehabilitational services. The larger the institution, the more emphasis there is on custody and security and the less there is on programs which fit the needs of the individual.\textsuperscript{151} The

146. For a statutory statement of the present conditions for parole see \textit{ILL. REV. STAT.} ch. 38, § 1003-3-7 (1975).
147. \textit{ILL. REV. STAT.} ch. 38, § 1005-8-1(c) (1975).
148. \textit{ILL. REV. STAT.} ch. 38, § 1003-3-9 (1975) provides the authority to revoke parole and return the individual to the institution. Section 813, (III) Illinois Dept. of Corrections Regs., provides for the revocation of good time “on recommendation” of the parole board.
149. David Fogel, in his testimony before House Judiciary II sub-committee of the Illinois General Assembly, September 11, 1975, devotes two paragraphs to the abolition of parole itself. He suggests that it is impossible for the parole agent to both counsel and be a police officer. This seems to fly in the face of retaining probation with a similar dual function.
150. See proposed \textit{ILL. REV. STAT.} ch. 38, § 1005-6-1.
ILLINOIS RECONSIDERS "FLAT TIME"

The desirability of smaller institutions seems well accepted by the correctional community, but the costs of replacing the large institution, like those in Illinois, are excessive and replacement may not be politically feasible.\(^{152}\)

The Justice Model bills are premised upon the assumption that more rational sentences with fewer variances for identical crimes, together with the removal of the uncertainty of parole release will make prisons more "just" and thus much easier places to operate for those incarcerated therein.\(^{153}\) The changes proposed by the Justice Model de-emphasize "rehabilitation." There is a preference for some period of incarceration for most sentences. It is appropriate to consider the effect of the proposed changes on institutional population in light of the goals of the Justice Model and the known effect of increasing institutional population.

After several years of steadily decreasing prison population the Illinois prison population dramatically increased during 1975.\(^{154}\) This increase does not correspond with any particularly sharp increase in crime; rather it appears to reflect an increased disposition towards imprisonment on the part of the courts.\(^{155}\)

The prison administration has little control over the size of the prison population.\(^{156}\) Rather, the courts, the legislature and the parole board functioning independently, but in concert, establish the size of the institutional population.\(^{157}\)

The legislature effectively assures the existence of a prison population of a predictable size through the establishment of mandatory prison sentences and the limitation of the dispositional alternatives available to the courts. The prison population is further controlled by the legislature’s prescribing the criteria for parole release.\(^{158}\) Legislative control of institutional population is not limited to the situations where the statute directly

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152. There are 4,208 people employed in the eight existing facilities in Illinois. U.S. LAW ENFORCEMENT ASSISTANCE ADMINISTRATION AND U.S. BUREAU OF THE CENSUS EXPENDITURE AND EMPLOYMENT DATA FOR THE CRIMINAL JUSTICE SYSTEM: 1970-1971 297 (1973). Since these institutions tend to have rural settings, they frequently are the largest local employer and thus have all the problems in closing such an institution that the United States Government has in closing a military base.

153. See generally Fogel, supra note 1, at 199-265.

154. Flanagan, Imminent Crisis in Prison Population, 37 AM. J. OF CORRECTIONS 20 (1975). At this writing the statistics indicating the rate of incarceration are not available.

155. Id.

156. This is not to suggest that administration does not have some control. In addition there are the informal controls arising from informal relationships with the parole board.

157. Presently the court has available the alternatives of probation, or conditional release which are totally non-incarcerational. ILL. REV. STAT. ch. 38, § 1005-5-3(d) (1975).

158. It is not our suggestion that the legislature consciously establish a prison population of given size. However, provisions such as ILL. REV. STAT. ch. 38, § 1005-5-3(d)(1) & (g) (1975) severely limit dispositional alternatives for class one felonies.
limits judicial discretion to choose non-incarcerational alternatives. Appropriations also control disposition since for the courts to employ alternatives to incarceration, the resources to operate such alternatives must exist.

Presently the ability of the accused to bargain for a sentence permits the judiciary, with the cooperation of the prosecution, to employ non-incarcerational alternatives. The courts themselves have control over the alternative forms of disposition chosen in a large number of offenses as well as the power to set the maximum and minimum sentences within the parameters established by the legislature. The courts are presently only employing the probationary alternative in 35 to 40 percent of all felonies despite an arguable preference for the utilization of this alternative. Part of this is due to the lack of community correctional resources, part to community pressure for incarceration. This is particularly true where the cases involved have received considerable public attention. The judge who is elected can safely sentence the individual to prison and place the release decision, and thus community wrath, on the parole board.

The parole board, through its choice of criteria to be employed in determining whether to release on parole together with the relative weight to be given to these criteria, can affect prison population. The board rarely paroles individuals whose offenses have attracted public attention until some years after they have become eligible for parole. The greater the weight given to the crime committed in determining whether to grant parole, the greater the likelihood of parole denial, thus increasing prison population.

159. Charges which could prelude incarceration may be bargained to lesser charges which permit a non-incarcerated alternative. Additionally a recommended disposition may be the subject of bargain. See Newman, supra note 62, at 112-30 (1966).

160. The Illinois legislature has exercised this power in Ill. Rev. Stat. ch. 38, § 1005-8-1 (1975) which established maximum and minimum sentences and mandatory parole.


162. Parole authorities can and have increased the rate of release from institutions during periods of stress. National Advisory Commission on Criminal Justice Standards and Goals, Corrections 395 (1973) [hereinafter cited as Corrections]. See also Costello v. Wainwright, 525 F.2d 1239 (5th Cir. 1976).

163. One of Mr. Merritt's clients has remained incarcerated for thirty years because of an unpleasant series of incidents. He is eligible for parole and his case is reviewed annually by the parole board. At the time of each review a Chicago newspaper publicizes the fact, giving a synopsis of the facts of the case.

A similar situation existed in Ohio. In 1968-69 the Ohio Adult Parole authority considered a grant of parole for Thomas Licavoli, a convicted gangland murderer of the 1930's era. At that time, television stations in Toledo, Ohio broadcast numerous editorials opposing parole even though Licavoli was then in his late sixties and planned to settle in Columbus, Ohio. Eventually, parole was granted.

164. See note 123 supra.

165. Without some publicly announced criteria for the determination whether to grant parole, it is impossible to determine what weight the parole board is giving to the offense in denying parole. See note 144 supra.
The prison administration's only method of control of institutional population is through varying the rate of earning good time or the amount of good time which is taken through institutional discipline. This will tend to control the population although its effect is not immediate. Additionally, the prison administration can employ alternative placements to the institutions such as work release to redistribute the population and thus permit the addition of population without the adverse impact of overcrowding.

The proposed Justice Model bills have a number of features which will tend to affect the institutional population. A number of changes will tend to decrease the institutional population. Any ambiguity concerning the preference for placing all felons on probation is removed and the preference for probation made clear. Additionally, the proposed centralization of control over probation will presumably provide better community resources, thus making probation a more acceptable alternative. The fact that flat

166. Ill. Rev. Stat. ch. 38, § 1003-6-3 (1975) requires the establishment of a good time system but does not specify rates of good time. Regulation 811 of the Illinois Department of Corrections establishes a sliding scale for earning good time.

167. Illinois Department of Corrections Regs. § 1200 provides for placement in work release centers. This regulation was substantially narrowed after a series of articles in the Chicago Daily News and has twice been revised since October, 1975.

168. Proposed Ill. Rev. Stat. ch. 38, § 1005-6-1 reads:

Sec. 5-6-1. Sentences of Mandatory Supervision and of Conditional Discharge. a) Except where specifically prohibited by other provisions of this Code, the court shall impose a sentence of mandatory supervision or conditional discharge upon an offender unless, having regard to the nature and circumstance of the offense, and to the history, character and conditions of the offender, the court is of the opinion that:

(1) his imprisonment or periodic confinement is necessary for the protection of the public; or

(2) mandatory supervision or conditional discharge would deprecate the seriousness of the offender's conduct and would be inconsistent with the ends of justice.

(b) The court may impose a sentence of conditional discharge for an offense if the court is of the opinion that neither a sentence of imprisonment nor of mandatory supervision is appropriate.

169. Proposed Ill. Rev. Stat. ch. 38, § 1006-5-1(a)-(c) reads:

Sec. 6-5-1. Establishment.) The Bureau shall make provisions for adult mandatory supervision services in each circuit. Bureau shall have the responsibility:

(a) To preserve complete and accurate records of the action of the court with respect to the case of each person and his supervisor the subsequent history of such person, and if he becomes a recidivist during the continuance of his supervision. These records shall be open to inspection by any judge or by any field services officer pursuant to order of court, but shall not be a public record, and its contents shall not be divulged otherwise than as above provided, except upon order of court;

(b) To supervise and provide services to all persons placed on mandatory supervision under such regulations and for such terms as may be prescribed by the court, and giving to each person full instructions as to the terms of his release upon supervision and requiring from him such periodic reports as shall keep the Bureau of Offender Control employee informed as to his conduct;

(c) To supervise and provide services to persons diverted from the adjudication process by deferred prosecution or other means, as directed by the court regarding the individual and as may be agreed to or contracted for, with the Bureau.
time sentencing has historically meant shorter sentences should not be overlooked. Furthermore, the provision of specific statutory criteria for mitigation of sentence will tend to force the courts to shorten sentences in specific instances. Periodic imprisonment will become available for all felonies, particularly armed robbery. Thus, this alternative will be available in specific cases.

Presently, those incarcerated in local facilities on misdemeanor sentences for a period in excess of two months may be transferred to the custody of the Illinois Department of Corrections. The proposed changes would raise the length of sentence necessary for transfer to a state institution to nine months, thus freeing the institutional space theretofore occupied by the misdemeanants for felons. Finally, prison incarceration is almost abolished for Class Four felonies.

Other features of the Justice Model bills would tend to increase population. Despite the express preference for probation as a disposition for all offenses, there is a prohibition against employing it as the sole disposition for Class One and Two felonies, a disposition presently permitted. The court has the alternative of combining it with periodic imprisonment or a fine. Most defendants are unable to afford the financial burden of a fine, leaving the court with the alternatives of imprisonment or probation with

170. See Rubin, supra note 3, at 162-66.
172. Proposed Ill. Rev. Stat. ch. 38, § 1005-5-3(d) reads:

(d) When a defendant is convicted of a Class 1 or Class 2 felony, the court may sentence such defendant to:

(1) a period of mandatory supervision or conditional discharge except in cases of murder, rape, armed violence that is punishable as a Class 1 felony, armed robbery, violation of Sections 401(a), 402(a), 405(a) or 407 of the Illinois Controlled Substances Act that is punishable as a felony or violation of section 9 of the Cannabis Control Act that is punishable as a Class 1 felony;

(2) a term of periodic imprisonment;

(3) a term of imprisonment;

(4) a fine. However, neither a period of mandatory supervision or conditional discharge nor a fine shall be the sole disposition in such felony cases but shall be imposed in such cases only together with or in addition to another disposition under paragraph (d) of this Section.

175. Proposed Ill. Rev. Stat. ch. 38, § 1005-8-1(b)(5) reads:

(b) Except as provided in paragraphs (a)(2) and (a)(3) of this Code, a defendant convicted of a felony offense and sentenced to a term of imprisonment shall have that term set as follows:

(5) for a Class 4 felony, the term shall be 2 years with up to 1 year added or subtracted for aggravating or mitigating circumstances. Such sentence shall be served under the supervision of the Bureau of Community Safety or local correctional officials, unless the Class 4 felony is to be served consecutively or concurrently with any other felony. Offenders subject to paragraphs (a)(2) and (a)(3) of Section 5-5-3.2 of this Code shall be sentenced as provided in Section 5-8-2.
176. For a discussion of this preference, see supra note 40 and accompanying text.
periodic imprisonment in local jail, local jails frequently being worse physically and operationally than the state prisons.\textsuperscript{177}

The establishment of criteria for the aggravation of sentences will have the effect of increasing population.\textsuperscript{178} The severe limitations placed on the judicial choice of sentence length indicates that the relative length of the sentences ultimately prescribed will be of particular importance in determining population. If the length of the sentences established by the legislature less good time is longer than the present average time served for all inmates convicted of a particular class of offense, the net result is longer prison terms with increased population.\textsuperscript{179}

The loss of parole release deprives the correction system of a population-reducing device.\textsuperscript{180} The provisions for sentence review are essentially neutral as to the prison population. However, permitting the state to appeal a sentence must have the consequences of raising the institutional population to some degree.

It cannot be predicted precisely what will occur to the institutional populations should the proposals be adopted as presently drafted. It can safely be said that the changes regarding the transfers of a misdemeanor to the custody of the Department of Corrections together with the placement of most Class Four felons in jail and the use of periodic imprisonment will increase the local jail population dramatically.\textsuperscript{181} Increased prison population is undesirable. Increased jail population is even more undesirable.\textsuperscript{182}


\textsuperscript{178} Proposed Ill. REV. STAT. ch. 38, § 1005-5-3.2. The proposed sentence length approximates the actual time presently served on the particular classes of felonies in Illinois. Assuming that length or some other length approximating current time served is chosen, then the enhancement of the sentence necessarily raises the sentence above the present average thus causing more man-days to be spent in prison and therefore a larger prison population.

\textsuperscript{179} The present proposal lengths are set forth. See Table 1. It is to be expected that there would be some pressure to keep the same sentence length as present maximums and abolish parole release. This appears to have occurred in Maine. M.R.S.A., tit. 17-A, § 1252 (West 1976 Supp.)

\textsuperscript{180} The use of parole as a device to lessen prison population during periods of tension is not unknown. See CORRECTIONS, supra note 168, at 395; Increase in Parole Alarms Law Officials in California, N.Y. Times, December 14, 1975, at 1, cols. 4 & 5.

\textsuperscript{181} While the Illinois jails are technically not overcrowded, see LEAA: NATIONAL JAIL CENSUS 1970 16 (1971), with only 3.7% of the jails being over the rated population, the facilities of many are antiquated. See generally H. Mattick & R. Sweet, ILLINOIS JAILS (1967).

The Justice Model bills as proposed will directly and indirectly work changes in the institutional disciplinary system and the good time system. It is thus appropriate to undertake a brief analysis to determine whether these changes will achieve the rationality of correctional operations and the equality of treatment which the Model envisions.

The institutional administration reduces the total length of the sentence based on the inmate's good behavior or good conduct while in the institution. This reduction, mandated by statute and established by regulation, is time off for good behavior or "good time." In addition to awarding good time for institutional behavior, the Illinois Department of Corrections also awards good time credits as a form of remuneration for work performed in prison industries and programs. Good time which has been awarded for good institutional behavior may be taken from the inmate as a form of discipline for infractions of the institutional rules. An inmate may also lose the right to earn good time in the future as discipline. However, by regulation, good time given in remuneration for work performed in the prison industries may not be taken as a form of discipline. The structure and form of the institutional disciplinary proceeding have largely been established by the judiciary. The Supreme Court established the tenor of the judicial approach in Wolff v. McDonnell, although the United States Court of Appeals for the Seventh Circuit and several other courts had theretofore enunciated most of the same procedural requirements. Under these decisions, the inmate facing serious disciplinary action, which would include the loss of good time, must be afforded: 1) Written notice of the charges against him not less than twenty-four hours prior to the proceeding at which his guilt is to be determined; 2) an opportunity to appear at that hearing; 3) an opportunity to present his version of the occurrence or to deny that he committed the act; 4) the opportunity to call witnesses on his behalf; 5) the opportunity to present documentary evidence on his behalf; 6) a hearing body composed of individuals not involved in the incident; and 7) a written decision stating the factual basis thereof which must be made on substantial evidence.

183. Proposed ILL. REV. STAT. ch. 38, § 1003-6-3.
184. ILL. REV. STAT. ch. 38, § 1003-12-5 (1975). See also note 209 infra.
185. The authority for taking of good time is the same as that earning for good time. See note 184 supra.
186. Illinois Department of Corrections Reg. § 866 II B by implication.
The drafters of the Uniform Code of Corrections did an excellent job of precursing the judicial decisions and the Code provides by statute most of the procedural guarantees which the courts have found due process to require in prison discipline. In addition, the Code permits the inmate to examine all witnesses called to testify before the disciplinary body and requires that disciplinary proceedings be commenced within seventy-two hours of the occurrence.

There is no appeal from the decision of the disciplinary committee, but review can be had by filing an institutional grievance. The grievance procedure provides a three-stage review of the complaint within the Department of Corrections, the first two stages being within the particular institution and the third stage at the departmental level. On paper, the disciplinary and grievance systems appear to provide the inmate with considerable protection as to assure a fair and rational result. As will be further discussed, considerable problems arise in the implementation of these safeguards.

The Justice Model would establish a flat rate for the earning of good time at one day of good time for each day served. Compensatory good time, that is, good time in return for work performed within the institution, would be abolished. Good time which had been earned would be vested at least monthly under rules and regulations to be established by the Department of Corrections.

McDonnell, 418 U.S. 539 (1974) added the requirement of a written decision. The Seventh Circuit in Aikens v. Lash, 514 F.2d 55 (7th Cir. 1975), petition for cert. filed, 44 U.S.L.W. 3122 (U.S. July 5, 1975) added a requirement that the decision be based on substantial evidence.

The establishment of the grievance system is mandated by statute. ILL. REV. STAT. ch. 38, § 1003-8-8 (1975). The actual structure is established by regulations. Ill. Dept. of Corrections Reg. § 845.

See notes 199-203 infra and accompanying text.

Proposed ILL. REV. STAT. ch. 38, § 1003-6-3(a) reads:

Sec. 3-6-3. Rules and Regulations for Diminution of Sentence.) (a) The Department of Corrections shall prescribe rules and regulations for the diminution of sentences on account of good conduct or meritorious service of persons committed to the Department. Such rules and regulations shall provide for the accumulation of such good time credits at a base rate of one day for each day of imprisonment or supervision subject to the provisions of paragraph (c) of this Section.

Proposed ILL. REV. STAT. ch. 38, § 1003-12-5 deletes those provisions permitting the award of good time credits in lieu of wages.

Proposed ILL. REV. STAT. ch. 38, § 1003-6-3(c) reads:

(c) The Department shall prescribe rules and regulations for revoking good time, or suspending or reducing the rate of accumulation thereof, during imprisonment or supervision. Such rules and regulations shall provide for
good time in the future could be affected by disciplinary action. Restrictions on the earning of good time could not be of more than thirty days' duration for a single infraction.  

The disciplinary procedure would remain unchanged by the Justice Model bills. However, the Department of Corrections would be required to establish a listing of infractions of institutional rules together with the penalties to be attached thereto to provide the inmates with fair notice of the possible results of their actions.  

While the Justice Model is touted as returning Illinois to determinate sentencing, the retention of good time, particularly at a day-for-day rate, results in the sentencing system remaining indeterminate. Unlike the present sentence structure, the resulting one would have only good time contributing to indeterminacy. Good time in turn would be dependent solely upon institutional behavior. Thus, the determination of the actual release date would depend solely upon the disciplinary committee. This seems to conflict with the concern of the Justice Model for equality.  

While the hearing procedures of the Department of Corrections are subject to considerable procedural safeguards, and would appear to be a fairer and more rational proceeding than a parole release determination, it is suggested that this is not the case. The disciplinary system must fail because those designated to conduct the hearings are members of the institutional staff. These individuals have regular duties within the institution other than hearing disciplinary matters or have been temporarily released from these duties and will be returned to such duties in a matter of days or weeks. As a result, the committee is likely to be reluctant to find an inmate not guilty of an infraction charged by a guard. To do so would be a failure to support a fellow upon whose actions other staff members' safety and lives might depend in the immediate future.  

the vesting of good time credits previously earned on a not less than monthly basis: and, shall provide further for the suspension of the right to accumulate good time, or, for a reduction in the rate of such accumulation, for fixed periods subsequent to a particular infraction not to exceed 30 days.  

197. Id.  

198. Proposed ILL. REV. STAT. ch. 38, § 1003-8-7(a) reads:  

Sec. 3-8-7. Disciplinary Procedures.) (a) All disciplinary action shall be consistent with this Chapter. Committed persons shall be informed of rules of behavior and conduct, the penalties for violation thereof, and the disciplinary procedure by which such penalties may be imposed. Such rules, penalties and procedures shall be posted and available to the persons committed.  

199. In its most basic form an indeterminate sentence is one in which the actual day of release is not capable of being calculated at the time that the sentence is imposed. However, the normal use of the term indeterminate refers to a sentence where there is a large period during which the individual could be paroled. See RUBIN, supra note 3, at 157-59.  

200. Prison operations have not been the subject of sufficient empirical research to provide statistics which suggest this. What studies exist tend to indicate that the prison disciplinary hearing is viewed by the staff as a dispositional hearing rather than a guilt determining proceeding. Harvard Center for Criminal Justice, Judicial Intervention in
Under current practice, the committee in hearing disciplinary committee violations rarely hears the testimony of the officer making the allegations against the inmate. Corroborating witnesses are called with even less frequency. The calling of inmate witnesses is the exception rather than the rule. These actions are justified on the basis that the guards' testimony is not necessary and that inmates called as witnesses would not be reliable because they desire to protect each other and fear reprisals should they testify against another inmate. This argument ignores the fact that much the same can be said for the accusing guard staff of the disciplinary committee itself.201

The written decisions of the disciplinary committee are frequently nothing more than a recitation of the charges or more frequently a statement that the committee accepts the facts as stated in the violation report. Since no record exists of the disciplinary hearing, it is impossible to determine what evidence, if any, the disciplinary committee had before it or the basis upon which it reached its decisions.202

The administrative grievance procedure is designed to correct errors in disciplinary proceedings through a de novo hearing.203 The existing grievance system appears to be reasonably effective in providing some relief from erroneous disciplinary proceedings. However, the relief appears to be granted at the departmental level rather than the institutional level thus demonstrating the inability of the institutional staff to find that their fellow employees erred.204

If the purpose of the proposed changes is to eliminate frustration arising from the uncertainty of the release date and the apparent arbitrariness of the parole board, it does not appear that the proposed changes have accom-
plished their goal. The result of the implementation of the Justice Model would be to shift the focus of inmate frustration from the parole board to the prison disciplinary committee, rather than abate that frustration.

Programs

If the Justice Model is to truly give justice, it must undertake to provide inmates with the opportunity to gain skills and abilities while incarcerated which will permit them to gain employment upon release. Presently, the Illinois Department of Corrections has as an official objective the rehabilitation of those incarcerated. The industrial and vocational programs are supposedly operated to equip the inmate with marketable skills and to promote work habits and responsibility. Academic programs are designed to provide high school and college level courses.

The industrial program and the operation of the institution employ most of the inmates. Some of these assignments are paid with wages in the $0.35 to $0.55 per hour range. Other positions are unpaid, with the inmates receiving remuneration in the form of compensatory good time.

The Justice Model bills do not deal extensively with institutional programs. The only changes proposed in the present form of the legislation are in the provisions relating to remuneration of inmates for work performed. Express authority is given to pay the inmate a rate up to the prevailing wage for similar work in the community. The provision is discretionary and it does not require the payment of wages for any work performed while in custody. The only other change is the abolition of compensatory good time.

The present non-payment of wages for work performed in the institution is due in part to the unavailability of funds in the departmental budget to make such payment. This situation is not expected to change with the adoption of the Justice Model. Thus there exists the specter of those inmates presently being remunerated in compensatory good time being denied such remuneration without being guaranteed any other form of remuneration. This does not appear to convey a sense of justice to the inmate population.

206. ILL. REV. STAT. ch. 38, §§ 1003-12-1, 1003-12-3 (1975).
207. ILL. REV. STAT. ch. 122, § 13-40 (1975) provides the authority therefor.
208. ILL. REV. STAT. ch. 38, § 1003-12-5 (1975).
209. Proposed ILL. REV. STAT. ch. 38, § 1003-12-5 reads: Sec. 3-12-5. Compensation.) Persons performing a work assignment under paragraph (a) of Section 3-12-2 shall receive wages under rules and regulations of the Department. In determining rates of compensation, the Department shall consider the effort, skill and economic value of the work performed and may compensate the persons performing it up to the prevailing wage for similar labor. All wages shall be deposited in the individual's account under rules and regulations of the Department.
The removal of the parole process does not eliminate either the need or the desirability of having programmatic services for the inmates. It would be erroneous to assume that all inmates would avoid involvement in these programs were the coercion of parole removed, and equally erroneous to assume that inmates cannot benefit from such institutional programs.\textsuperscript{210}

While the removal of the parole process with its inherent coerciveness will make participation in programs more voluntary, there is still the problem that the prison administration has a real need to keep inmates occupied in some manner. Long periods of physical and mental idleness coupled with the inherently unpleasant surroundings in the correctional institution produce the same type of frustration which the parole process produces and which the Justice Model is attempting to eliminate.

It is unfortunate that the proposed legislation does not undertake to assure the improvement of the institutional programs. Earlier drafts of the Justice Model legislation did propose an intricate system of "credits" to be earned together with good time. These credits could, to a limited extent, have been used to purchase commodities within the institutional economy and could have been employed as a device to give the inmate some freedom of choice in programmatic matters. While the draft legislation presented a number of problems, it is unfortunate that the drafters decided to delete these provisions.\textsuperscript{211}

The elimination of the parole process will ostensibly free the institutional staff from evaluating inmates' institutional progress for the parole board, so that they can spend more time providing programmatic services. But this group is far too small to constitute a substantial benefit to the inmate population. At best, it will mean that there will be a few counselors and psychologists who will be available to provide services in addition to diagnosis.\textsuperscript{212}

**After Care**

Inmates just released from prison have a need for a variety of services. These services include job counseling and placement, family and personal counseling and other similar services.\textsuperscript{213} Ostensibly these services are

\textsuperscript{210} New Red Barn, supra note 151, at 138-39 (lack of revenue and programs); Morris, supra note 5, at 28-31 (the coercive operation of contemporary prisons); Corrections, supra note 162, at 350.

\textsuperscript{211} The proposal provided for each unit of good time to carry with it a credit to which an economic value would be attached. These credits could to a limited extent be converted into cash for use in the institutional economy; or as a form of unemployment compensation after release. They could have been "spent" to elect programs within the institution. There was the possibility that these credits could have been taken as discipline. Unfortunately, this was deleted from the most recent draft of the legislation.

\textsuperscript{212} Presently the larger institutions simply do not have treating psychologists or psychiatrists. The individuals employed devote their attention to diagnosis for the parole board.

\textsuperscript{213} Corrections, supra note 162, at 430-31.
presently provided by parole officers. In fact, the extent to which these services are provided depends upon the parole officer's caseload and whether he visualizes his role as one of a "helping person" or police officer.\textsuperscript{214} Since inmates, with very few exceptions, must spend some time under supervision before discharge from sentence, in theory parole is a vehicle for providing aftercare services.\textsuperscript{219}

By eliminating parole supervision, the Justice Model would eliminate this vehicle to re-entry and rehabilitation. To obviate this difficulty, the drafters of the proposed changes included language which permits the Department of Corrections (renamed the Bureau of Community Safety) to provide such services.\textsuperscript{216} The language is discretionary, rather than mandatory.

The proposal permits needed services to be offered by the department through its own employees or to be purchased from community resources where the department is unable to provide the services. A purchase of services could only be effected where the releasee is unable to afford the cost of the service. Additionally, the department would be permitted to assess all or part of the costs or services against the releasee according to his ability to pay.\textsuperscript{217}

\textsuperscript{214} Id.
\textsuperscript{215} Every felon sentenced after the effective date of the Unified Code of Corrections has a mandatory parole term under ILL. REV. STAT. ch. 38, § 1005-8-1(e) (1975).
\textsuperscript{216} Proposed ILL. REV. STAT. ch. 38, §§ 1006-6-1 and 1006-6-2 read:

Sec. 6-6-1. Services to Persons on Parole or Release. (a) The Bureau shall provide services to persons released from prison or placed on parole, or mandatory release and shall supervise such persons during their parole or release period in accord with the conditions set.

(b) The Bureau shall assign personnel to assist persons eligible for institutional parole or mandatory release in preparing a community living plan. Such Department personnel shall make a report of their efforts and findings to the Bureau prior to, or at the time of transference to the authority of the Bureau.

(c) The supervising officer of the Bureau shall regularly advise and consult with the parolee or releasee, assist him in adjusting to community life, and inform him of the restoration of his rights on successful completion of sentence under Section 1005-5-5.

(d) The supervising officer shall keep such records as may be required by rules and regulations of the Bureau. All records shall be entered in the master file of the individual.

Sec. 6-6-2. Post Release Services. To assist parolees or releasees the Bureau of offender control may, in addition to other services, provide the following:

1. employment counseling, job placement, and assistance in residential placement;
2. family and individual counseling and treatment placement;
3. financial counseling;
4. vocational and educational counseling and placement; and
5. referral services to any other State or local agencies.

The Bureau may purchase necessary services for a parolee or releasee if they are otherwise unavailable and the parolee or releasee is unable to pay for them. It may assess all or part of the costs of such services to a parolee or releasee in accordance with his ability to pay for them.

\textsuperscript{217} This runs into the inevitable problem of determining ability to pay. \textit{See, e.g.,
While the need for these services is obvious, it appears the provision of these services would be one of the lowest priorities of the Department of Corrections. Attempting to charge the releasee for these services is completely unrealistic. The need for these services occurs in the immediate post-release period. If the individual has been able to amass any amount of money during his term of incarceration, it is probable that he will need it to carry him through the first few months after release. The adoption of rational guidelines for the determination of ability to pay would result in the exclusion of most releasees from payment, rendering the process meaningless. Attempts to charge would tend to inhibit the releasees from utilizing these services.

A better solution might be to define the period when services would be rendered or at least commenced to include the first six or nine months following release. Thereafter, the individuals would have to use other agencies or pay the full cost of the services provided through the Department of Corrections.

**Some Concluding Assessments**

The Justice Model proposal for a return to flat time sentences involves Illinois in a wide variety of changes, all directed toward the purpose of reducing prison term disparity by controlling or eliminating official discretion. Insofar as these changes recognize and build upon the documented weaknesses of the indeterminate sentencing structure in Illinois, they are mandates for serious attention by the General Assembly. However, in attacking the problems set out by the critics of the indeterminate sentence, the Justice Model also creates some problems of its own.

A general point that seems relevant here is the legislative form which the Justice Model bills take. While the individual measures per se might be regarded as providing answers to problems of criminal justice in Illinois, it appears they are intended to be an integrated, total reform package since they propose to alter the central and defining elements of the present system. But the bills are, for the most part, merely amendatory of present legislation.218 The problem with this approach is that the drafters simply have not considered many of the interrelated parts of the Code of Corrections of 1973 supposedly left untouched by the amendments. Because the central system of the Code has been changed, all interrelated parts of the law will be affected. To give only the most glaring example of this change, plea bargaining under the determinate sentencing structure will be radically


218. The Determinate Sentencing bill is entirely amendatory. The other two bills, supra note 1, on Sentencing Equalization and the Bureau of Community Safety, are new legislation. They do, however, fit into the legislative framework of the Code of Corrections of 1973.
affected. The bills do not address this problem. The answer seems to lie in a much more extensive reworking of the Code of Corrections, or at least a careful consideration of major implications of the changes. The drafters appear to have chosen the path of least resistance by amending only those sections of the Code directly affected.

In addition, the overriding problem of goal conflict has not been adequately addressed by the Justice Model bills. The Model proposes a punishment-equality approach, yet retains a dangerousness and rehabilitation element. While consensus on what goals are proper and how they are to be ordered is not currently possible, a reasonable solution lies in an attempt at revising and unifying present goal statements contained in the criminal codes of the state. This should leave open questions not resolved such as the potential conflict between retributive goals and deterrent ones, but it should deal forthrightly with ones that can be resolved, for example, the removal of rehabilitative goals as the primary ones for corrections.

The lacunae which this statement might contain should be left to the courts to fill in on a case by case basis. Thus, both trial and appellate courts should be forced to express their reasons for imposing certain sentences. The sentencing criteria would be important, but not in the rigid form proposed by the Justice Model. There would be no quarrel if the criteria were mandating but not exclusive, that is, that courts could gradually add to the list in light of the goal statement. Plea bargaining should be brought into line with both the goal statement and the criteria for sentences. The practice desperately needs some guidance beyond the exigencies of the docket.

219. The debate on goals is wide-ranging and intricate. There is no single bibliographical source for all of it. One of the authors has summarized parts of the debate in an earlier article that may be helpful. Gerber & McAnany, Philosophy of Criminal Law and Punishment, in Johnson, Savits & Wolfgang, The Sociology of Punishment and Corrections 337-61 (2d ed. 1970).

220. There are three formal goal sections in the present chapter 38: Ill. Rev. Stat. ch. 38, §§ 1-2, 101-1, 1001-1-2(1975). The Illinois Constitution also contains principles that are important here. Ill. Const. art. I, § 11. An attempt at revising the goal statements was made in drafting the Code of Corrections, but the Council on Diagnosis, the reviewing body, rejected the effort as too complicated. For a review of such a goal statement contained in the American Law Institute’s Model Penal Code, see Hart, The Aims of the Criminal Law, 23 L. & Contemporary Prob. 401 (1958).

221. The debate involves the shift in emphasis from past offense of an individual offender to prevention of future offenses by other potential offenders. It does not, as such, raise the same questions as a social defense philosophy of restraint of dangerousness. For an intelligent treatment of the conflict, see Packer, The Limits of the Criminal Sanction Part I (1968).

222. Many critics are currently advocating this position. See, e.g., Struggle For Justice, supra note 5; Fogel, supra note 1, at 50-62; Silving, A Plea for a New Philosophy of Criminal Justice, 35 Revista de Jurid. de U. Puerto Rico 401 (1966).

223. Unarticulated reversals of lower court sentences would leave them in the dark and allow goals to continue unordered. For a similar experience with the Connecticut appellate courts, see Note, Appellate Review of Sentencing Procedure, 74 Yale L.J. 379 (1964).
There is reason to believe that the present assignment of offenses to classes also needs revising, though the Justice Model does not explicitly recognize this fact. If proportionality is made the basis of the sentencing process, care should be taken to frequently review the degree of public condemnation a particular offense entails. The Code of Corrections bypassed this challenging task and merely assigned offenses to classes on the basis of their then current penalties.224

Together with this reassessment of classes of offenses, the legislature might consider ordering, in degree of seriousness, the penalties themselves. While it is true that there already exists some general sense of gradation of seriousness from death through imprisonment to fines, there is need to make the order explicit, especially in making imprisonment the last, or most restrictive, alternative.225 The death penalty, already subject to serious doubt, should be eliminated.

If determinate terms are finally proven more reconcilable with the goal statement, as the authors believe they will be, a very careful examination should be made as to length and its effect on present prison population, as well as jail population. If Illinois chooses to return to more universal, short prison terms, then the total prison system as it has developed—or failed to develop—should be re-examined to accommodate the change.226 Another way to handle the dangerous offender must be found in order to make clear that the criminal law system deals with past offenses, not future ones.

Appellate review of sentences as set out by the Justice Model bill is acceptable if the state's right to appeal is either adequately curtailed or altogether eliminated. The Justice Model approach makes too broad a concession to the state which is unnecessary in light of the other mechanisms available for control of lenient judges. In any event, an appropriate law on appellate review should conform to the goal statement and also help to formulate it in an ongoing fashion.

Statewide criminal justice statistics, suggested as a part of appellate review, should be broadened to include all phases of the criminal justice process and a neutral agency mandated to collect and collate them.227 Making the Department of Corrections responsible seems unwarranted because it is the agency most likely to be affected by outcome of sentencing.


225. For a general discussion of the role of the legislature in sentencing, see Corrections, supra note 162, at 143-47.

226. Similar recommendations have been brought forward by the Committee for the Study of Incarceration. Chicago Daily News, Feb. 18, 1976, at 30, cols. 1 & 2.

227. For a model, one could look to the State of California where a division of the Attorney General's Office has been given such a mandate. See Calif. Penal Code §§ 11075, 1330 (West 1976 Supp.)
Should the state elect a determinate sentencing approach, parole release would be abolished. The authors feel that even with the best efforts of courts overseeing the parole release process, there is faint chance that the decision will be anything but arbitrary. But parole supervision might be retained as some public guarantee that the imprisoning agency will provide for the return of offenders to community life. This would also mandate the appropriation of money for needed services through the agency, rather than leaving it to the vagaries of local effort. But the supervision period could be relatively short and free of oppressive techniques of control as exercised in the past.

Prison and jail discipline becomes a major focus under the Justice Model since flat time sentences are reduced only by good time provisions which affect amount of good time earned or retained. A disciplinary committee which functions outside the operating personnel of the prison is required. Present law gives rather clear guidelines for an adequate justice system at this level. It needs only to be implemented so that the difficult decision of punishing prisoners is not thrust on the very officers responsible for the institution.

Finally, voluntary programs of rehabilitation should be part of any changeover to determinate sentencing. To date, rehabilitation has failed. The reasons for this failure are inconclusive. But evidently the resources or motivation, or both, have been lacking. If the Justice Model's notion of a credit-voucher system can be evaluated and tested for effectiveness, it might provide an answer. But pure punishment without recognition that change is implied in that term will simply not work, nor would it be acceptable to most of the public.

The Justice Model has taken serious strides toward several of these goals. It has not been entirely successful in its efforts. This article has attempted an analysis of the problems addressed and the remedies offered. It has made what it saw as reasonable criticism for inadequate answers and has ended by sketching some alternatives to these weaknesses. In the end, the authors are encouraged that the Justice Model has undertaken the address of serious problems of justice in our system and that the criticism offered here will be constructive of a better and more just future for the use of the criminal sanction.

228. The article has not discussed the merits of the proposal of a statewide probation agency, the Bureau of Community Safety, as a division of the Illinois Department of Corrections. There are several advantages to this statewide approach, but all efforts in this direction have been defeated in the legislature. But beyond these political feasibility problems, there may be issues of freedom and effectiveness which need to be considered before we go to a statewide system. See McAnany, Recommendations for Improving the Ailing Probation System in Gerber, Contemporary Issues in Criminal Justice: Some Problems and Suggested Reforms 76-93 (1976).

229. Punishment as revenge is unacceptable. But this is clearly distinguishable from retributive punishment which recognizes the fact that condemnation of wrongdoing entails return to community. See generally Gerber & McAnany, note 68 supra.