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Truth-in-Sentencing: Illinois Adds Yet Another Layer of Reform to Its Complicated Code of Corrections

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Truth-in-Sentencing: Illinois Adds Yet Another Layer of “Reform” to Its Complicated Code of Corrections

*Gregory W. O’Reilly**

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I. INTRODUCTION

On August 20, 1995, Illinois Governor Jim Edgar signed "truth-in-sentencing" legislation which, he contended, would "keep violent offenders behind bars where they belong."¹ The new law increases punishment for certain crimes, and according to proponents, offers the promise that Illinois' criminal laws will tell the public the "truth" about the actual length of sentences. Supporters also contend that the new law will both restore confidence in the criminal justice system by allowing the public and victims of crime to understand the real penalties imposed for crimes, and reduce crime rates by keeping violent offenders in prison longer—a strategy known as incapacitation.²

1. Gary Marx, *Edgar Signs a Stricter Truth-in-Sentencing Law*, CHI. TRIB., Aug. 21, 1995, § 2, at 1; see also Pub. Act No. 89-404, § 40, 1995 Ill. Legis. Serv. 3936, 3936-37 (West) (codified at ILL. COMP. STAT. ANN. ch. 730, §§ 5/3-6-3 and 5/3-6-3.1 (West Supp. 1996)); U.S. DEP'T OF JUSTICE, COMBATING VIOLENT CRIME: 24 RECOMMENDATIONS TO STRENGTHEN CRIMINAL JUSTICE 7-10 (July 28, 1992) (report by Attorney General William P. Barr, during the 1992 Presidential campaign, popularizing "truth-in-sentencing" plan).

2. FRANKLIN E. ZIMRING & GORDON HAWKINS, INCAPACITATION-PENAL CONFINEMENT AND THE RESTRAINT OF CRIME (1995) (discussing incapacitation and the surrounding policy debate). Illinois has implemented this strategy, to some degree in ILL. COMP. STAT. ANN. ch. 730, § 5/3-6-3.1(a) (West Supp. 1996). In Illinois, opponents of the bill argued that Illinois already had truth-in-sentencing, because the Unified Code of Corrections ("UCC") specified that prisoners who behave in prison would serve one-half of the sentence imposed, and that judges therefore imposed a term weighing the fact that it would be cut in half. As a consequence of the new law, judges may merely cut in half the sentence imposed to reflect actual time which they desire the offender to spend in custody. Such reductions could not occur in a number of cases because of mandatory min-

The new law alters Illinois' sentencing structure by amending the early release sections of the Unified Code of Corrections (the "UCC").³ Currently, Illinois controls the actual length of imprisonment through two mechanisms. Early release, a "back door" mechanism, allows prisoners to be released before their sentence is completed. Good conduct credits are an example of this mechanism. "Front door" methods establish, or purport to establish, the length of sentence when it is imposed. Examples of this method include statutory classifications of offenses by seriousness and statutory provisions which set out the maximum and minimum sentences a court can impose.⁴ The truth-in-sentencing law focuses on "backdoor" mechanisms. It eliminates both the day-for-day good conduct credit, which allows prisoners to trim their sentence by one day for each day they serve at good behavior,⁵ and the additional 90 or 180 days of good conduct credit for "meritorious service," which the Illinois Department of Corrections ("IDOC") awards prisoners.⁶ Persons convicted of offenses not covered by truth-in-sentencing will continue to have their sentences reduced by good conduct credit. For instance, under the new law, murderers will serve 100% of the sentence imposed by a judge, persons convicted of violent crimes such as aggravated criminal sexual assault or criminal sexual assault will serve about eighty-five percent of their sentence, and persons convicted of burglary will serve less than one-half of the sentence imposed by the court.⁷

The new law also establishes a Truth-in-Sentencing Commission (the "Commission"), consisting largely of law enforcement officials, which is charged with assuring that "criminals serve the sentences handed down by the courts."⁸ While this charge could indicate that the State is leaning towards extending truth-in-sentencing to all offenses, it should be viewed in the context of the costs that such a program would entail. For instance, the IDOC estimated that the current truth-in-sentencing law will cost the State \$320 million and add 3774 inmates to

imum sentences, below which the judge cannot deviate. Opponents also contended that the bill would eliminate prisoners' incentive to behave in prison, that it would not significantly reduce crime, and that it would cost Illinois millions—or billions—of dollars. Marx, *supra* note 1, at 1.

3. See ILL. COMP. STAT. ANN. ch. 730, §§ 5/3-6-3 and 5/3-6-3.1 (West Supp. 1996).

4. See *infra* notes 19-64 and accompanying text.

5. ILL. COMP. STAT. ANN. ch. 730, § 5/3-6-3(a)(2)(ii) (West Supp. 1996). Under the law, prisoners in the 85% category shall receive "no more than 4.5 days of good conduct credit for each month of his or her sentence of imprisonment." *Id.*

6. *Id.* § 5/3-6-3(a)(3).

7. *Id.* § 5/3-6-3(a).

8. *Id.* § 5/3-6-3.1(a).

Illinois prisons in its first decade.⁹ The IDOC predicted that, over the same period, the costs of extending truth-in-sentencing to all offenses would approach six billion dollars.¹⁰ Moreover, these new demands on the IDOC come at a time when the State's prisons are already filled to near capacity.¹¹ In this context, the Commission's additional charge of examining the possibility of "*changing* sentences in order to more accurately reflect the actual time spent in prison" could be construed as an indication that the State will consider lowering the sentences set forth in the Code to reflect the actual time served by prisoners, and eliminating good conduct credit for all offenses.¹²

This Article reviews Illinois' truth-in-sentencing law and the sentencing structure into which it falls. It will not attempt to engage in the controversial and enormous task of evaluating the merits of various strategies of incapacitation, nor will it weigh the shift in power from judges to prosecutors which has flowed from offense-based sentencing and mandatory sentencing policies.¹³ Illinois' complicated and confusing sentencing system has been built up by the unsystematic accretion of sentencing policies and enhancements over the last three decades. Rather than clarifying the Code, "truth" adds yet another layer to this system. The accretion of sentencing policies is in large measure the product of a legislature which constantly responds to public perceptions about crime by passing new laws. Without debating the merits of such democratic responsiveness, one must recognize that it has added costs to the criminal justice system beyond the obvious costs of prison construction. The profusion of unrelated policies has

9. Marx, *supra* note 1, at 1.

10. H.B. 3252, 89th Ill. Gen. Assem., 1st Sess. (1995) (Illinois Department of Corrections, Corrections Impact Note). The Illinois Department of Corrections projected that House Bill 3252, which would have created across-the-board, truth-in-sentencing, would cost \$5.8 billion over the next 10 years. *Id.*

11. *See infra* part IV.C.

12. ILL. COMP. STAT. ANN. ch. 730, § 5/3-6-3.1(a)(c)(3) (West Supp. 1996) (emphasis added).

13. The shift to sentences—especially mandatory sentences—based on the charged offense, rather than the offender, has also shifted power from judges to prosecutors. The prosecutor, not the judge, selects the charge. When the consequences of that charge are fixed regardless of the specifics of the offender or the crime, the judge cannot alter the sentencing outcome. The prosecutor, however, may do so by filing a different charge, or by reducing charges, a power often used in plea bargaining. *See, e.g.,* Symposium, *The Sentencing Controversy: Punishment and Policy in the War on Drugs*, 40 VILL. L. REV. 301, 313 (1995). *See also, e.g.,* United States v. Harrington, 947 F.2d 956, 964-65 (D.C. Cir. 1991) (Edwards, J., concurring) (emphasizing the power prosecutors wield when influencing sentencing); Bennett L. Gershman, *The Most Fundamental Change in the Criminal Justice System—The Role of Prosecutors in Sentencing*, CRIM. JUST., Fall 1990, at 3 (discussing how the federal sentencing guidelines have increased prosecutors' power in controlling the length of sentences).

obscured the debate over how best to spend the State's limited amount of money to best incapacitate—or rehabilitate—offenders. It has also resulted in an unnecessarily complex and unpredictable sentencing system so arcane that few lawyers—not to mention the public or the accused—can understand what specific legal consequences flow from specific criminal conduct.¹⁴

II. LAYER UPON LAYER: A BRIEF HISTORY OF SENTENCING POLICY

Over the last 150 years, Illinois sentencing policy has shifted with a number of major revisions, but it has mainly grown by accretion.¹⁵ It has also generally progressed towards setting forth the actual length of a sentence at the time of sentencing, and, in fixing the amount of punishment, it has come to focus less on the offender than on the offense charged.¹⁶ In its most extreme form, this trend has resulted in a number of “mandatory minimum” terms of imprisonment, which require a court to sentence an offender convicted of certain offenses to serve a minimum number of years in a penitentiary, regardless of individual circumstances.¹⁷ Supporters of this evolution might argue that these changes produce greater predictability in the amount of punishment which will follow as a consequence of a given offense, and that it provides more clarity about the consequences of criminal conduct to crime victims, offenders, and the public. Over the last thirty-five years, however, this trend towards clarity has been diluted as a

14. Gerald F. Uelman, *Federal Sentencing Guidelines: A Cure Worse Than the Disease*, 29 AM. CRIM. L. REV. 899, 905 (1992) (arguing that the guidelines are complex and confusing and they result in a federal bureaucracy of sentencing that is void of judicial discretion).

15. See *infra* parts II.A-F and III.

16. See *infra* part IV.B. This focus on *offense*, rather than offender, and complex sentencing consequences caused by the accretion of sentencing schemes, creates a rift between sentencing policies and provisions in the Criminal Code and the Illinois Constitution, which require that punishment be proportionate to the seriousness of the offense and recognize an offender's potential for rehabilitation. ILL. CONST. of 1970, art. I, § 11 (“All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship.”); ILL. COMP. STAT. ANN. ch. 720, § 5/1-2(c) (West 1992) (indicating that one of the general purposes of the criminal code is to “[p]rescribe penalties which are proportionate to the seriousness of the offense and which permit recognition of differences in rehabilitative possibilities among individual offenders”). See also Susan M. Witt, *Illinois' Aggravated Battery of a Senior Citizen Statute: Out of Sync with the Sentencing System*, 1989 U. ILL. L. REV. 1161, 1178. Witt notes that, “(t)urning its collective head from circumstances of the offense, the legislature rejected the Illinois Supreme Court's position that punishment should fit the *offender* rather than the crime alone.” *Id.* (citing *People v. LaPointe*, 431 N.E.2d 344, 350 (Ill. 1981)).

17. See *infra* parts II.C-F and III (discussing the evolution of sentencing in Illinois).

number of new sentencing mechanisms—both front door and back door—have been added, one on top of another, to the existing UCC and Criminal Code.¹⁸

A. 1833 to 1961—*Indeterminate Sentencing and the Opening of the Back Door*

From 1833 until 1872, Illinois sentencing law offered little or no predictability in the amount of punishment which would follow as a consequence of a given offense because, for most offenses, the length of imprisonment was determined by a jury.¹⁹ In 1872, the legislature created a schedule of good-time credits allowing a prisoner to be released before he or she had served the period of incarceration which had been imposed. This change constituted the first back door sentencing mechanism.²⁰

The use of good time credits was part of a nationwide prison reform movement which sought to sort prisoners who could be rehabilitated and restored to the community from those who were fit only for continued punishment and incapacitation.²¹ While New York passed the first good time law in 1817, most good time laws were passed after 1850.²² By 1869, twenty-three states had similar laws.²³ Under Illinois' 1872 plan, a prisoner who behaved in prison was released one month early from a one-year sentence, or three months early from a two-year sentence.²⁴ A prisoner facing the almost hopeless prospect of a very long sentence was given even greater incentive to behave. For instance, a prisoner facing a twenty-year term could have it reduced to eleven years and three months if he behaved in prison.²⁵

In 1895, the legislature expanded the back door sentencing mechanism when it adopted an explicit indeterminate sentencing model that allowed prison officials to release a prisoner at any time.²⁶ The almost

18. See *infra* parts II.B-F and III.

19. ILL. REV. STAT. ch. 30, para. 168 (1845); see also James B. Haddad, Commentary, *Some Lessons from the History of Illinois Sentencing Laws*, 2 N. ILL. U. L. REV. 19, 23-25 (1981) (tracing the history of Illinois' sentencing system).

20. ILL. REV. STAT. ch. 108, para. 45 (1877); Haddad, *supra* note 19, at 23. Since the actual term of imprisonment was determined at the time of sentencing, it was as predictable as a front door mechanism. The law set an explicit schedule of days by which sentences were to be reduced. See ILL. REV. STAT. ch. 108, para. 62 (1896).

21. LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 160-62 (1993).

22. *Id.*

23. *Id.*

24. *Id.*

25. ILL. REV. STAT. ch. 108, para. 62 (1896); FRIEDMAN, *supra* note 21, at 159.

26. ILL. REV. STAT. ch. 38, para. 501 (1898); 1895 Ill. Laws 158 (codified at ILL. REV.

total lack of predictability of this system was somewhat tempered by an amendment in 1917 which set forth minimum periods which a prisoner had to serve before he or she would be eligible for parole.²⁷ In 1941, Illinois again expanded the back door mechanism.²⁸ Juries retained their power to set terms for serious felonies, while, for less serious felonies, authorized terms spanned a wide range of years, with the actual time of release determined by the prison authorities. A burglar, for instance, could be sentenced to one year to life in the penitentiary.²⁹

B. *The Criminal Code of 1961*

In 1961, the legislature extensively revised the criminal laws when it passed the Criminal Code of 1961.³⁰ The new code added a degree of predictability to sentencing by allowing judges to take over sentencing from juries (except in capital cases), and by limiting the terms of imprisonment which judges could impose to a statutory range of years.³¹ The new code added a degree of clarity to sentencing by including an individual penalty section for each offense.³² But it also added unpredictability by expanding the back door mechanism because all sentences were "indeterminate."³³ Except in cases where the offender was sentenced to consecutive sentences for separate offenses, all offenders were eligible for parole within eleven years and three months.³⁴

STAT. ch. 38, paras. 498-509 (1895)).

27. Sentence, Commitment, and Parole Act of 1917, H.B. 1029, 1917 Ill. Laws. 353; See ILL. REV. STAT. ch. 38, para. 498(l) (1920); Haddad, *supra* note 19, at 24. Haddad notes that release was based "upon the condition that the warden keep in touch with the prisoner for at least six months." *Id.*

28. H.B. 103, 62d Ill. Gen. Assem., 1st Sess., 1941 Ill. Laws. 560 (amending ILL. REV. STAT. ch. 38, para. 802 (1941)); Haddad, *supra* note 19, at 24.

29. Haddad, *supra* note 19, at 24 (citing ILL. REV. STAT. ch. 38, paras. 84, 802 (1941)).

30. Criminal Code of 1961, 1961 Ill. Laws 1983-2049 (codified at ILL. REV. STAT. ch. 38, paras. 1-1 to 35-1 (1961)).

31. See, e.g., ILL. REV. STAT. ch. 38, para. 10-1 (1961) (indicating that the penalty for kidnapping was between one and five years); John P. Heinz et al., *Legislative Politics and the Criminal Law*, 64 NW. U. L. REV. 277, 321 (1969); Haddad, *supra* note 19, at 23.

32. See, e.g., ILL. REV. STAT. ch. 38, para. 11-1(c) (1961) (indicating that the rape penalty is set forth in the same section as the substantive offense); Marvin E. Aspen, *New Class X Sentencing Law: An Analysis*, 66 ILL. B.J. 344, 345 (1978).

33. Aspen, *supra* note 32, at 345.

34. Haddad, *supra* note 19, at 25.

C. *The Unified Code of Corrections*

On January 1, 1973, a new sentencing scheme, the UCC, became effective, making sentencing more predictable.³⁵ The new law limited the power of judges or parole authorities to be lenient in the most serious cases, yet granted judges powers in those cases to impose long sentences.³⁶ It also allowed parole authorities to retain significant discretion over the determination of when to release those prisoners who were facing the longest terms of imprisonment.³⁷ The UCC retained indeterminate sentencing, but removed the penalty provisions from individual offenses and placed them in the new code.³⁸ It classified felonies into four categories and set murder into its own category.³⁹

The new code set relatively high minimum terms of imprisonment of fourteen years for murder and four years for Class 1 felonies; no maximum terms were set for these offenses.⁴⁰ This structure prevented judges from imposing too "lenient" a penitentiary sentence, while it allowed them to set a very high maximum term. While parole authorities also could not be too lenient in releasing these serious offenders before the minimum term, they retained enormous discretion in deciding when to release a serious offender after the minimum term had expired. This structure additionally provided those offenders facing the longest imprisonment a strong incentive to behave or to rehabilitate themselves.

For the less serious Class 2, 3, and 4 felonies, the UCC imposed a minimum penitentiary term of only one year—if the judge elected not to sentence the offender to probation.⁴¹ Maximum terms for these categories were set at twenty years for Class 2 felonies, ten years for Class 3, and three years for Class 4.⁴² Thus, as the seriousness of the offense decreased, so did the power of the judge to impose a very long sentence; parole authorities also had less ability to hold these offenders for long periods. This limit on discretion was assured by a provision which limited the extent to which a judge could increase the minimum sentence in Class 2 and 3 felonies. The higher minimum term could

35. The Unified Code of Corrections, Pub. Act No. 77-2097, 1972 Ill. Laws 758-838 (codified at ILL. REV. STAT. ch. 38, paras. 1001-1-1 to 1008-6-1 (1973)).

36. See Aspen, *supra* note 32, at 345.

37. *Id.* at 345 n.18 (citing ILL. REV. STAT. ch. 38, para. 1005-5-1 (1977)).

38. *Id.* at 345 (citing ILL. REV. STAT. ch. 38, para. 1005-8-1 (1977)).

39. *Id.* (citing ILL. REV. STAT. ch. 38, para. 1005-8-1(b) (1977)).

40. *Id.*

41. *Id.* (citing ILL. REV. STAT. ch. 38, para. 1005-8-1(c) (1977)).

42. *Id.* (citing ILL. REV. STAT. ch. 38, para. 1005-8-1(b)(3)-(5) (1977)).

not exceed one-third of the maximum term set in that case by the court.⁴³ For example, the potential sentence for a Class 2 felony could range from one to twenty years, which would give the parole board very broad discretion.⁴⁴ The one-third provision, however, restricted parole or back door discretion by requiring the court to impose a sentence within a range of, for instance, two to six years.⁴⁵ The UCC also gave judges the power to impose double the maximum terms of imprisonment in cases where the offender inflicted or attempted to inflict serious bodily injury upon another person, or used a firearm in commission of a felony.⁴⁶

D. Class X

Only five years later, in 1978, Illinois extensively overhauled its sentencing laws, again making sentencing more predictable.⁴⁷ According to then-Governor Thompson, the new "Class X" law would "tell criminals that we are not going to fool around with them any longer."⁴⁸ The law abolished the primary back door mechanisms of indeterminate sentencing and the parole system.⁴⁹ It continued, however, to use a form of back door release—day-for-day good time.⁵⁰ This provision allowed a prisoner to be released one day early for each day he served on good behavior.⁵¹ While still a back door mechanism, this system was very predictable, allowing a fairly accurate assessment of the offender's length of imprisonment at the time of sentencing. It retained the incentive for prisoners serving long sentences to behave in order to gain early release. The Class X law also authorized the IDOC to release prisoners ninety days earlier than their release date based on good conduct credit for "meritorious service,"⁵² a provision which evolved into a virtually automatic reduction of sentence.⁵³

43. *Id.* (citing ILL. REV. STAT. ch. 38, para. 1005-8-1(c)(3)-(4) (1977)).

44. ILL. REV. STAT. ch. 38, para. 1005-8-1 (1977).

45. Aspen, *supra* note 32, at 345 (citing ILL. REV. STAT. ch. 38, para. 1005-8-1(c)(3)-(4) (1977)).

46. *Id.* (citing ILL. REV. STAT. ch. 38, para. 1005-8-2(a) (1977)).

47. Pub. Act No. 80-1099, 1977 Ill. Laws 3264-3368 (codified as amended in scattered sections of ILL. REV. STAT. ch. 38 (1979)).

48. Marcia Stepanek, *Thompson Proposes Tough Anti-Crime Laws*, CHI. TRIB., Apr. 6, 1977, § 1, at 1.

49. Pub. Act No. 80-1099, 1977 Ill. Laws 3289 (deleting old section and replacing it with good time credit in section 1003-6-3).

50. Aspen, *supra* note 32, at 349 (citing ILL. REV. STAT. ch. 38, para. 1003-6-3(a)(2) (1978)).

51. ILL. REV. STAT. ch. 38, para. 1003-6-3(a)(2) (1978).

52. *Id.*

53. Aspen, *supra* note 32, at 349 n.67; see also ILL. COMP. STAT. ANN. ch. 730, § 5/3-

The cornerstone of the Class X law was the new category encompassing serious offenses, such as rape and armed robbery, for which the law was named. Under this provision, persons convicted of Class X offenses were ineligible for probation, and were required to serve a mandatory minimum term of imprisonment which the court would set at between six and thirty years.⁵⁴ The Class X provision strengthened the trend towards more predictable punishment, for not only was back door parole authority curtailed, so too was front door judicial discretion in deciding whether to incarcerate Class X offenders.⁵⁵

The Class X law also made Illinois' front door sentencing more predictable by requiring judges to sentence offenders within a more strictly limited range of years.⁵⁶ For instance, under the 1973 law, a non-capital murder conviction carried a term of imprisonment from fourteen years to a limitless maximum; parole authorities decided when to release the offender.⁵⁷ Under the Class X law, a person convicted of murder faced a fixed term of between twenty and forty years,⁵⁸ a term which would be cut in half if the offender behaved in prison.⁵⁹ In cases where certain aggravating factors were present, the offender could face natural life in prison or death.⁶⁰

The Class X law made sentencing significantly more predictable for lesser crimes as well. Under the 1973 law, Class 1 felonies carried a term of imprisonment which ranged from a minimum of four years to a limitless maximum.⁶¹ With the one-third requirement, an offender sentenced to imprisonment thus could have faced a term of eight to twenty-four years, with the parole authorities deciding when, after eight years, the offender would be released.⁶² Under Class X, a judge could sentence a Class 1 offender to probation, or to a fixed term of imprisonment of between four and fifteen years. Class 2 felonies, which had carried an indeterminate term of between one and twenty years, now carried a fixed term of between three and seven years. For

6-3 (West Supp. 1996) (setting forth meritorious good time provisions); ILL. ADMIN. CODE tit. 20, § 107.210 (Barclays July 22, 1994) (setting forth meritorious good time provisions).

54. ILL. REV. STAT. ch. 38, para. 1005-8-1(a)(3) (1978).

55. Aspen, *supra* note 32, at 347-48.

56. *See* Pub. Act No. 80-1099, 1977 Ill. Laws 3308 (codified at ILL. REV. STAT. ch. 38, para. 1005-8-1 (1978)).

57. *See* ILL. REV. STAT. ch. 38, para. 1005-8-1 (1977).

58. *Id.*

59. *Id.* paras. 1005-8-1(b)(2) & 1005-8-1(c)(2).

60. *Id.* para. 1005-8-1(a)(1).

61. ILL. REV. STAT. ch. 38, para. 1005-8-1(a)(4) (1977).

62. *Id.* para. 1005-8-2.

Class 3 felonies a fixed term could be set at between two and five years, while for Class 4, it could range between one and three years.⁶³

The Class X law channeled judges' discretion in setting a term of years for a sentence by specifying aggravating and mitigating factors which they were to consider. For instance, mitigating factors included the fact that an offender had led a law-abiding life or acted with strong provocation, while the fact that an offender inflicted serious bodily injury or had a record of prior offenses were aggravating factors.⁶⁴

E. Class X and Special Sentencing Enhancements

While the Class X law increased the fixed and predictable minimum terms of imprisonment which accompanied conviction for a given offense, it also allowed judges to impose longer terms of imprisonment based not upon the statutory offense, but upon the character of the offender's conduct, or his previous criminal behavior. These provisions authorizing additional consequences include extended terms,⁶⁵ consecutive sentences,⁶⁶ enhanced penalties for repeat offenders,⁶⁷ and "habitual offender sentencing"⁶⁸—an early version of the recent "three-strikes-you're-out" laws.

1. Extended Terms

Under the Class X law, a judge was allowed to impose a term longer than the statutory maximum—an "extended term"—in cases where the offense was "exceptionally brutal or heinous" or "indicative of wanton cruelty."⁶⁹ For instance, a judge could impose an extended term for murder at a fixed number of years between forty and eighty,⁷⁰ which would be reduced by about one-half by good conduct credit.⁷¹ A judge could also impose an extended term of between thirty and sixty years for a Class X felony.⁷²

63. Aspen, *supra* note 32, at 347-48.

64. *Id.* at 350; Patricia Hartman, *Factors in Aggravation and Mitigation: A Trap for the Sentencing Judge*, 33 DEPAUL L. REV. 357, 357-58 (1984).

65. ILL. REV. STAT. ch. 38, para. 1005-8-2 (1978).

66. *Id.* para. 1005-8-4.

67. *Id.* para. 1005-5-3(c)(6).

68. *Id.* paras. 33B-1, 1005-5-3(c)(5).

69. *Id.* paras. 1005-8-2(a), 1005-8-1(a)(1).

70. *Id.* para. 1005-8-2(a)(1).

71. *Id.* para. 1003-6-3.

72. *Id.* para. 1005-8-2(a)(2).

2. Consecutive Sentences

Before Class X, a judge could sentence an offender to serve consecutive sentences for two convictions only if the offenses were not part of a single course of conduct.⁷³ Under the Class X law, however, even if both offenses were part of the same course of conduct, the court could sentence consecutively if (1) at least one offense was a Class 1 or Class X felony, and (2) the victim was severely injured. This amounted to longer sentences for more serious felonies involving physical harm, because the offender would serve one sentence after the other, rather than two at the same time or concurrently.⁷⁴

3. Repeat Offenders

Under Class X, mandatory prison sentences were to be based not only on the offense at hand, but also upon an offender's previous convictions. One new "enhanced Class X" provision required a judge to sentence as a Class X offender any Class 1 or Class 2 offender over the age of twenty-one if he or she had previously been convicted two times before of either a Class 1 or Class 2 felony.⁷⁵

4. Habitual Offender Sentencing

A more severe provision focusing on the offender's previous convictions required a judge to impose a life sentence for an offender's third conviction for a serious violent felony, such as murder, armed robbery, or rape.⁷⁶ Although "habitual criminal," or "three-strikes-you're-out" laws had existed since 1885, when Ohio passed a habitual criminal law,⁷⁷ they did not gain national attention until 1994, when a number of states followed the lead of California in passing similar laws.⁷⁸

73. ILL. REV. STAT. ch. 38, para. 1005-8-4(a) (1977).

74. Compare ILL. REV. STAT. ch. 38, para. 1005-8-4(a) (1977) with ILL. REV. STAT. ch. 38, para. 1005-8-4 (1978); see Aspen, *supra* note 32, at 348.

75. ILL. REV. STAT. ch. 38, para. 1005-5-3(c)(6) (1978); see also Aspen, *supra* note 32, at 348 (reviewing Class X provisions).

76. ILL. REV. STAT. ch. 38, paras. 33B-1, 1005-5-3(c)(5) (1978); see also Aspen, *supra* note 32, at 348 (reviewing Class X provisions).

77. FRIEDMAN, *supra* note 21, at 161; 1885 Ohio Laws 236-37.

78. See CAL. PENAL CODE § 667 (West Supp. 1996); WASH. REV. CODE § 9.94A.120 (1994); see also Alan C. Smith, *More than a Question of Forum: The Use of Unconstitutional Convictions to Enhance Sentences Following Custis v. United States*, 47 STAN. L. REV. 1323, 1324 n.4 (1995) (noting that 17 states have enacted or debated a "Three Strikes" measure).

F. 1978 Through 1995—The Accretion of Policies

From 1978 until 1995, Illinois sentencing laws continued to evolve piecemeal, without regard to the entire structure, as the General Assembly added individual sentencing enhancements. While by no means an exhaustive survey of the numerous enhancements passed during this period, the following section summarizes illustrative examples.

1. Ad Hoc Mandatory Imprisonment

Under the Class X law, imprisonment was mandatory for the most serious class of offenses. In 1981, the General Assembly began adding mandatory imprisonment for offenses in less serious categories on an ad hoc basis. This change began when the General Assembly required judges to impose a term of imprisonment for the Class 1 felony of residential burglary. Regardless of mitigating factors, a judge was required to sentence an offender to four years imprisonment.⁷⁹ With this amendment, the General Assembly may have opened the door for further encroachments into judicial discretion in the sentencing of less serious classes of offenses. For instance, the General Assembly has required judges to sentence anyone found guilty of possession with intent to deliver five or more grams of cocaine, a Class 1 felony, to four years in prison.⁸⁰ In 1995, the General Assembly enhanced the penalty for the Class 1 felony of compelling gang membership to require a mandatory minimum term of imprisonment upon conviction.⁸¹

2. The Location of the Offense—"Safe" Zones

Since 1985, the General Assembly has added numerous sentencing enhancements based upon the location of the offense, rather than the nature of the offender or the offense itself. While this concept began as an enhancement to combat drug sales in schools, it has expanded to include a wide range of areas, and seems popular with the General Assembly, as indicated by a number of recent proposals to add still more "safe zones."

79. Pub. Act No. 82-238, 1981 Ill. Laws 1275-77 (codified at ILL. REV. STAT. ch. 38, para. 19-3(b) (1981)).

80. ILL. COMP. STAT. ANN. ch. 730, § 5/5-5-3 (West Supp. 1996); ILL. COMP. STAT. ANN. ch. 720, § 570/401(c)(2) (West Supp. 1996).

81. ILL. COMP. STAT. ANN. ch. 720, § 5/12-6.1 (West Supp. 1996).

a. *School Zones*

The roots of the "safe zones" concept date from the original Illinois Controlled Substances Act of 1971,⁸² which focused on drug sales to children, regardless of location. That law permitted, but did not require, judges to double the sentence of a person eighteen years of age or older who was convicted of delivering a controlled substance, such as cocaine, to someone under eighteen who was at least two years younger than the offender.⁸³ It required the actual delivery of drugs, and focused on the ages of the parties involved.⁸⁴

In 1985, the General Assembly modified the law aimed at drug sales to children, transforming it into the "safe school zone" law.⁸⁵ The new law deleted the requirement that the offender be at least two years older than the person receiving the drugs, and added a new section which applied to offenses committed on school grounds, or on a public way within 1000 feet of a school.⁸⁶ The 1985 law applied to offenders of any age, covered possession of drugs and possession with intent to deliver drugs, and contained mandatory sentencing enhancements and mandatory terms of imprisonment.⁸⁷ For instance, a person found guilty of possession with intent to deliver between one and five grams of a controlled substance would, under the Controlled Substances Act, be guilty of a Class 1 felony, and face a sentence of probation, or if other factors were involved, a possible term of between four and seven years imprisonment.⁸⁸ If the same person was found guilty of that offense within the zone, he or she would be guilty of a Class X felony, and a judge would then have to sentence that person to a term of between six and thirty years in prison, regardless of the offender's age or absence of a criminal record.⁸⁹

The school zone concept has also been added to the assault and various firearms statutes. A person who assaults a teacher on school

82. Illinois Controlled Substances Act, Pub. Act No. 77-757, 1971 Ill. Laws 1538 (codified at ILL. REV. STAT. ch. 56 1/2, paras. 1100-1603 (1971)).

83. Pub. Act No. 77-757, § 407, 1971 Ill. Laws 1538, 1563 (codified at ILL. REV. STAT. ch. 56 1/2, para. 1407 (1971)).

84. *Id.*

85. Illinois Controlled Substances Act, Pub. Act No. 84-1075, § 2, 1985 Ill. Laws 7116, 7119-20 (codified at ILL. REV. STAT. ch. 56 1/2, para. 1407(a), (b) (1985)).

86. *Id.* See also Pub. Act No. 85-616, 1987 Ill. Laws 2700 (codified at ILL. REV. STAT. ch. 56 1/2 para. 1407(b) (1985)) (adding "public park" to the areas covered by the zone).

87. ILL. REV. STAT. ch. 56 1/2, para. 1407 (1985).

88. ILL. COMP. STAT. ANN. ch. 720, § 570/401(c)(2) (West 1992).

89. ILL. COMP. STAT. ANN. ch. 720, § 570/407(b)(1) (West Supp. 1996).

grounds, which, under Illinois law, means placing the teacher in reasonable apprehension of battery, faces a penalty enhancement from a Class C to a Class A misdemeanor.⁹⁰ A person who unlawfully sells a firearm to a person under eighteen years of age, if the firearm is concealable or if the recipient does not have a license, faces a penalty enhanced from a Class 3 to a Class 2 felony.⁹¹ A person who carries a handgun in his or her pocket or in a car is guilty of a Class 4 felony. The penalty is enhanced, however, to a Class 3 felony if the act occurred in a school zone.⁹² The courts have broadly construed the coverage of the statute, finding that the safe zone includes colleges and universities.⁹³

b. Public Parks and Public Housing

In 1987 the General Assembly applied the coverage of the safe school zone law to public parks.⁹⁴ Cocaine offenses were thus punished more severely if they occurred in a public park than in a private yard or home. Two years later, the General Assembly extended the zone to cover offenses committed within 1000 feet of "any residential property owned, operated and managed by a public housing agency."⁹⁵ Under that law, for example, a person convicted of possessing with intent to deliver one gram of cocaine in or around their privately-owned home would be guilty of a Class 1 felony, and be eligible for probation.⁹⁶ If the person was found guilty of that offense in or around a school or public housing, however, he or she would be guilty of a Class X felony, and a judge would then have to sentence that person to at least six years in prison, regardless of the offender's age or absence of a criminal record.⁹⁷

According to the Illinois Supreme Court, this statute did not violate equal protection of the law. According to the court, it was reasonable to enhance the penalty based on its location in an area with significant narcotics activity.⁹⁸ The court also found that the statute did not

90. *Id.* §§ 5/12-1, 5/12-2(a)(3)(b).

91. *Id.* § 5/24-3(a), (i), (k).

92. *Id.* § 5/24-1(a)(4), (b), (c)(1.5).

93. See *People v. Goldstein*, 562 N.E.2d 1183, 1187 (Ill. App. 5th Dist. 1990), *appeal denied*, 567 N.E.2d 336 (Ill. 1991), *cert. denied*, 502 U.S. 810 (1991).

94. Illinois Controlled Substances Act, Pub. Act No. 85-616, 1987 Ill. Laws 2700 (codified at ILL. REV. STAT. ch. 56 1/2, para. 1407 (1987)).

95. Pub. Act No. 86-946, 1989 Ill. Laws 5667, 5673 (codified at ILL. REV. STAT. ch. 56 1/2, para. 1407 (1989)).

96. ILL. REV. STAT. ch. 56 1/2, para. 1401(c)(2) (1989).

97. *Id.* para. 1407(b)(2) (1989).

98. *People v. Shepard*, 605 N.E.2d 518, 525 (Ill. 1992).

penalize persons based upon where they lived, because the enhanced penalty was based only upon where the offense occurred.⁹⁹ The enhanced penalties for offenses committed in parks and public housing have also been extended to apply to numerous firearm offenses.¹⁰⁰ For example, a person who carries a handgun in his or her pocket or in a car is guilty of a Class 4 felony.¹⁰¹ If the same act is done in or around public housing, it is enhanced to a Class 3 felony.¹⁰²

c. Rest Areas and Truck Stops

In 1992, the General Assembly expanded its safe zone concept to include "truck stops" and "safety rest areas."¹⁰³ Under this law, a person faces enhanced penalties for drug offenses committed in, or within 1000 feet of, these zones.¹⁰⁴ The zones covered are broad indeed. For example, according to the statute, a "safety rest area" is "a roadside facility removed from the roadway with parking and facilities designed for motorists' rest, comfort, and information needs."¹⁰⁵ Offenders in possession of controlled substances likely drive within 1000 feet of innumerable zones during a moderately long drive, constantly increasing and decreasing their criminal liability.

d. Aggravating Factor for Zone Offenses

In 1994, the General Assembly greatly broadened the application of the zone concept to cover two dozen additional offenses by allowing judges to consider the fact that the offense occurred within a zone as an aggravating factor at sentencing.¹⁰⁶ The General Assembly seems

99. *Id.* at 523.

100. ILL. COMP. STAT. ANN. ch. 720, § 5/24-1 (West Supp. 1996).

101. *Id.* §§ 5/24-1(a)(4), (b).

102. *Id.* §§ 5/24(a)(4), (c)(1.5).

103. Illinois Controlled Substances Act, Pub. Act No. 87-1225, 1992 Ill. Laws 3843 (codified at ILL. REV. STAT. ANN. ch. 56 1/2, para. 1407 (1993)).

104. ILL. COMP. STAT. ANN. ch. 720, § 570/407(a)(2)-(4) (West Supp. 1996).

105. *Id.* § 570/407(a)(4).

106. *Id.* § 5/5-5-3.2(a)(16). The offenses covered are: Kidnapping—ILL. COMP. STAT. ANN. ch. 720, § 5/10-1 (West 1992); Aggravated Kidnapping—*id.* § 5/10-2; Child Abduction—*id.* § 5/10-5; Soliciting for a Juvenile Prostitute—*id.* § 5/11-5.1; Keeping a Place of Juvenile Prostitution—*id.* § 5/11-17.1; Patronizing a Juvenile Prostitute—*id.* § 5/11-18.1; Juvenile Pimping—ILL. COMP. STAT. ANN. ch. 720, § 5/11-19.1 (West Supp. 1996); Exploitation of a Child—*id.* § 5/11-19.2; Aggravated Assault—*id.* § 5/12-2; Aggravated Battery—*id.* § 5/12-4; Heinous Battery—*id.* § 5/12-4.1; Aggravated Battery with a Firearm—*id.* § 5/12-4.2; Aggravated Battery of a Child or Institutionalized Mentally Retarded Person—ILL. COMP. STAT. ANN. ch. 720, § 5/12-4.3 (West 1992); Intimidation—ILL. COMP. STAT. ANN. ch. 720, § 5/12-6 (West Supp. 1996); Compelling Organization Membership of Persons—*id.* § 5/12-6.1; Criminal Sexual Assault—ILL. COMP. STAT. ANN. ch. 720, § 5/12-13 (West 1992); Aggravated Criminal

likely to continue to carve out more special zones for sentencing enhancements, as evidenced by recent proposals. These proposals include safe zones for public transportation, a "Safe Retail Zone"¹⁰⁷ for retail shopping malls, and a proposal to create safe religion zones.¹⁰⁸

3. The Use or Possession of Weapons

Illinois law has a number of sentencing mechanisms which come into play both when dangerous weapons are illegally possessed under the unlawful use of a weapon statute, and when they are used in the commission of illegal acts under the armed violence statute. The line between illegal use and illegal possession has been blurred, however, since a 1978 amendment which extended armed violence to include the possession, but not use, of a weapon during the commission of any felony.¹⁰⁹ The effect of this amendment has become especially pronounced as the penalties attached to armed violence have dramatically increased.¹¹⁰ For instance, judges must now impose a prison sentence of fifteen years on a person found guilty of possessing any amount of cocaine while in illegal possession of a handgun.¹¹¹

Illinois has regulated the possession of firearms since at least 1881, a policy that is based on the premise that weapons inherently dangerous to human life constitute a hazard to society sufficient to justify their prohibition.¹¹² The foundation of the current laws regulating firearms and other deadly weapons dates from a 1925 law, now codi-

Sexual Assault—*id.* § 5/12-14; Criminal Sexual Abuse—*id.* § 5/12-15; Armed Robbery—*id.* § 5/18-2; and Armed Violence—*id.* § 5/33A-2.

107. See H.B. 584, 88th Ill. Gen. Assem., 1st Sess. (1993) (proposing that the charge should be increased to a Class 2 felony if the firearm is illegally possessed in retail zone); H.B. 586, 88th Ill. Gen. Assem., 1st Sess. (1993) (enhancing penalties for weapons offenses in retail zone).

108. The 1995-96 General Assembly is considering an amendment to ILL. COMP. STAT. ANN. ch. 720, § 570/407, which would include churches, synagogues and other places of worship in the current list of safe zones already provided for. S. 1296, 89th Gen. Assem., Reg. Sess. (1995). Currently, judges may consider the commission of a crime near a place of worship as an aggravating factor in sentencing. ILL. COMP. STAT. ANN. ch. 730, § 5/5-5.3.2(c)(11) (West Supp. 1996).

109. Pub. Act No. 80-1099, § 1, 1977 Ill. Laws 3264, 3268 (codified at ILL. REV. STAT. ch. 38, para. 334-2 (1977)).

110. See *infra* notes 112-33 and accompanying text.

111. ILL. COMP. STAT. ANN. ch. 720, § 5/33A-1 (West Supp. 1996) (defining "armed with dangerous weapon" as someone who carries a handgun or other small concealed firearm); ILL. COMP. STAT. ANN. ch. 720, § 5/33A-2 (West 1992) (defining the offense of armed violence as one where the offender is "armed with a dangerous weapon [while] he commits another felony"); ILL. COMP. STAT. ANN. ch. 720, § 5/33A-3(a) (West Supp. 1996) (imposing a minimum 15 year imprisonment for armed violence).

112. ILL. COMP. STAT. ANN. ch. 720, § 5/24 cmts. (West 1992).

fied in the "unlawful use of weapon" statute.¹¹³ The 1925 law constituted a regulatory scheme defining how and where even law-abiding people could carry weapons.¹¹⁴ For instance, it prohibited any person from carrying a concealed handgun "on or about his person."¹¹⁵ As the purpose of the law was to control the hazard created by the presence of dangerous weapons, it did not matter that a person did not use the weapon to commit an offense, only that he or she possessed it in violation of the regulatory scheme.¹¹⁶

Under the Criminal Code of 1961, the offense of unlawful use of a weapon remained essentially the same; the illegal possession of a handgun, for instance, was defined as a person carrying a handgun "concealed in any vehicle or concealed on or about his person," except in the person's home or business.¹¹⁷ Violators were guilty of a misdemeanor, unless they possessed a machine gun, sawed-off shotgun, or bomb, in which case they faced the possibility of an indeterminate prison sentence of one to five years.¹¹⁸ Since 1961, the General Assembly has more pervasively regulated the possession of dangerous weapons through almost forty amendments.¹¹⁹ Over the same period, the General Assembly has increased penalties; in 1994, for instance, the illegal possession of a handgun offense was increased from a misdemeanor to a Class 4 felony.¹²⁰

In 1967, the General Assembly added a new weapons offense, aimed at the illegal *use* of a dangerous weapon, when it passed the Armed Violence statute. As its name implies, the law focused on persons who carried a dangerous weapon when committing any one of thirteen violent felonies, such as kidnapping, rape, intimidation, and deviate sexual assault.¹²¹ The law's essential effect was to require a

113. *Id.*

114. 1925 Ill. Laws 339, § 4 (codified at ILL. REV. STAT. ch. 38, para. 155 (1925)).

115. *Id.*

116. *Id.*

117. 1961 Ill. Laws 1983, 2028 (codified at ILL. REV. STAT. ch. 38, para. 24-1(a)(4) (1963)).

118. ILL. REV. STAT. ch. 38, para. 24-1(a)(7), (b) (West 1961).

119. See ILL. COMP. STAT. ANN. ch. 720, § 5/24-1 (West 1992 & Supp. 1996) (listing the amendments leading up to the present form of the law); JOHN F. DECKER, ILLINOIS CRIMINAL LAW: A SURVEY OF CRIMES AND DEFENSES 505 (2d ed. 1993).

120. ILL. COMP. STAT. ANN. ch. 720, § 5/24-3.1(b) (West Supp. 1996).

121. 1967 Ill. Laws 2595, 2598 (codified at ILL. REV. STAT. ch. 38, para. 33A-3 (1967)). The offenses covered were kidnapping—ILL. REV. STAT. ch. 38, para. 10-1 (1967); aggravated kidnapping—*id.* para. 10-2; rape—*id.* para. 11-1; deviate sexual assault—*id.* para. 11-3; aggravated assault—*id.* para. 12-2; aggravated battery—*id.* para. 12-4; intimidation—*id.* para. 12-6; compelling confession or information by force of threat of force—*id.* para. 12-7; theft—*id.* para. 16-1; theft of more than \$150—*id.* paras. 19-1, 31-1, 31-6(a), or 31-7.

prison sentence in these cases. A first conviction carried an indeterminate sentence of from two years in prison to a maximum sentence which could be no longer than the maximum allowed for the same act when committed by an unarmed offender.¹²² A second offense carried a prison term of at least five years in the penitentiary.¹²³

Within eleven years, the statute had been transformed from its focus on the *use* of weapons to commit *violent* crimes, to a broad statute covering persons who commit any felony, even if non-violent, while possessing a weapon.¹²⁴ The statute's name, however, remained "Armed Violence." The expansion began in 1975, when the General Assembly added an enhanced penalty which applied in cases where a machine gun or sawed-off shotgun was used.¹²⁵ More significantly, the new enhanced penalty applied beyond the original thirteen offenses, to include forcible felonies—those involving the use or threat of physical force or violence—such as murder, voluntary manslaughter, rape, burglary, and aggravated battery.¹²⁶

Although the law's focus was still on the *use* of weapons to commit *violent* crimes, the door had opened to further expansion. That expansion came in 1978, when the General Assembly amended the armed violence statute to cover non-violent offenses.¹²⁷ A person was guilty of armed violence if he or she possessed a weapon and committed "any felony."¹²⁸

The new law did not require that the offender use the weapon to harm or threaten others, or that it be used to facilitate the offense.¹²⁹ The armed violence statute thus covered, for example, the simultane-

122. 1967 Ill. Laws 2595, 2598 (codified at ILL. REV. STAT. ch. 38, para. 33A-3 (1967)); *see supra* note 116 and accompanying text.

123. 1967 Ill. Laws 2595, 2598 (codified at ILL. REV. STAT. ch. 38, para. 33A-3 (1967)).

124. Pub. Act No. 80-1099, § 1, 1977 Ill. Laws 3264, 3268 (codified at ILL. REV. STAT. ANN. ch. 38, para. 33A-2) (1979)); *see also* ILL. COMP. STAT. ANN. ch. 720, § 5/33A-2 (history notes) (West 1992) (defining elements of armed violence).

125. Pub. Act No. 79-1029, § 1, 1975 Ill. Laws 3133, 3133-34 (codified at ILL. REV. STAT. ch. 38, para. 24-1(a)(7), (b) (1975)).

126. Pub. Act No. 79-1029, 1975 Ill. Laws 3133 (codified at ILL. REV. STAT. ch. 38, para 33A-2.1. (1976)). If a sawed-off shotgun or machine gun was used in a forcible felony, the penalty became a Class 1 felony, punishable by from four years to any number of years in the penitentiary. ILL. REV. STAT. ch. 38, para. 1005-8(b)(2) (West 1975).

127. Pub. Act No. 80-1099, 1978 Ill. Laws 3269, § 1 (codified at ILL. REV. STAT. ANN. ch. 38, para. 33A-2 (1979)); *see* ILL. COMP. STAT. ANN. ch. 720, § 5/33A-2 (history notes) (West 1992).

128. Pub. Act No. 80-1099, 1977 Ill. Laws 3264, 3268 (codified at ILL. REV. STAT. ch. 38, para. 33A-2 (1979)); *see* ILL. COMP. STAT. ANN. ch. 720, § 33A-2 (history notes) (West 1992).

129. ILL. COMP. STAT. ANN. ch. 720, § 33A-2 (West 1992).

ous possession of any amount of cocaine and a handgun.¹³⁰ Thus, the line began to blur between the illegal use of weapons to commit crimes and the illegal possession of weapons. This merging of categories of criminal conduct gained added significance after a 1994 amendment to the armed violence law greatly enhanced penalties.¹³¹

Before the amendment, the simultaneous possession of even a small amount of cocaine and a handgun was an armed violence offense, for which an offender would face a six year Class X penalty, which amounted to about two and one-half years imprisonment.¹³² The new law raised the penalty for such an offense from the six year sentence, to a special category of Class X offense, which carries a mandatory minimum term of fifteen years imprisonment. A person convicted of armed violence for the simultaneous possession of any amount of cocaine and a handgun thus faces a mandatory prison sentence of fifteen years, regardless of his age, or criminal record.¹³³

4. Gang Sentencing

Since 1989, the General Assembly has added new sentencing enhancements aimed at crimes related to gangs.¹³⁴ In 1989, it passed a law which requires a judge to impose a prison sentence on offenders convicted of a forcible felony related to gang activity.¹³⁵ In 1993, it passed a law which authorizes judges to consider imposing a longer sentence for offenses committed while the defendant was engaged in gang-related activity.¹³⁶ In 1994, it again passed a law which allows

130. *Id.*; see ILL. COMP. STAT. ANN. ch. 720, § 570/401 (West Supp. 1996).

131. Pub. Act No. 88-680, Art. 40, § 40-10, 1994 Ill. Laws 2750, 2791 (amending ILL. COMP. STAT. ANN. ch. 720, §§5/33A-1, 5/33A3 (West 1992)).

132. See ILL. COMP. STAT. ANN. ch. 720, § 5/33a-2 (West 1992) (armed violence is committed when any felony is committed with a dangerous weapon); *id.* § 570/402(c) (possession of any amount—even a tiny amount—of cocaine is a Class 4 felony); *id.* § 5/33a-1(b) (West 1992) (a pistol is a category I weapon); *id.* § 5/33A-3(a) (armed violence with a category I weapon is a Class X offense); ILL. COMP. STAT. ANN. ch. 730, § 5/5-3(c)(2)(C) (a Class X offense requires imprisonment); *id.* § 5-8-1(a)(3) (the imprisonment term is 6 to 30 years); *id.* § 5/3-6-3(a)(1) (this term would be reduced by one-half); *id.* § 5/3-6-3(a)(3) (it would also be cut by an additional 180 days).

133. ILL. COMP. STAT. ANN. ch. 720, § 5/33A-2 (West 1992) (defining armed violence as committing a felony while “armed with a dangerous weapon”); *id.* § 5/33A-1 (defining “armed with a dangerous weapon” as carrying a category I, II, or III weapon); ILL. COMP. STAT. ANN. ch. 720, § 5/33A-3 (West Supp. 1996) (imposing a minimum 15 year sentence for a category I weapon used in armed violence).

134. See *infra* notes 205-09 and accompanying text.

135. Pub. Act No. 86-863, § 3, 1989 Ill. Laws 4709, 4713 (codified at ILL. COMP. STAT. ANN. ch. 730, § 5/5-5-3(c)(2)(J) (West 1992 & Supp. 1996)).

136. Pub. Act No. 88-215, § 1, 1993 Ill. Laws 2312, 2313 (codified as amended at ILL. COMP. STAT. ANN. ch. 730, § 5/5-5-3.2(a)(15) (West Supp. 1996)).

judges to impose extended terms of imprisonment on offenders considered to be gang leaders.¹³⁷ That law also increased penalties for "compelling gang membership" from a Class 3 to a Class 2 felony.¹³⁸ In 1995, the General Assembly again enhanced the penalty for this offense to require judges to impose a mandatory minimum four year term of imprisonment upon conviction.¹³⁹

5. Violation of Bail Bond

Legislators have also enhanced penalties for bail bond violators. If an accused person is released on bail and fails to appear at trial, he or she can face a stiffer sentence due to the bail bond violation.¹⁴⁰ This type of punishment originated in 1959, when the Illinois General Assembly declared bail bond violators to be in contempt of court, a finding already within a court's power.¹⁴¹ In 1961,¹⁴² 1972,¹⁴³ and 1982,¹⁴⁴ the General Assembly added specific penalty provisions, the last specifying that the violation of bail bond should be punished one class below the class of the offense for which the offender had been granted bail.

The punishment for violating bail is thus related to the gravity of the punishment which the offender sought to avoid.¹⁴⁵ The General Assembly increased penalties in 1985 by mandating that courts impose consecutive sentences for the original offense and for the violation. The statute retained the express language reserving the court's power to punish the same conduct as contempt.¹⁴⁶ In 1994, the General

137. ILL. COMP. STAT. ANN. ch. 730, § 5/5-5-3.2(b)(8) (West Supp. 1996).

138. ILL. COMP. STAT. ANN. ch. 720, § 112-6.1 (West Supp. 1996) (amending the offense of compelling organizational membership). Under this law, the penalty increased from a Class 2 to a Class 1 felony for persons 18 or older who threaten someone under 18 to solicit or cause them to join a gang. *See id.* Also under this law, the penalty for the offense of intimidation remains a Class 3 felony, but the highest possible penalty is increased from five to ten years. *Id.*

139. *Id.* § 5/12.6.1 (making such persons ineligible to receive probation, conditional discharge, or periodic imprisonment as a sentence).

140. *Id.* § 5/32-10.

141. *See* ILL. REV. STAT. ch. 38, para. 615a (1959).

142. Criminal Code of 1961, S.B. No. 897, 1961 Ill. Laws 2447-48, § 1 (codified at ILL. REV. STAT. ch. 38, para. 32-10 (1961)).

143. Pub. Act No. 77-2638, § 1, 1972 Ill. Laws 1717, 1762 (codified at ILL. REV. STAT. ch. 38, para. 32-10 (1973)).

144. Pub. Act No. 82-281, § 1, 1981 Ill. Laws 1633 (codified at ILL. REV. STAT. ch. 38, para. 32-10 (1981)).

145. *See* Pub. Act No. 82-281, § 1, 1981 Ill. Laws 1633, 1633 (codified at ILL. REV. STAT. ch. 38, para. 32-10 (1981)).

146. Pub. Act No. 84-945, § 1, 1985 Ill. Laws 6020, 6021 (codified at ILL. REV. STAT. ch. 38, para. 32-10 (1985)). Also, under this law, judges are to impose consecu-

Assembly added a Class 4 felony offense for violating a condition of bond by possessing a firearm.¹⁴⁷

6. Consecutive Sentences

Under the 1978 Class X law, judges were given the power to sentence consecutively for acts which were part of a single course of conduct if at least one offense was a Class 1 or Class X felony, and a victim was severely injured.¹⁴⁸ Ten years later, the General Assembly further expanded judges' power to sentence consecutively by adding a second category of offenses which could carry consecutive sentences for acts arising from the same course of conduct—criminal sexual assault and aggravated criminal sexual assault.¹⁴⁹ In 1995, the Illinois Supreme Court held that the 1988 amendment requires judges to impose consecutive sentences for both categories.¹⁵⁰

In 1985, the General Assembly required judges to impose consecutive sentences when a person charged with a felony offense committed a separate felony while on bail.¹⁵¹ Thus, a person released on bail facing a charge of possessing with intent to deliver less than one gram of cocaine near a park, who commits the same offense again while on bail, faces a mandatory four years imprisonment for each offense, and these terms must be served one after the other—a mandatory eight year sentence.¹⁵²

tive sentences when a person charged with a felony offense commits a separate felony while on bail. Pub. Act No. 84-945, § 3, 1985 Ill. Laws 6020, 6030 (codified at ILL. REV. STAT. ch. 38, para. 1005-8-4(i) (1985)).

147. ILL. COMP. STAT. ANN. ch. 720, § 5/32-10(a-5) (West Supp. 1996). The sentence is upgraded to a Class 3 offense for second-time offenders. *Id.*

148. Aspen, *supra* note 32, at 348 n.61 (citing ILL. REV. STAT. ch. 38, para. 1005-8-4(a) (1978)).

149. See also Pub. Act No. 85-1030, § 3, 1988 Ill. Laws 200, 203-04 (codified at ILL. REV. STAT. ch. 38, para. 1005-8-4 (1989)); David Stevens, *Mandatory Consecutive Sentencing: Proposed Corrections Code Amendments*, 83 ILL. B.J. 526 (1995) (noting the courts' historical difficulties in interpretation of the statute and recommending new statutory language).

150. *People v. Arna*, 658 N.E.2d 445, 448 (Ill. 1995); see also Stevens, *supra* note 149, at 526 (arguing that consecutive sentences are mandatory) (citing *People v. Arna*, 635 N.E.2d 815 (Ill. 1994), *aff'd*, 658 N.E.2d 445 (Ill. 1995)).

151. See *supra* text accompanying notes 145-46.

152. ILL. COMP. STAT. ANN. ch. 720, §§ 570/401(d), 570/407(b)(2), ch. 730, §5/5-8-1(a)(4) (West 1992 & Supp. 1996).

7. The Nature of the Victim

a. Special Categories of Aggravated Battery

Since the adoption of the Criminal Code of 1961, the General Assembly has amended the battery laws more than thirty times and has enhanced penalties for cases where the victim fits special categories.¹⁵³ The misdemeanor offense of battery under Illinois law occurs when a person causes someone bodily harm or makes physical contact with someone in an insulting or provoking manner.¹⁵⁴ Aggravated battery, on the other hand, is a felony offense.¹⁵⁵ Since the Code was adopted, battery has been enhanced to aggravated battery when the victim fits one of the following categories: school teachers and other school employees, park district employees, Public Aid employees, State Department of Children and Family Services employees, policemen, firemen, corrections officers, paramedics and emergency medical personnel, people walking on public property or on a public way, public transportation employees, persons of at least sixty years of age, pregnant women, judges, and the physically handicapped.¹⁵⁶

Special categories have also been added to cover cases where victims either under thirteen or over sixty years of age suffer great bodily harm. In 1988, the General Assembly passed a law making aggravated battery of a senior citizen a Class 2 felony with a mandatory term of at least three years imprisonment.¹⁵⁷ In 1980, the General Assembly added the felony of aggravated battery of a child, a Class 2 offense, punishable by probation or a prison term of three to five years.¹⁵⁸ The offense covers cases where a child has been bruised, burned, scalded, or dangerously shaken.¹⁵⁹ In 1990, the penalty was enhanced to a Class 1 felony, punishable by a term of probation or a

153. See ILL. COMP. STAT. ANN. ch. 720, § 5/12-4 (West 1992) (discussing aggravated battery and listing the amendments leading up to the current statutory version).

154. *Id.* § 5/12-3.

155. ILL. COMP. STAT. ANN. ch. 720, § 5/12-4 (West Supp. 1996).

156. *Id.*

157. Pub Act No. 85-1177, 1988 Ill. Laws 1403 (codified at ILL. COMP. STAT. ANN. ch. 720, § 5/12-4.6 (West 1992)); see also Witt, *supra* note 16, at 1163 (describing legislative action on this law, and policies arguing that mandatory terms are inappropriate and unnecessary).

158. Pub. Act No. 81-1520, 1980 Ill. Laws 3953 (codified at ILL. COMP. STAT. ANN. ch. 720, § 5/12-4.3 (West 1992)), amended by Pub. Act No. 89-313, 1995 Ill Legis. Serv. 3216, § 5 (West) (codified at ILL. COMP. STAT. ANN. ch 720, § 5/12-4.3(a) (West Supp. 1996)).

159. *People v. Renteria*, 597 N.E.2d 714, 718-19 (Ill. App. 1st Dist. 1992); *People v. Herr*, 409 N.E.2d 442, 444-45 (Ill. App. 2d Dist. 1980).

prison term of four to fifteen years.¹⁶⁰ In 1995, the penalty was again enhanced—to a Class X offense, punishable by a mandatory minimum term of at least six years in prison.¹⁶¹ By also adding this offense to the truth-in-sentencing bill, the General Assembly ensured that prison terms will be almost doubled because no good-conduct credits will reduce Class X sentences imposed under this law.¹⁶² Persons sentenced under the law will, therefore, serve about five years and one month in prison, which is equivalent to a non-“truth” prison term of about ten and one-half years—a significant increase in the minimum term from probation.

*b. Enhanced Penalties for Offenses Against
Police and Fire Officials*

Twice within three years the General Assembly enhanced penalties for certain offenses against police officers, firemen, and other officials.¹⁶³ In 1992, the General Assembly passed legislation drafted by Cook County State’s Attorney Jack O’Malley which enhanced penalties for offenses against this category of victim. The law raised the minimum penalty in such cases to a mandatory term of natural life imprisonment for murder. It created an enhanced Class X term of fifteen to sixty years imprisonment for an attempt to commit first degree murder against this category of victim, and an enhanced Class X term of ten to forty-five years imprisonment for aggravated battery with a firearm involving this category of victim. It also created an enhanced Class X term of six to thirty years imprisonment for cases of aggravated discharge of a firearm involving police or firemen.¹⁶⁴

In 1994, the General Assembly passed legislation drafted by Chicago Mayor Richard J. Daley and again enhanced penalties for such offenses.¹⁶⁵ The penalty for attempted first-degree murder rose from fifteen to sixty years to twenty to eighty years, an enhancement

160. Pub. Act No. 86-1003, § 3, 1989 Ill. Laws 6826, 6828 (codified at ILL. REV. STAT. ch. 38, para 12-4.3 (1989)).

161. Pub. Act No. 89-313, § 5, 1995 Ill. Legis. Serv. 3216 (West) (codified at ILL. COMP. STAT. ANN. ch. 720, § 5/12-4.3 (West Supp. 1996)).

162. Pub. Act No. 89-404, § 40, 1995 Ill. Legis. Serv. 3941 (West) (amending ILL. COMP. STAT. ANN. ch. 730, §§ 5/5-4-1, 5/3-6-3(a)(2)(ii) (West 1992)).

163. Pub. Act No. 87-921, 1992 Ill. Laws 1769 (codified in scattered sections at ILL. COMP. STAT. ANN. ch. 38 (West 1992); Pub. Act No. 88-680, § 35-5, 1994 Ill. Laws 2750, 2782 (codified in scattered sections at ILL. COMP. STAT. ANN. ch. 720 (West Supp. 1996)).

164. S. 1964, 87th Gen. Assembly; Pub. Act No. 87-921, § 1, 1992 Ill. Laws 1769, 1769-74 (amending ILL. COMP. STAT. ANN. ch. 720, §§ 5/9-1, 5/8-4(c)(1), 5/12-4.2, 5/24-1.2 (West 1992)).

165. ILL. COMP. STAT. ANN. ch. 720, § 5/8-4 (West Supp. 1996).

which made it possible for the attempted murder of an official to carry a longer prison term than murder. This second bill enhanced the penalty for aggravated battery with a firearm in cases involving officials from the recently enacted ten to forty-five year sentence to fifteen to sixty-five years. It also enhanced the penalty for aggravated discharge of a firearm from the recently enhanced six to thirty year sentence to ten to forty-five years.¹⁶⁶

8. Back Door Release by Offense

While the 1978 Class X law abolished the unpredictable back door mechanisms of indeterminate sentencing and the parole system, it continued to use a predictable back door release system of good conduct credit.¹⁶⁷ Good conduct credit was aimed at providing an incentive for prisoners to behave,¹⁶⁸ but it has also been used to reduce prison overcrowding.¹⁶⁹ Even before the truth-in-sentencing law was enacted, however, the good conduct credit system had begun to evolve into a separate and complicated sentencing mechanism. Good conduct credit came to be awarded based not on the good conduct of an inmate in prison, but largely on the offense for which the inmate had been sentenced. This factor is known at the time of sentencing, and has nothing to do with an inmate's subsequent prison conduct.

This back door credit includes day-for-day good conduct credit, which allows prisoners to trim their sentence by one day for each day they serve on good behavior,¹⁷⁰ and an additional ninety or 180 days of good conduct credit for "meritorious service" which the IDOC awards prisoners.¹⁷¹ Day-for-day credits can be increased if a prisoner enrolls in programs such as full-time drug treatment, educational programs, and prison industries.¹⁷² Each day a prisoner eligible for this credit is enrolled in these programs counts as a day and one-half towards release.¹⁷³

166. ILL. COMP. STAT. ANN. ch. 720, §§ 5/8-4(c)(1), 5/12-4.2(b), 5/24-1.2(b) (West Supp. 1996).

167. Aspen, *supra* note 32, at 347-48.

168. *People v. Burton*, 427 N.E.2d 625, 628 (Ill. App. 4th Dist. 1981).

169. FINAL REPORT, THE ILLINOIS TASK FORCE ON CRIME AND CORRECTIONS 30 (1993).

170. Under the law, a prisoner in the 85% category shall receive "no more than 4.5 days of good conduct credit for each month of his or her sentence of imprisonment." ILL. COMP. STAT. ANN. ch. 730, § 5/3-6-3(a)(2)(ii) (West Supp. 1996).

171. ILL. COMP. STAT. ANN. ch. 730, § 5/3-6-3(a)(3) (West Supp. 1996).

172. ILL. COMP. STAT. ANN. ch. 730, § 5/3-6-3(a)(4) (West 1992).

173. *Id.* IDOC may reduce a prisoner's sentence by an additional 180 days of good conduct credit for "meritorious service" for most offenses. The Director, however, may award only 90 days of good conduct credit for "meritorious service" for the following offenses: first degree murder; aggravated criminal sexual assault; criminal sexual

Even before the truth-in-sentencing law was enacted, the amount of credit for meritorious service which an inmate could receive depended on the offense for which the inmate was convicted.¹⁷⁴ For most offenses, the IDOC awards 180 days of meritorious conduct credit. For the following offenses, however, only ninety days of meritorious conduct can be awarded:

- first degree murder;
- aggravated criminal sexual assault;
- criminal sexual assault;
- reckless homicide while under the influence of alcohol or any other drug;
- aggravated kidnapping;
- kidnapping;
- stalking;
- aggravated stalking;
- deviate sexual assault;
- aggravated criminal sexual abuse;
- aggravated indecent liberties with a child;
- indecent liberties with a child;
- child pornography;
- heinous battery;
- aggravated battery of a spouse;
- aggravated battery of a spouse with a firearm;
- aggravated battery of a child;
- endangering the life or health of a child;
- cruelty to a child; and
- narcotic racketeering.¹⁷⁵

Inmates' eligibility for day and one-half credit for participation in approved prison programs also depended on the offense for which the inmate was sentenced.¹⁷⁶ Before 1993, the offenses excluded from

assault; deviate sexual assault; aggravated criminal sexual abuse; reckless homicide while under the influence of alcohol or any other drug; aggravated kidnapping; kidnapping; stalking; aggravated stalking; aggravated indecent liberties with a child; indecent liberties with a child; child pornography; heinous battery; aggravated battery of a spouse; aggravated battery of a spouse with a firearm; aggravated battery of a child; endangering the life or health of a child; cruelty to a child; and narcotic racketeering. ILL. COMP. STAT. ANN. ch. 730, § 5/3-6-3(a)(3) (West 1992); Pub. Act No. 89-404, § 40, 1995 Ill. Legis. Serv. 3935 (codified at ILL. COMP. STAT. ANN. ch. 730, § 5/3-6-3(a)(4) (West Supp. 1996)).

174. ILL. COMP. STAT. ANN. ch. 730, § 5/3-6-3(a)(3) (West 1992).

175. ILL. COMP. STAT. ANN. ch. 730, § 5/3-6-3(a)(3) (West Supp. 1996).

176. *Id.* § 5/3-6-3(a)(4).

this program were first degree murder, second degree murder, and Class X felonies. In 1993, the General Assembly allowed inmates convicted of second degree murder to gain the extra credits, removed some offenses from eligibility for the credits, and increased the credit from 1.25 to 1.5 for each day a prisoner was enrolled in a program.¹⁷⁷ Since then, the General Assembly has removed additional offenses from eligibility for day and one-half credit. The list of excluded offenses is now as follows:

- offenses listed in truth-in-sentencing sections;
- first degree murder;
- a Class X felony;
- criminal sexual assault;
- felony criminal sexual abuse;
- aggravated criminal sexual abuse;
- aggravated battery with a firearm;
- any predecessor or successor offenses with the same or substantially the same elements; and
- any inchoate offenses relating to the foregoing offenses.¹⁷⁸

III. TRUTH-IN-SENTENCING: THE FINAL LAYER

The Illinois truth-in-sentencing law¹⁷⁹ continues the trend towards lengthening sentences by narrowing the back door for some offenses, and by closing it for others. It creates four categories of offenses for back door release.¹⁸⁰ Depending on the category of offense for which an inmate is sentenced, he or she will serve 100%, 85%, or 50% of the sentence imposed.¹⁸¹ The law applies to offenses committed on or after its August 20, 1995 effective date,¹⁸² because to apply the law otherwise would have violated the prohibition against *ex post facto* laws.¹⁸³ It thus does not apply to the 39,000 prisoners currently in the Illinois Department of Corrections.

177. Pub. Act No. 88-311, 1993 Ill. Laws 2604, 2612 (codified at ILL. COMP. STAT. ANN. ch. 730, § 5/3-6-3(a)(4) (West Supp. 1996)).

178. ILL. COMP. STAT. ANN. ch. 730, § 5/3-6-3(a)(4) (West Supp. 1996).

179. *Id.* § 5/3-6-3.

180. *Id.* §§ 5/3-6-3(a)(2)(i), (ii), 5/3-6-3(a)(2.1)).

181. *Id.* § 5/3-6-3(a).

182. *Id.* §§ 5/3-6-3(a)(2)(i), (ii), (iii), 5/3-6-3(a)(2.1).

183. *See* U.S. CONST. art. 1, § 10, cl. 1; *Weaver v. Graham*, 450 U.S. 24, 31-34 (1981); *Barger v. Peters*, 645 N.E.2d 175, 177-78 (Ill. 1994).

A. *Category One—Murder*

The new law eliminates all credits for those prisoners who fall within the first category, which currently includes only first degree murder.¹⁸⁴ Before “truth,” a minimum sentence of twenty years for murder would, with good conduct and meritorious conduct credits, amount to nine years and nine months in prison.¹⁸⁵ A twenty-year sentence now will amount to twenty years in prison.¹⁸⁶ This system now is the direct opposite of the State’s original good time law, which gave the greatest incentive to behave well in prison to those facing the longest sentences by allowing them to receive the greatest amount of good time.¹⁸⁷ It also raises questions about what incentive prisoners will have to rehabilitate themselves, or to behave in prison, if they will serve the same amount of time behind bars regardless of their behavior.

B. *Category Two —Selected Violent Offenses*

A prisoner serving a sentence for selected violent offenses will receive no more than four and one-half days of good conduct credit for each month of his or her sentence of imprisonment.¹⁸⁸ This computation amounts to about eighty-five percent of the sentence imposed. Before “truth,” a prisoner sentenced to ten years imprisonment for aggravated criminal sexual assault would serve about four years and nine months in prison.¹⁸⁹ After “truth,” the same sentence would amount to about eight and one-half years in prison.¹⁹⁰ Offenses in this category include the following:

- attempt to commit first degree murder;
- solicitation of murder;
- solicitation of murder for hire;

184. Inmates serving time for first degree murder “shall receive no good conduct credit and shall serve the entire sentence imposed by the court.” Pub. Act No. 89-404, 1995 Ill. Legis. Serv. 3934 (West) (codified at ILL. COMP. STAT. ANN. ch. 730, § 5/3-6-3(a)(2)(i) (West Supp. 1996)).

185. ILL. COMP. STAT. ANN. ch. 730, §§ 5/5-8-1(a)(1), 5/3-6-3 (West 1992).

186. ILL. COMP. STAT. ANN. ch. 730, §§ 5/5-8-1(a)(1), 5/3-6-3(a)(2)(i) (West Supp. 1996).

187. See *supra* notes 20-25 and accompanying text; FRIEDMAN, *supra* note 21, at 159.

188. ILL. COMP. STAT. ANN. ch. 730, § 5/3-6-3(a)(2)(ii) (West Supp. 1996).

189. ILL. COMP. STAT. ANN. ch. 720, § 5/12-14 (West 1992) (establishing this offense as a Class X felony); ILL. COMP. STAT. ANN. ch. 730, § 5/5-8-1(a)(3) (West Supp. 1996) (setting the sentence for a Class X felony to be not less than 6 and not more than 30 years); *id.* § 5/3-6-3 (allowing most prisoners, regardless of the offense committed, to receive one day of good conduct credit for each day of service while in prison).

190. ILL. COMP. STAT. ANN. ch. 730, § 5/3-6-3(a)(2)(ii) (West Supp. 1996).

intentional homicide of an unborn child;
predatory criminal sexual assault of a child;¹⁹¹
aggravated criminal sexual assault;
criminal sexual assault;
aggravated kidnapping;
aggravated battery with a firearm;
heinous battery;
aggravated battery of a senior citizen; and
aggravated battery of a child.¹⁹²

*C. Category Three —Maybe Truth: Offenses Requiring
a Judicial Finding*

Some offenses may trigger the eighty-five percent requirement, depending on whether the judge “has made and entered a finding that the conduct leading to conviction for the enumerated offense resulted in *great bodily harm to a victim.*”¹⁹³ These offenses include the following:

home invasion;
armed robbery;
aggravated vehicular hijacking;
aggravated discharge of a firearm; and
armed violence with a category I or II weapon.¹⁹⁴

This section recalls a previous law in effect during the 1970s, which allowed a judge to impose up to twice the ordinary maximum term of imprisonment if the defendant either inflicted or attempted to inflict serious bodily injury upon another person or used a firearm in commission of felony.¹⁹⁵

191. Predatory criminal sexual assault of a child is a new offense which was added by ILL. COMP. STAT. ANN. ch. 720, § 5/12-14.1 (West Supp. 1996).

192. ILL. COMP. STAT. ANN. ch. 730, § 5/3-6-3(a)(2)(ii) (West Supp. 1996).

193. The court must make a finding “pursuant to subsection (c)(1) of section 5-4-1 of this Code.” ILL. COMP. STAT. ANN. ch. 730, § 5/3-6-3(a)(2)(iii) (West Supp. 1996) (emphasis added). Note that the Fifth District Appellate Court of Illinois has upheld a section of the Jail Good Behavior Act which bars good conduct credit for offenses involving “physical harm.” *People v. Gaither*, 582 N.E.2d 735, 742-43 (Ill. App. 5th Dist. 1991) (construing ILL. COMP. STAT. ANN. ch. 730, § 130/3 (West 1992)). Also note that the General Assembly must set intelligible standards when it delegates to the Department of Corrections decisions about whom to release through good conduct credits. *People ex rel. Colletti v. Pate*, 201 N.E.2d 390, 393 (Ill. 1964).

194. ILL. COMP. STAT. ANN. ch. 730, § 5/3-6-3(a)(2)(iii) (West Supp. 1996).

195. Aspen, *supra* note 32, at 345 (citing ILL. REV. STAT. ch. 38, para. 1005-8-1 (1977)).

D. *Category Four — Day-for-Day Credit Continues*

The "truth" law does not apply to other offenses. For those offenses, the awarding of day-for-day good conduct credit continues.¹⁹⁶ For instance, persons convicted of burglary, theft, and drug offenses will serve less than one-half of the sentence imposed by the court.¹⁹⁷ Compare that sentence with "truth" sentences: murderers will serve 100% of the sentence imposed by a judge, persons convicted of violent crimes such as aggravated criminal sexual assault or criminal sexual assault will serve about 85% of their sentence.

IV. PEELING BACK THE LAYERS

The profusion of unrelated policies has resulted in an unnecessarily complex and unpredictable maze of sentencing laws so arcane that few lawyers—not to mention the public or the accused—can understand what specific legal consequences flow from specific criminal conduct. The new laws, and especially their mandatory nature, have enhanced the prosecutor's power, reduced that of the judiciary, and focused sentencing on the *offense*, not the *offender*. They have also obscured the debate over how best to spend the State's limited amount of money to best incapacitate—or rehabilitate—offenders.

A. *A Complex Maze of Laws*

The costs of the rapid and continuous growth of criminal laws was highlighted in a 1992 concurring opinion by Illinois Appellate Justice Steigmann, who discussed "the legislative frenzy" of new criminal laws, focusing on the twenty-seven substantive amendments to the drug laws which the General Assembly had passed in the preceding four and one-half years.¹⁹⁸ Justice Steigmann pointed out the likelihood that the legislature creates drafting errors when it passes laws without deliberation. He also decried the "confusion and uncertainty these frequent changes engender," and warned of the additional time it

196. ILL. COMP. STAT. ANN. ch. 730, § 5/3-6-3(a)(2.1) (West Supp. 1996).

For all offenses, other than those enumerated in subdivision (a)(2) committed on or after the effective date of this amendatory Act of 1995, the rules and regulations shall provide that a prisoner who is serving a term of imprisonment shall receive one day of good conduct credit for each day of his or her sentence of imprisonment or recommitment under Section 3-3-9. Each day of good conduct credit shall reduce by one day the prisoner's period of imprisonment or recommitment under Section 3-3-9.

Id.

197. *Id.* § 5/3-6-3(a).

198. *People v. Liberman*, 592 N.E.2d 575, 585 (Ill. App. 4th Dist. 1992) (Steigmann, J., concurring), *appeal denied*, 602 N.E.2d 466 (Ill. 1992).

takes for courts, prosecutors, and defense attorneys to litigate and interpret the new laws.¹⁹⁹ According to Justice Steigmann, "Given these costs, the benefits derived from all this legislative activity should be carefully assessed. My assessment leaves me unpersuaded that all this activity is justified."²⁰⁰

The flood of new laws has skewed what once was a carefully designed sentencing model. For instance, the seriousness of an offense is, in theory, apparent from its statutory class, a concept codified in the Unified Code of Corrections of 1973.²⁰¹ Murder is the most serious offense; a Class X offense is worse than a Class 1 offense, and a Class 1 offense is worse than a Class 2 offense. Illinois sentencing laws, however, no longer follow the "unified" or systematic pattern implicit in their original design. This breakdown is apparent to practicing criminal attorneys who routinely navigate the maze of laws which control sentences.

For example, as specified in the "Disposition" and "Sentence of Imprisonment" sections of the UCC, a Class 1 felony carries either a term of probation, or a prison term of between four and fifteen years.²⁰² A Class 1 offender generally faces probation if he or she does not have a prior record of convictions. As specified in the "Disposition" section of the UCC, however, the Class 1 felony of criminal sexual assault carries a term of imprisonment without the possibility of probation.²⁰³ Under the "truth" law, which modifies the "Early Release" section of the UCC, the criminal sexual assault offender must serve eighty-five percent of the minimum four-year sentence, or about three and one-half years behind bars.²⁰⁴

The Class 1 felony of compelling gang membership also carries a mandatory minimum term of imprisonment upon conviction.²⁰⁵ The four year sentence, however, is reduced both by day-for-day credit, and by 180 days of credit for meritorious service. This Class 1 offense thus carries a mandatory minimum term of actual imprisonment of one and one-half years. This term may, however, be reduced further because, under the "Early Release" section of the UCC, an inmate serving time for the offense of compelling gang membership

199. *Id.* (Steigmann, J., concurring).

200. *Id.* (Steigmann, J., concurring).

201. *See Aspen, supra* note 32, at 345.

202. ILL. COMP. STAT. ANN. ch. 730, §§ 5/5-5-3(b)(1), 5/5-8-1(a)(4) (West 1992).

203. ILL. COMP. STAT. ANN. ch. 720, § 5/12-13(b) (West 1992); ILL. COMP. STAT. ANN. ch. 730, § 5/5-5-3(c)(2)(H) (West 1992).

204. ILL. COMP. STAT. ANN. ch. 730, § 5/3-6-3(a)(2)(ii) (West Supp. 1996)).

205. ILL. COMP. STAT. ANN. ch. 720, § 5/12-6.1, ILL. COMP. STAT. ANN. ch. 730, § 5/5-5-3(c)(2)(J) (West 1992).

qualifies for one and one-half days of good conduct credit for each day that he or she is enrolled in an approved program after 1993.²⁰⁶ A similar outcome occurs with the Class 1 felony of possession with intent to deliver five or more grams of cocaine, because judges must sentence anyone found guilty of this offense to four years in prison.²⁰⁷ Persons sentenced under this law will serve about one and one-half years behind bars.

The lower category of Class 2 offenses carry a term of probation, or a prison term of between three and five years. The Class 2 offense of aggravated battery of a senior citizen, however, carries a mandatory term of imprisonment.²⁰⁸ It also falls within the "truth" law's automatic eighty-five percent category, so a conviction for this Class 2 offense carries a minimum term of over two and one-half years actual imprisonment—one year behind bars more than the enhanced Class 1 felony of compelling gang membership.²⁰⁹

Until 1995, aggravated battery of a child, which covers cases where a child has been bruised, burned, scalded, or dangerously shaken,²¹⁰ had carried a possible sentence of probation. Regardless of the circumstances of the offense or the background of the offender, the offense is now a Class X offense, punishable by a mandatory minimum term of at least six years in prison.²¹¹ Eighty-five percent of the sentence must be served in prison, as the offense falls within the truth-in-sentencing law.²¹² Persons sentenced under the law will therefore serve, at a minimum, about five years and one month in prison.

By contrast, a person sentenced for another Class X offense—armed robbery—will, regardless of background, have his or her six year mandatory sentence reduced by day-for-day good time under the "Early Release" section of the UCC; under the same section, he or she

206. ILL. COMP. STAT. ANN. ch. 730, § 5/3-6-3(a)(2.1) (West Supp. 1996) (including offense carrying day-for-day good conduct credit); *id.* § 5/3-6-3(a)(3) (qualifying for 180 days meritorious credit); *id.* § 5/3-6-3(a)(4) (qualifying for time and one-half credit).

207. ILL. COMP. STAT. ANN. ch. 720, § 570/401(c)(2) (West Supp. 1996); ILL. COMP. STAT. ANN. ch. 730, § 5/5-5-3(c)(2)(D) (West Supp. 1996).

208. ILL. COMP. STAT. ANN. ch. 720, § 5/12-4.6 (West 1992); Witt, *supra* note 16, at 1161.

209. ILL. COMP. STAT. ANN. ch. 730, 5/3-6-3(a)(2)(ii) (West Supp. 1996)).

210. *People v. Renteria*, 597 N.E.2d 714, 715 (Ill. App. 1st Dist. 1992) (child dangerously shaken); *People v. Herr*, 409 N.E.2d 442, 444 (Ill. App. 2d Dist. 1980) (child burned).

211. ILL. COMP. STAT. ANN. ch. 720, § 5/12-4.3 (West Supp. 1996) (showing amended classification to be a Class X offense); ILL. COMP. STAT. ANN. ch. 730, § 5/5-8-1(a)(3) (West Supp. 1996) (setting a term of six years mandatory imprisonment for Class X offenses).

212. ILL. COMP. STAT. ANN. ch. 730, § 5/3-6-3(a)(2)(ii) (West Supp. 1996).

will have another 180 days shaved off the sentence, and qualify for one and one-half days good conduct credit for each day that he or she is enrolled in an approved program.²¹³ The armed robber will thus serve less than two and one-half years in prison, which is less than half the actual time which a parent with no record will spend behind bars for a onetime incident of aggravated battery of a child. Such consequences will be only more frequent, as the complicated Code continues to focus on the offense, to the exclusion of examining individual offenders.

A simple drug possession case can entail a number of possible mandatory consequences. A person convicted of possession with intent to deliver one gram of cocaine faces probation,²¹⁴ unless charged as having committed the offense within 1000 feet of public housing or a school.²¹⁵ If so charged, the offense is a Class X felony, and a judge would have to sentence that person to at least six years in prison, regardless of the offender's age or absence of a criminal record.²¹⁶ If the offender was on bond for this offense and committed the same offense, a judge would have to impose consecutive sentences—or twelve years in prison.²¹⁷ This term, however, would be halved by various good time credits.

After navigating the relevant sections of the hundreds of pages which comprise the Criminal Code and UCC, the extent to which Illinois' code of correction remains unified is difficult to discern. In the practice of criminal law, the navigation of the disunified code becomes more complex as a host of factors, mostly unrelated to the offender, control the front door sentencing outcome. These factors include, for example, "safe zones," gang enhancements, the nature of the victim, an array of provisions mandating extended or consecutive terms, as well as a three-strikes-you're out law.²¹⁸ After a practicing attorney or a judge has determined the front door consequences, he or she must analyze the back door consequences: is it a day-for-day or truth offense? If the former, does it qualify for 180 or 90 days of meritori-

213. *Id.* §§ 5/3-6-3(a)(3), (a)(4).

214. ILL. COMP. STAT. ANN. ch. 720, § 570/401(c)(2) (West 1992).

215. *Id.* § 570/407(b)(1).

216. *Id.* §§ 570/404(b)(1), 570/401(a) (West 1992); ILL. COMP. STAT. ANN. ch. 730, § 5/5-8-1(a)(3) (West Supp. 1996). In 1993, penalties increased for unlawful possession of firearms if committed in a "safe school zone," or in a public park or public housing. ILL. COMP. STAT. ANN. ch. 720, § 5/24-1(c)(1) (West Supp. 1996). Another new "zone" enhancement covers persons who unlawfully sell firearms in a school zone, public park, or in public housing. This offense is now a Class 2 felony. *Id.*

217. ILL. COMP. STAT. ANN. ch. 720, § 5/32-10 (West Supp. 1996).

218. *See supra* parts II.E.2, 4, and II.F.2, 4, 7.

ous good time, and does it qualify for day and one-half credits for participation in prison programs? If it is a truth offense, is it 100%, or 85%, and if the latter, is it an automatic 85% or is it subject to a judicial finding? Even the experienced attorney may go astray navigating this maze. What hope then for the ordinary citizens with no golden thread to guide them?

B. *Sentencing by Offense Not Offender*

The new focus on *offense*, rather than offender, has raised a conflict between the new laws and provisions in the Criminal Code and the Illinois Constitution, which both require that punishment be proportionate to the seriousness of the offense and recognize an offender's potential for rehabilitation. According to the Illinois Constitution, for example, "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship."²¹⁹ According to the Criminal Code, one of its purposes is to "[p]rescribe penalties which are proportionate to the seriousness of offenses and which permit recognition of differences in rehabilitation possibilities among individual offenders."²²⁰ These constitutional and statutory precepts clearly no longer guide Illinois' sentencing policy. The charged offense, not the circumstances of the offense or the offender, is the relevant issue in sentencing—unless a penalty *enhancement* is possible because of the nature of the offense or the offender's criminal record.

C. *Allocating a Scarce Resource —Prison Space*

A confused sentencing policy frustrates the court system, causes disproportionate and unjust results, and mystifies defendants and the public. A confused sentencing policy is also a confused public choice about how to allocate a scarce and costly resource—prison space. Such confusion may result in unintended choices. Yet even if the choices would be the same absent such confusion, the democratic process is better served when such choices are clear and explicit.

The demand for prison space has steadily grown. In 1973, the IDOC housed 6100 inmates, a number which rose to 10,733 by 1978. By 1985, the prison population had risen to 18,279. In less than ten years the IDOC population had doubled: 36,543 inmates were serving time in 1994.²²¹ If history is a guide, new sentencing proposals will

219. ILL. CONST. of 1970, art. I, § 11.

220. ILL. COMP. STAT. ANN. ch. 720, § 5/1-2(c) (West 1992).

221. ILLINOIS DEP'T OF CORRECTIONS, 1994 STATISTICAL PRESENTATION 4 (July 1995)

continue to flow out of the General Assembly, and the prison population will continue to grow. Indeed, the Truth-in-Sentencing Commission is composed largely of political appointees and law enforcement officials, and could call for longer prison terms, as it is charged with assuring that "criminals serve the sentences handed down by the courts."²²²

The increasing demand for scarce prison space calls out for informed choices about which offenders should spend time in prison, and for how long. In Illinois, however, confusing layers of sentencing policy obscure these choices and lead to an uninformed, and possibly unintended allocation of scarce public resources.

Surprising effects of Illinois' multi-layered sentencing policy can be seen in the imprisonment of drug offenders, which has grown at an unprecedented rate. In 1985, the IDOC housed 851 drug offenders, or 4.7% of the inmate population. By 1994, 7874 drug offenders were housed in the IDOC—21.5% of the inmate population.²²³ There is pronounced growth in the incarceration of minor drug offenders. For example, possession of a controlled substance, such as cocaine, is a Class 4 felony in Illinois. In 1994, there were 2395 Class 4 possession offenders admitted to Illinois' prisons.²²⁴ Almost as many in this class of offender left prison that year—2169. The offenders served an average of about one-half year in custody.²²⁵ The increased incarceration of minor offenders—especially drug offenders—seems likely to continue as the effects of recent sentencing enhancements, such as those for offenses committed on bond or in "safe zones," work their way through the criminal justice system.

Although the effect may not be immediate, automatic sentencing enhancements can force unexpectedly large shifts in incarceration policy. For example, under the Class X law, a judge must sentence any Class 1 or Class 2 offender over the age of twenty-one as a Class X offender if he or she has previously been convicted two times before of either a Class 1 or Class 2 felony. This law includes drug offenders.²²⁶ In 1985, only eight inmates were serving time under this provision. By 1992, the number had risen to 414. By 1994, however, the number of inmates serving time under this provision soared

[hereinafter IDOC PRESENTATION].

222. ILL. COMP. STAT. ANN. ch. 730, § 5/3-6-3.1(a) (West Supp. 1996).

223. IDOC PRESENTATION, *supra* note 221, at 9.

224. *Id.* at 90-91.

225. *Id.* at 47.

226. Aspen, *supra* note 32, at 348; ILL. COMP. STAT. ANN. ch. 730, § 5/5-5-3(c)(8) (West Supp. 1996).

to 1305—a 215% increase in just two years.²²⁷ A similar effect may be developing as a consequence of the expansion of consecutive sentencing laws. In 1994, consecutive sentences increased thirty-eight percent.²²⁸

As a consequence of Illinois' multi-layered sentencing policy, it seems likely not just that the prison population will continue to grow, but that the courts will continue to lock up more drug offenders and more offenders caught in mandatory sentencing enhancements. If, as seems likely, the General Assembly continues to pass sentencing enhancements, the demand for prison space might someday force a reassessment of the sentencing system. Such a reexamination may not alter the balance of incarceration in Illinois, but it could yield a rational public choice, weighing the costs of each incarceration decision against its benefits.

D. *Wiping the Slate Clean?*

If Illinois is forced to reassess its sentencing system, it will have the opportunity to examine the efforts of states that have grappled with the costs and complexities of sentencing reform. North Carolina's response—often referred to as “structured sentencing” or the “grid”—has gained widespread attention. The grid system went into effect in October of 1994.²²⁹ This model, the product of North Carolina's Sentencing and Policy Advisory Commission, fixes sentences based upon both the seriousness of offenses, which range from level A—such as murder—through level I—such as lesser drug offenses, and the offender's prior criminal record. The “grid” refers to a chart, in which offense categories are listed on the left side by seriousness, and prior criminal history, which is reduced to “points,” is represented across the top of the chart. At sentencing, a judge matches on the chart the severity of the offense with the offender's criminal record, and finds the proper sentencing range. For example, a level D offense such as armed robbery falls within a forty-four to fifty-five month range before various aggravating and mitigating factors are weighed.²³⁰

227. IDOC PRESENTATION, *supra* note 221, at 21.

228. *Id.* at 82.

229. N.C. GEN. STAT. § 15A-1340.17 (Supp. 1995); Michael Tonry, *Structured Sentencing*, in 10 CRIME AND JUSTICE: A REVIEW OF RESEARCH 267 (Michael Tonry & Norval Morris eds., 1988) (reviewing structured sentencing models).

230. NORTH CAROLINA SENTENCING AND POLICY ADVISORY COMMISSION, REVISED SUMMARY OF NEW SENTENCING LAWS AND THE STATE-COUNTY CRIMINAL JUSTICE ACT 8 (1994) [hereinafter N.C. COMMISSION]; William Claiborne, *Making Sentences Fit the Prisons*, WASH. POST, July 16, 1994, at A1.

The grid system fits the "truth-in-sentencing" mold, because sentences imposed by the courts match the actual time which the offender will spend behind bars. Parole is eliminated. This feature qualifies North Carolina for federal grants to construct prisons. The grid system also attempts to control corrections costs by targeting violent and career offenders for prison, while less serious offenders are sentenced to probation or go to day reporting centers, boot camps, house arrest, or halfway houses.²³¹ New sentencing enhancements must be accompanied by notes outlining their cost—a practice already in place in Illinois.²³²

North Carolina also adopted a community corrections strategy to impose intermediate sanction on the offender in the community through probation, day reporting centers, boot camps, house arrest, or halfway houses.²³³ This approach, however, might cause two problems. First, law enforcement officials might argue that these alternative sentences should be targeted at offenders now under less restraint rather than those currently in the prison system. Probationers, for instance, would thus get more conditions and more supervision. According to this view, it would be "soft on crime" to give these intermediate sanctions to offenders now in the prison system. If this approach is followed, prison admissions would not be reduced; more minor offenders would be put under greater restraint. Second, these intermediate sanctions take place locally.²³⁴ In Illinois, such a division of jurisdiction could result in shifting sentencing costs to the counties. In North Carolina, State government covers these costs through grants to counties.²³⁵

North Carolina also sought to control enormous and costly growth in its prison budget. Its reform was intended to cost no more than the

231. Claiborne, *supra* note 230, at A1; Penelope Lemov, *Justice by the Grid*, GOVERNING, Mar. 1994, at 27. The grid system does not expressly adopt capacity-based sentencing, which adjusts the number of inmates who enter the prison system to meet the system's capacity. This capacity management, in effect in Minnesota for a number of years, was considered by an Illinois legislative commission in 1986. ADMINISTRATIVE OFFICE OF THE ILLINOIS COURTS, SENTENCING GUIDELINES AS A RESPONSE TO SENTENCING REFORM: A STUDY AND SOME OBSERVATIONS 40 (1986). That commission took no action after objections were raised that it would be soft on criminals. *Id.* at 44-46.

232. The Correctional Budget and Impact Note Act, Pub. Act No. 89-198, § 10, 1995 Ill. Legis. Serv. 2741, 2742-73 (West) (codified at ILL. COMP. STAT. ANN. ch. 25, §§ 701/1-12 (West 1992 & Supp. 1996)).

233. N.C. COMMISSION, *supra* note 230, at 3-4.

234. *Id.* at 3-5.

235. *Id.* at 31-35; Lemov, *supra* note 231, at 30.

system which it replaced.²³⁶ In the absence of such a limit, the reform might have become a means of enhancing more sentences. The benefits of North Carolina's reform might, however, be short-lived. The North Carolina legislature has already returned to the practice of enhancing sentences. New enhancements went into effect in December, 1995.²³⁷ Time will tell if this is the beginning of a pattern.

V. CONCLUSION

Illinois' sentencing system, built up by the unsystematic accretion of sentencing policies and enhancements, has become so complicated and confusing that few lawyers—not to mention the public or the accused—can understand what specific legal consequences flow from specific criminal conduct. Rather than clarifying the Code, "truth" adds yet another layer to this system. This multi-layered system has obscured the debate over how to spend the State's limited amount of money to best incapacitate—or rehabilitate—offenders. As a consequence, it seems likely that Illinois will continue to lock up more drug offenders, as well as others caught in mandatory sentencing enhancements.

If the Illinois General Assembly continues to pass sentencing enhancements, the increased demand for prison space might force a reassessment of the sentencing system. The lessons from North Carolina could help clarify our complex laws, shift the focus to some degree on the offender, rather than solely on the offense, and limit the growth in the prison system. While such a reexamination may not alter the balance of incarceration in Illinois, it could yield a rational public choice, one which weighs the costs of each incarceration decision against the benefits of incapacitation.

236. N.C. COMMISSION, *supra* note 230, at 5.

237. N.C. GEN STAT. § 14-415.21 (Supp. 1995).