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In this article the author discusses contemporary trends in criminal sentencing. The philosophies underlying criminal punishment are examined, as well as recent changes in the sentencing practices of a sample of states. Data regarding actual sentencing practices in Wyoming are analyzed, an assessment of sentencing disparity is made, and recommendations for change are offered.

## THE CHANGING STRUCTURE OF CRIMINAL SENTENCING

*by David J. Roberts\**

The sentencing powers of the judges are, in short, so far unconfined that, except for frequently monstrous maximum limits, they are effectively subject to no law at all. Everyone with the least training in law would be prompt to denounce a statute that merely said the penalty for crimes "shall be any term the judge sees fit to impose." A regime of such arbitrary fiat would be intolerable in a supposedly free society, to say nothing of being invalid under our due-process clause. But the fact is that we have accepted unthinkingly a criminal code

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Please note that since completion of this article, the Wyoming Legislature has adopted a new criminal code effective July 1, 1983. As a result, the statutory citations in this article may differ from those in the new code.

creating in effect precisely that degree of unbridled power.<sup>1</sup>

Sentencing practices, penal philosophy, and correctional intervention have, in recent years, been the subject of intense criticism, debate, research and reform. During the past decade we have witnessed the eclipse of rehabilitation as a fundamental goal of sentencing and corrections. Similarly, parole has fallen into disfavor in many segments of society, and forces seeking its abolition have prevailed in limited areas.<sup>2</sup> The indeterminate sentence, once heralded as providing "the best of both worlds—long protection for the public yet a fully flexible opportunity for the convict's rehabilitation,"<sup>3</sup> lies fatally wounded in the flurry of penal reform.

The quixotic aims of correctional reform during the 1950's and 1960's have given way to the pragmatic and Spartan theories of the 1970's and 1980's. Discussion of the criminal offender is no longer couched in the medico-legal jargon of "reformation," "rehabilitation," "treatment," and "cure." Gone are the notions that all offenders can be successfully rehabilitated, the only stumbling block being the process of matching the correct treatment strategy to the needs of the client.

Today's treatises on sentencing and correctional intervention are littered with terms like "just deserts," "commensurate deserts," and "retribution."<sup>4</sup> The retributive aims of punishment, once thought dead and discarded for their perceived anachronistic barbarism, have been embraced by a most unlikely constituency—the political right and left. Liberals and conservatives alike have railed against the

1. M. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 8 (1975).

2. In 1976 the State of Maine became the first jurisdiction in recent years to abolish parole. ME. REV. STAT. ANN. tit. 17-A, §§ 1201-1206 (1977).

3. R. CLARK, *CRIME IN AMERICA* 224 (1970).

4. See, e.g., AMERICAN FRIENDS SERV. COMM., *STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA* (1971); A. DERSHOWITZ, *FAIR AND CERTAIN PUNISHMENT* (1976); J. FEINBERG, *DOING & DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* (1970); D. FOGEL, "... WE ARE THE LIVING PROOF...": *THE JUSTICE MODEL FOR CORRECTIONS* (1979); A. VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* (1976); A. VON HIRSCH & K. HANRAHAN, *THE QUESTION OF PAROLE: RETENTION, REFORM, OR ABOLITION* (1979); N. MORRIS, *THE FUTURE OF IMPRISONMENT* (1974).

indeterminate sentence, albeit with vastly different perceptions of its operation.<sup>5</sup> What has emerged is an uneasy alliance pressing for remarkably similar reforms in sentencing and corrections.

Determinate, fixed-term, mandatory, and presumptive sentences, sentencing councils, sentencing and parole guidelines, the abolition of parole, and the "justice model" of corrections are all products of the research and rhetoric of the past decade. Maine was the first state to abolish parole, though its sentencing provisions still allow a wide range of judicial discretion.<sup>6</sup> California explicitly rejected the rehabilitative ideal in sentencing that had once been its hallmark, and specifically articulated punishment as the principal concern of its new presumptive sentencing legislation.<sup>7</sup> Similarly, many other states have substantially revised their criminal sentencing provisions and correctional practices.

The demise of the rehabilitative ideal and the indeterminate sentence may be traced to both practical and theoretical considerations. The late Robert Martinson's study of the effectiveness of correctional treatment programs rendered the ominous verdict, "With few and isolated exceptions, the rehabilitative efforts that have been reported so far have no appreciable effect on recidivism."<sup>8</sup> Other researchers have drawn similar conclusions.<sup>9</sup> Faced with mounting evidence that rehabilitative efforts were not only ineffective, but perhaps inefficacious, scholars and practitioners began questioning the theoretical foundations of a correctional system that embraced reformation of the offender as its ultimate goal.

The rise of prisoners' rights during the 1960's and 1970's brought the courts for the first time into direct contact with the operation of correctional agencies. The "Hands-Off Doc-

5. See, e.g., AMERICAN FRIENDS SERV. COMM., *supra* note 4; J. WILSON, THINKING ABOUT CRIME (1975).

6. ME. REV. STAT. ANN. tit. 17-A, § 1251 (1977).

7. CAL. PENAL CODE § 1170(a)(1) (West 1981).

8. Martinson, *What Works?—Questions and Answers About Prison Reform*, THE PUB. INTEREST 25 (Spring 1974).

9. Bailey, *Correctional Outcome: An Evaluation of 100 Reports*, 57 J. CRIM. L. & CRIMINOLOGY 153 (1966). But see Gottfredson, *Treatment Destruction Techniques*, 16 J. RESEARCH IN CRIME & DELINQ. 39-54 (1979).

trine,"<sup>10</sup> which historically had precluded judicial scrutiny of correctional institutions, experienced a gradual erosion during this period.<sup>11</sup> Perhaps more than any other factor, the impediments devised by prison officials to limit inmate access to the judiciary were responsible for the initiation of judicial review.<sup>12</sup> Establishing the primacy of the right to open and unfettered access to the courts was, of necessity, a first step in court intervention, for courts could hardly judge the constitutionality of any particular condition or practice if every petition was intercepted or censured.

The increasingly easy access to the courts which prisoners enjoyed once the "Hands-Off Doctrine" was lifted brought a flood of writs from prisoners challenging everything from standards prescribing the length of an inmate's hair to torturous corporal punishment. A surprisingly consistent and chronic complaint of inmates concerned the workings of the indeterminate sentence. Though viewed as humanitarian in operation by those who urged its passage, the indeterminate sentence backfired with savage force. Instead of motivating the offender to participate in available rehabilitation programs and receive a discharge at precisely the optimum rehabilitative point, the indeterminate sentence hung like a noose over the future of the offender. The prisoner had virtually no idea when release would come or what those making the release decision required. Indeed, in some jurisdictions, it took court action to get the parole board to tell the prisoner why parole release had been withheld.<sup>13</sup> Prisoners began a fervent call for fixed-term sentences which would establish a precise date of release.

A concurrent development with the growing body of literature challenging the empirical basis of rehabilitation and

10. The "Hands-Off Doctrine," a term apparently coined by FRITCH, CIVIL RIGHTS OF FEDERAL PRISON INMATES 31 (1961) (document prepared for the Federal Bureau of Prisons), refers to the historical practice of appellate courts of denying jurisdiction to petitions from prison inmates challenging the constitutionality of the conditions of their confinement. See Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963).

11. See, e.g., *Cooper v. Pate*, 378 U.S. 546 (1964); *Palmigiano v. Trivisono*, 317 F. Supp. 776 (D.R.I. 1970); *Sostre v. Rockefeller*, 312 F. Supp. 863 (S.D.N.Y. 1970). See also Goldfarb and Singer, *Redressing Prisoners' Grievances*, 39 GEO. WASH. L. REV. 175 (1970); Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610 (1979).

12. *EX PARTE HULL*, 312 U.S. 546 (1941), *reh'g denied*, 312 U.S. 716 (1941).

13. *Franklin v. Shields*, 399 F. Supp. 309 (W.D. Va. 1975); *Monks v. New Jersey State Parole Bd.*, 58 N.J. 238, 277 A.2d 193 (1971).

the rising political voice of prisoners, was a fundamental questioning of the "justice" and "equity" of basing sentencing and correctional release upon purely utilitarian aims. Disenchantment with the rehabilitative ideal on philosophical grounds stemmed in part from its operational misuse. Prisoners were spending considerably longer periods in confinement under the well-intended strategy of reform and treatment.<sup>14</sup> The length of time a person spent in prison bore no particular relationship to the seriousness of the offense or to the extent of his prior criminal record.<sup>15</sup> Questions of the "justice" of the sentencing and correctional system began to surface with troublesome frequency.

Indeterminacy in sentencing is an important issue in Wyoming because of the extraordinarily broad penalty ranges presently authorized in state statutes. The legislatively authorized penalty for first degree sexual assault,<sup>16</sup> robbery with a firearm,<sup>17</sup> and armed burglary<sup>18</sup> is "imprison[ment] in the penitentiary for not less than five (5) years nor more than fifty (50) years."<sup>19</sup> No other limitations are placed on the sentencing judge with respect to the range of the sentence actually imposed. For example, the judge may impose a sentence of five years to five years, five years to fifty years, fifty years to fifty years, or any combination within the rather broad

14. AMERICAN FRIENDS SERV. COMM., *supra* note 4, at 91-96.

Three trends are significant in appraising the consequences of California's adoption of the rehabilitative ideal. First, the length of sentences has steadily increased. From 1959 to 1969 the median time served has risen from twenty-four to thirty-six months, the *longest in the country*. Second, the number of persons incarcerated per 100,000 has continued to rise, from 65 in 1944 to 145 in 1965. This figure too is the highest in the country. During a period when the treatment ideal was maximized . . . more than twice as many persons served twice as much time. Third, there is evidence that people are not being helped any more by a median stay of three years in a rehabilitatively oriented prison than they were by approximately two years in a basically punitively oriented prison.

*Id.* at 91-92 (emphasis in original).

15. See generally ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES 49-50 (Tent. Draft, 1967); J. HOGARTH, SENTENCING AS A HUMAN PROCESS (1971); U.S. DEP'T OF JUSTICE, L. SUTTON, FEDERAL SENTENCING PATTERNS: A STUDY OF GEOGRAPHICAL VARIATIONS, ANALYTIC REP. 18 (1978); U.S. DEP'T OF JUSTICE, L. SUTTON, VARIATIONS IN FEDERAL CRIMINAL SENTENCES: A STATISTICAL ASSESSMENT AT THE NAT'L LEVEL, ANALYTIC REP. 17 (1978); Morgan, *Disparity and the Sentencing Process in Wyoming District Courts: Recommendations for Change*, 11 LAND & WATER L. REV. 525 (1976).

16. WYO. STAT. §§ 6-4-302 and 306(a)(i) (1977).

17. WYO. STAT. § 6-4-402 (1977).

18. WYO. STAT. § 6-7-201(b) (1977).

19. WYO. STAT. § 6-4-402 (1977).

legislative authorization.<sup>20</sup> The parole board can release an inmate only after he has served the minimum sentence imposed by the court<sup>21</sup> (assuming no sentence change is subsequently authorized by the judge or the Governor). Good time awards, that is, awards granted for acceptable behavior in the institution, reduce only the maximum sentence, do not accelerate parole eligibility, and cannot reduce a sentence below the court imposed minimum.<sup>22</sup>

This article will examine the changing structure and climate of criminal sentencing and punishment in the United States, and in Wyoming in particular. The article is divided into four sections: a discussion of retributive and utilitarian philosophies in criminal sentencing; a review of recent changes in sentencing and parole legislation throughout the United States; an analysis of current sentencing and correctional practices in Wyoming; and, finally, recommendations for change.

### THE PHILOSOPHY OF PUNISHMENT

Any discussion of the purposes of penal sanctions must begin with the now familiar litany of penal philosophies: rehabilitation, incapacitation, general deterrence, and retribution.<sup>23</sup> These philosophies have traditionally been dichotomized into the utilitarian and the retributive aims of the criminal law. Though the present debate is thought-provoking, it is anything but new. One need only review the works of Kant, Hegel,

20. While WYO. STAT. § 7-13-201 (1977) mandates that sentencing judges "shall not fix a definite term of imprisonment," WYO. STAT. § 7-13-202 (1977) expressly provides that such a sentence "shall not for that reason be void."

21. WYO. STAT. § 7-13-402(a) (1977) provides that the Board of Parole has the power to grant parole "to any person imprisoned in any institution under sentence ordered by any district court of this state, other than a life sentence, and who shall have served the minimum term pronounced by the trial court. . . ." See also Rules and Regs. of the Bd. of Parole, Ch. V, § 2 (1974); 2 Op. Att'y Gen. 84 (1974). It should be noted that Wyo. R. CRIM. P. 36 authorizes the sentencing court to reduce a criminal sentence within 120 days of its imposition. Further, the Governor has the power to commute any sentence imposed by a district court. WYO. CONST. art. 4, § 5; WYO. STAT. §§ 7-13-801 to -809 (1977).

22. Rules and Regs. of the Bd. of Parole, Ch. IV, § 1 (1974).

23. Deterrence is typically divided into "special deterrence" and "general deterrence." H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 39-48 (1968). Special deterrence refers to the inhibition of further criminality in an offender through the imposition of punishment. General deterrence, by contrast, refers to the inhibition of criminality in the general public through the threat of punishment. *Id.* For the purpose of this paper special deterrence will be included within the general category of rehabilitation, since it primarily concerns the modification of the offender's behavior by imposition of punishment.

Beccaria, Bentham, and Romilly, to name a few, to realize the longevity of the dialectic.<sup>24</sup>

Utilitarian philosophy is grounded in the prescription of the greatest good for the greatest number.<sup>25</sup> It is forward-looking in as much as criminal penalties are authorized in order to reform the miscreant, restrain his harmful actions through incapacitation, and deter the general public, as well as the offender himself, from future depredations. Though punishment itself is viewed as an evil, its imposition is justified by the greater good affected through these reformative, restraining, and deterrent functions.

### *Rehabilitation*

Traditionally, the concept of rehabilitation views the criminal offender in the general framework of the medical model. The offensive behavior of the individual is believed to stem from biological, psychological, social, or environmental disorders. The aim of the penal system, then, is the treatment of the "patient" or "client." Indeed, during the 1950's and 1960's we saw a concurrent change in the vocabulary surrounding the penal system. Penitentiaries became correctional institutions, guards became correctional officers, and punishment became treatment.

Commentators during the 1960's and 1970's viewed rehabilitation as the panacea to the crime problem that loomed predominant on the social scene.<sup>26</sup> Viewed as humanizing our monolithic penal institutions at a time when prisoners were gaining political voice and other social reforms were taking place, rehabilitation was embraced with a fervent innocence: "Rehabilitation must be the goal of modern corrections. Every other consideration should be subordinated to it. To rehabilitate is to give health, freedom from drugs and alcohol,

24. See, e.g., C. PHILLIPSON, *THREE CRIMINAL LAW REFORMERS* (1923); *PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT* (G. Ezorsky ed. 1972); *THE GREAT LEGAL PHILOSOPHERS: SELECTED READINGS IN JURISPRUDENCE* (C. Morris ed. 1959).

25. See generally Bentham, *An Introduction to the Principles of Morals and Legislation*, in *PHILOSOPHICAL PERSPECTIVES*, *supra* note 24, at 56.

26. See *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS - 1974*, at 171-76 (M. Hindelang, C. Dunn, A. Aumick, & L. Sutton eds. 1975) (public opinion surveys during 1960's and 1970's indicated substantial concern for safety and the perception of increasing crime rates).

to provide education, vocational training, understanding and the ability to contribute to society."<sup>27</sup>

Given the idealistic timbre of the reform movement of the 1960's, it is not difficult to understand the move to indeterminate sentencing. The indeterminate sentence, it was believed, would allow correctional officials to release an offender from confinement at the precise point of reformation, thus returning a useful and productive citizen to the community and averting needless punishment to one who no longer posed a threat to society. There existed, however, a truculent breach between the philosophy and the practice, which will be discussed in detail shortly.

### *Incapacitation*

The incapacitation of those who have demonstrated their dangerousness to the community by the commission of a criminal act is perhaps the most conspicuous and, arguably, the most easily attainable goal in corrections. Isolating these persons from society is rather like quarantining persons with contagious diseases.<sup>28</sup> Though incarceration prevents the offender from preying upon the general public, prisons are notorious for the amount of crime that is committed within their walls.<sup>29</sup> Given this fact, incapacitation is at best only marginally successful. That 99 percent of all prisoners are ultimately released from confinement further testifies to the fact that isolation, as an ultimate goal in corrections, is only temporary.<sup>30</sup>

The rationale underlying incapacitation is the belief that, unless restrained, the convict will continue a course of criminal conduct. While intuitively appealing, contemporary research

27. CLARK, *supra* note 3, at 220. For comprehensive contemporary discussions of rehabilitation, see *NEW DIRECTIONS IN THE REHABILITATION OF CRIMINAL OFFENDERS* (S. Martin, L. Sechrest, & R. Redner eds. 1981); *THE REHABILITATION OF CRIMINAL OFFENDERS: PROBLEMS AND PROSPECTS* (L. Sechrest, S. White, & E. Brown eds. 1979).

28. E. VAN DEN HAAG, *PUNISHING CRIMINALS: CONCERNING A VERY OLD AND PAINFUL QUESTION* 243 (1975).

29. S. REID, *CRIME AND CRIMINOLOGY* 633-43 (2d ed. 1979); H. TOCH, *POLICE, PRISONS, AND THE PROBLEM OF VIOLENCE* 52-73 (1977).

30. NAT'L ADVISORY COMM'N ON CRIM. JUST. STANDARDS AND GOALS, *CORRECTIONS* 145 (1973).

seriously questions our ability to accurately predict individual dangerousness.<sup>31</sup>

While current attempts at incapacitation appear only partially effective, some commentators have urged that the principle is right, but the practice has faltered. Ernest van den Haag, for example, has proposed a system of protracted confinement, which he calls "post-punishment incapacitation."<sup>32</sup> An ardent utilitarian, van den Haag calls for the confinement of criminal offenders who are predicted to be dangerous, even beyond their period of "deserved" punishment, though he would attempt to mitigate the pain of restraint and make it as non-punitive as possible.<sup>33</sup>

Must we then let offenders go after they have served their time, even when we foresee danger? If justice were our only aim, we could do nothing else: *fiat justitia pereat mundus*. But the preservation of society and the security and welfare of its members are legitimate political ends beyond justice. . . . Surely, then, once having punished offenders for their offenses, we may incapacitate them when we have reason to believe that they will unlawfully harm others if released and that the harm and the likelihood of it are great enough to outweigh the harm the preventive restriction on their freedom does to them.<sup>34</sup>

Substantive questions challenging the justice of a system like that proposed by van den Haag must surface where the order for continued confinement is based solely on predictions of future danger.

Rehabilitation and incapacitation share an important characteristic which distinguishes them from the other penal philosophies: an emphasis on individualized decisionmaking. These two philosophies focus upon the actor, not the act, except to the extent that the act may reveal elements of the

31. DOING JUSTICE, *supra* note 4, at 19-26; THE FUTURE OF IMPRISONMENT, *supra* note 4, at 68-72; E. VAN DEN HAAG, *supra* note 28, at 245-46; Steadman and Kneveles, *The Community Adjustment and Criminal Activity of the Bazstrom Patients: 1966-1970*, 129 AM. J. PSYCHIATRY 304-10 (1972); von Hirsch, *Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons*, 21 BUFFALO L. REV. 717 (1972).

32. E. VAN DEN HAAG, *supra* note 28, at 241-51.

33. *Id.* at 250.

34. *Id.* at 243.

pathology or the danger of the offender. This allows the judge or corrections official to prescribe vastly different sanctions for virtually identical criminal acts, based upon differences in offender characteristics. Thus, disparity in sentencing is not an artifact of an unjust process, but rather, it is a design element characteristic of decisionmaking tailored to the individual.

Disparity in sentencing has been well documented.<sup>35</sup> John Hogarth, in his excellent work *Sentencing as a Human Process*,<sup>36</sup> investigated a host of factors which were found to interact with judicial decision making. Interestingly, though perhaps not surprisingly, the importance attached to any particular penal philosophy by the sentencing judge substantially affected both the type of sentence and the length of sentence he imposed.<sup>37</sup> The philosophy espoused by the magistrate also significantly governed his interpretation of pre-sentence information:

[M]agistrates who see a great deal of pathology in the area of family and personal relationships tended to have relatively high reformation and punishment corrects scores and relatively low general deterrence, retribution, and justice scores. . . . The attitudes and penal philosophies of magistrates appear to function as filters through which information is perceived selectively.<sup>38</sup>

The critical point here is that sentencing and correctional decisionmaking under the indeterminate sentence are largely

35. See generally sources cited *supra* note 15.

36. HOGARTH, *supra* note 15.

37. *Id.* at 322-40.

38. *Id.* at 276. The "punishment corrects" and "justice" scores are factors statistically derived from the attitudes and philosophies of the magistrates examined by Hogarth. "Justice" refers to a sentencing judge "concerned with justice [who] would not only ensure that the punishment is severe enough, bearing in mind the seriousness of the offence, but also that it must not exceed the limit that is appropriate for the offence." *Id.* at 128. "Punishment corrects" is a factor which is "associated with the notion that offenders deserve and need punishment, in order to prevent them from committing further crime." *Id.*

"Reformation," "general deterrence," and "retribution" are penal philosophies with which magistrates indicated agreement to a greater or lesser degree. "Reformation" was defined as "[t]he attempt to change the offender through treatment or corrective measures, so that when given the chance he will refrain from committing crime." *Id.* at 70. "General deterrence" was defined as the "attempt to impose a penalty on the offender before the court sufficiently severe that potential offenders among the general public will refrain from committing crime through fear of punishment." *Id.* "Retribution" was defined by Hogarth as the "attempt to impose a just punishment on the offender, in the sense of being in proportion to the severity of the crime and his culpability, whether or not such a penalty is likely to prevent further crime in him, or others." *Id.*

governed by the judge's perception of both the danger and the rehabilitative potential of the offender. Hogarth has shown that judges, like all humans, selectively perceive and interpret the vast quantity of data thrust upon them, and their perceptions and interpretations are tempered by the penal philosophies they hold, as well as a host of other demographic factors.<sup>39</sup> This data rather convincingly demonstrates the importance of narrowing the range of available penal sanctions and providing an explicit statement of the philosophical perspective which is to govern sentencing and correctional decision making.

### *Deterrence*

The aim of general deterrence is the inhibition of criminal behavior in members of the general public through the threat and imposition of punishment. General deterrence possesses an eloquent logical simplicity which has garnered broad popular appeal and acceptance. Judges, legislators, scholars, and the general public frame their discussions of the effectiveness of criminal penalties largely in terms of the deterrent capacity of punishment. Whether the death penalty exhibits a deterrent capacity superior to protracted confinement has been the subject of virulent debates and perhaps exhaustive, though inconclusive, research.<sup>40</sup> The Wyoming legislature has recently increased the severity and certainty of punishment for those apprehended for drunk driving, with the aim of general deterrence in mind.<sup>41</sup>

Deterrence functions where the punishment imposed is proportionate in severity to the offense committed, its certainty is great, and it is sufficiently swift to relate the sanction to the criminal act.<sup>42</sup> The severity of the punishment must be

39. *Id.* at 211-28.

40. *See generally* CAPITAL PUNISHMENT IN THE UNITED STATES (H. Bedau & C. Pierce eds. 1976); THE DEATH PENALTY IN AMERICA (H. Bedau ed. 1964); F. ZIMRING & G. HAWKINS, DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL (1973).

41. WYO. STAT. § 31-5-233(d) (1977). The 1980 revision mandated confinement for a minimum of one day and specifically placed this one day minimum beyond the reach of probation, pardon, parole, commutation, or suspension. 1980 WYO. SESS. LAWS Ch. 58, § 1. The 1981 session of the legislature repealed this penalty section. 1981 WYO. SESS. LAWS Ch. 12, § 1. In 1982, the legislature added section (h), which limits the authority of the prosecutor to plea bargain: "Any person charged under this section shall be prosecuted under this section and not under a reduced charge." 1982 WYO. SESS. LAWS Ch. 50, § 1 codified at WYO. STAT. § 31-5-233(h) (Supp. 1982).

42. C. BECCARIA, ON CRIMES AND PUNISHMENT (H. Paolucci trans. 1963); Bentham, *supra* note 25.

commensurate to the seriousness of the crime and outweigh by some quantum the pleasure which can be derived from the act. Where the penalty is disproportionately severe, it will rarely be imposed; where it is too lenient, crime will be indulged. The certainty of punishment must assure the potential offender that pain will inevitably result should the offense be committed. The time interval between the commission of the crime and the imposition of punishment must be sufficiently brief in order for the offender to realize that his misbehavior precipitated the penal sanction.

The deterrent capacity of the criminal law has been the topic of a considerable amount of research over the years. Current research regarding the superior deterrent function of the death penalty is inconclusive, and perhaps it is destined to remain so.<sup>43</sup> The ability of the criminal law to deter undesirable behavior, however, has been successfully demonstrated under certain circumstances.<sup>44</sup>

Measuring the deterrent capability of criminal sanctions is an extraordinarily complex task. The importance ascribed to different elements of basic deterrence theory is a matter of continuing research. For example, it is not clear whether the certainty of punishment or the severity of the penalty is more important in deterring criminal behavior.

### *Retribution*

Retribution is an ambiguous term typically employed in discussions of the condemnatory function of criminal punish-

43. See generally CAPITAL PUNISHMENT IN THE UNITED STATES, *supra* note 40; THE DEATH PENALTY IN AMERICA, *supra* note 40; ZIMRING & HAWKINS, *supra* note 40. For an excellent discussion of the current state of knowledge regarding both deterrence and incapacitation, see DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES (A. Blumstein, J. Cohen & D. Nagin eds. 1978).

44. The British Road Safety Act of 1967, for example, was successful in reducing the incidence of drunk driving and the number of alcohol-related automobile accidents. Ross, *Law, Science and Accidents: The British Road Safety Act of 1967*, 2 J. LEGAL STUD. 1 (1973). Similarly, prophylactic measures instituted at airports in response to airline hijackings during the 1970's substantially reduced the incidence of this crime. Landes, *An Economic Study of U.S. Aircraft Hijacking, 1961-1976*, 21 J.L. & ECONOMICS 1 (1978). Significantly increasing the number and presence of police officers on the New York City subways during critical periods of the day also resulted in deterrence. Chaiken, Lawless and Stevenson, *The Impact of Police Activity in Crime: Robberies in the New York City Subway System* (1974) in Cook, *Research in Criminal Deterrence: Laying the Groundwork for the Second Decade*, 248 (Table 2) in 2 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 211-68 (N. Morris & M. Tonry eds. 1980). See generally, F. ZIMRING, PERSPECTIVES ON DETERRENCE (1973); ZIMRING & HAWKINS, *supra* note 40.

ment. From the strict *lex talionis* of the past,<sup>45</sup> retribution has undergone a recent metamorphosis. Today's treatises on the philosophy of punishment are steeped in terms like "just deserts" and "commensurate deserts."<sup>46</sup> The punitive aim of punishment, repudiated not that long ago, has resurfaced in recent years in the idea of desert.

The punishment of criminals comprehends a vast array of functions for society. The condemnation of the act, as well as the actor, the requital of evil, the balancing of rights, and the sovereign expression of vengeance are all elements of retribution. Another critically important element of retribution is "desert."

Desert occupies a unique role in the notion of retributive punishment. As Andrew von Hirsch points out, "[A]sk the person on the street why a wrongdoer should be punished, and he is likely to say that he 'deserves' it."<sup>47</sup> Further questioning of von Hirsch's "man on the street" might elicit a response mentioning several of the social functions expressed above, as well as some of the utilitarian aims.<sup>48</sup>

The purpose of desert, with respect to criminal punishment, differs from that of the other social functions of retribution. These other social functions, like incapacitation, deterrence and rehabilitation, are objectives sought by society through the imposition of punishment. Desert, on the other hand, is a limiting principle which restrains the power a sovereign may justifiably exercise over its citizens. When we say a person is to be punished because he *deserves* punishment, what we mean is that the person's behavior has met whatever legal and procedural qualifications we have established to

45. *Lex talionis* refers to the ancient principle of retaliation. BLACK'S LAW DICTIONARY 822 (5th ed. 1979). See also H. BARNES & N. TEETERS, NEW HORIZONS IN CRIMINOLOGY 337-40 (2d ed. 1952). The traditional conception of retribution as a simplistic retaliatory principle stems in part from the well-worn quote of Immanuel Kant:

Even if a Civil Society resolved to dissolve itself with the consent of all its members—as might be supposed in the case of a People inhabiting an island resolving to separate and scatter themselves throughout the whole world—the last Murderer lying in the prison ought to be executed before the resolution was carried out.

Kant, *Kant's Philosophy of Law*, in THE GREAT LEGAL PHILOSOPHERS, *supra* note 24, at 258.

46. See generally sources cited *supra* note 4.

47. DOING JUSTICE, *supra* note 4, at 45.

48. See *supra* text accompanying notes 23-44.

distinguish those who may justly be penalized from those who may not. Simply put, desert tells us that we may punish only those who deserve punishment. Conviction of a crime is the minimum qualification for criminal punishment in the United States.

Desert also exercises a delimiting role when we discuss the quantum of punishment which may be imposed. Once we have identified those individuals who are deserving of punishment, we must face the question of how much punishment may justifiably be imposed. The precision with which desert answered our first question (who may be punished?) is woefully lacking in addressing the second. Desert tells us that we may not punish a person more severely than he deserves for the crime(s) committed. Whether there exists a concurrent prescription against punishing him less than he deserves is a matter of some controversy.<sup>49</sup>

The function of desert, therefore, is to limit the exercise of punishment in civilized society. We do not punish simply because the person "deserves it." Rather, we punish to achieve social benefits. Our efforts in achieving these benefits, if we are to obey the dictates of justice, must take into account the restrictions imposed by desert.

### *The Purpose of Punishment*

The philosophies of punishment thus briefly sketched, it is now appropriate to outline the proper role of the retributive and utilitarian goals of criminal punishment. General deterrence and the desert element of retribution have different functions, answer different questions, and are imbued with quite dissimilar limitations. The codification of a set of formalized laws and penalties has, as its general purpose, the prevention of evil. Though the deterrent effect of the criminal

49. Compare THE FUTURE OF IMPRISONMENT, *supra* note 4, at 74-75 with Armstrong, *The Retributivist Hits Back*, in PHILOSOPHICAL PERSPECTIVES, *supra* note 24, at 136. Armstrong notes:

[J]ustice gives the appropriate authority the *right* to punish offenders up to some limit, but one is not necessarily and invariably *obliged* to punish to the limit of justice. Similarly, if I lend a man money I have a right, in justice, to have it returned; but if I choose not to take it back I have not done anything unjust.

Armstrong, *supra* at 136 (emphasis in original).

law is not precisely measurable, evidence does demonstrate that the amount of crime in society is measurably reduced where laws exist and their enforcement is manifest.<sup>50</sup>

General deterrence gives us reason for the implementation and operation of an organized system of criminal justice. Further, relying on principles enunciated over two centuries ago by Beccaria and Bentham, deterrence dictates with some measure of specificity the factors governing the severity and celerity of punishment. It does not, however, and cannot answer all of the questions.

The classic objection to the purely utilitarian penal philosophy is that it contains inadequate constraints on the power exercised by a sovereign in pursuit of deterrence. An innocent man, for example, who is popularly believed to be guilty would admirably serve the objectives of general deterrence, where the public spectacle of punishment is all important.<sup>51</sup> Though the deterrent effect of the law would swiftly diminish if it were perceived that punishment is randomly allocated, this concern by itself insufficiently encumbers the punitive powers of the state. While deterrence is the objective of the law, desert established the limits within which a state may pursue its objective.

Both the American Law Institute and the American Bar Association have proposed standards regarding sentencing which have received broad acceptance and have been used as models for the drafting of much state legislation. The *ALI Model Penal Code*<sup>52</sup> and the *ABA Standards Relating to Sentencing Alternatives and Procedures*<sup>53</sup> each urge the primacy of the least restrictive sanction in selecting among alternative dispositions in sentencing, and both recommend the same triad of elements which would authorize a sentence of imprisonment: 1) incapacitation to prevent future crime; 2)

50. See generally ZIMRING & HAWKINS, *supra* note 40.

51. "In a purely deterrent system, for instance, it matters not a jot who is punished provided somebody is punished and the public persuaded that he is guilty. The effect of hanging or imprisoning the wrong man is as deterrent as hanging or imprisoning the right one." Shaw, *Imprisonment*, in BERNARD SHAW: SELECTED PROSE 874 (D. Russell ed. 1952).

52. MODEL PENAL CODE § 7.01 (1962).

53. ABA STANDARDS—SENTENCING ALTERNATIVES, *supra* note 15, STANDARD 2.5(c) (Approved Draft 1968).

total confinement to insure rehabilitation; and 3) a crime too serious to allow another form of punishment.<sup>54</sup>

To base sentences of confinement upon predictions of dangerousness or rehabilitative treatment, however, puts us on dangerous ground. When we base a decision to imprison on the predicted dangerousness of an individual, we fail to constrain our punishment to that which is deserved for the criminal act(s) committed. What we do in effect is punish for acts which we predict will occur in the future. Moreover, we strain at the very boundaries of our empirical capabilities, for studies have amply demonstrated that we are lamentably ineffective in accurately predicting dangerousness.<sup>55</sup> Similarly, to base a decision to sentence an individual to penal confinement on the perceived rehabilitative potential of the person or program assumes a predictive capability far exceeding our present methods.<sup>56</sup> The simple fact is that we don't know how to rehabilitate criminal offenders. *Parum proficit scire quid fieri debet, si non cognoscas quomodo sit facturum.*<sup>57</sup>

There are, of course, substantial philosophical questions that linger when treatment is the overriding concern in imposing a prison sentence. The tyranny of a sentencing system does not abate simply because the purpose is benevolent. As C. S. Lewis has noted:

It is only as deserved or undeserved that a sentence can be just or unjust. . . . Thus when we cease to consider what the criminal deserves and consider only what will cure him or deter others, we have tacitly removed him from the sphere of justice altogether; instead of a person, a subject or rights, we now have a mere object, a patient, a "case."<sup>58</sup>

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54. ABA Standard 2.5(c) provides in part:

(c) A sentence not involving total confinement is to be preferred in the absence of affirmative reasons to the contrary. Examples of legitimate reasons for the selection of total confinement in a given case are:

(i) Confinement is necessary in order to protect the public from further criminal activity by the defendant; or  
 (ii) The defendant is in need of correctional treatment which can most effectively be provided if he is placed in total confinement; or  
 (iii) It would unduly depreciate the seriousness of the offense to impose a sentence other than total confinement.

55. See generally sources cited *supra* note 31.

56. *Id.*

57. "It profits little to know what ought to be done, if you do not know how it is to be done." BLACK'S LAW DICTIONARY, *supra* note 45, at 1011.

58. Lewis, *The Humanitarian Theory of Punishment*, in THEORIES OF PUNISHMENT 302 (S. Grupp ed. 1971).

Principled sentencing requires that desert play a central role in establishing who will be subject to punishment and how much punishment will be imposed. General deterrence plays a dual role, providing the fundamental rationale underlying our system of laws and penalties, and also assisting in the selection of the appropriate penalty in the individual case. Rehabilitation and incapacitation are objectives that must be subordinated to both the deterrent and desert prescriptions, but we should not shun them entirely. While we should not base the decision to imprison solely on the need for treatment, once the decision to incarcerate has been made—on desert and deterrent grounds—our efforts should be directed toward providing rehabilitative programs for the offenders.<sup>59</sup>

Traditionally legislatures have provided little if any direction regarding the philosophy underlying and guiding the criminal sanctioning process. Typically, the sentencing provisions of state statutes are prefaced by preambles notable more for their ambiguity and all-encompassing philosophical aims than a set of principles strictly governing the power the sovereign may exercise over its constituency.

The only real guidance to sentencing principles in Wyoming is contained in the state constitution, which proclaims, "The penal code shall be framed on the humane principles of reformation and prevention."<sup>60</sup> Virtually no other direction is provided.<sup>61</sup> Without an adequate philosophical foundation upon which to premise our penal system, judges lack sufficient direction in establishing the primacy of competing penal philosophies. As former U.S. District Judge Marvin Frankel has noted: "We have in our country virtually no legislative declarations of the principles justifying criminal sanctions. . . . [T]his is much more than an aesthetically regrettable lack. It is the omission of foundation stones, without which no stable or reliable structure is possible."<sup>62</sup>

59. See THE FUTURE OF IMPRISONMENT, *supra* note 4, at 1-28 for a compelling discussion of the problems associated with coerced treatment and the importance of making rehabilitative programs voluntary.

60. WYO. CONST. art. 1, § 15.

61. WYO. STAT. § 7-13-201 (1977) mandates simply that the sentence imposed by the district court be within the minimum and maximum statutory ranges. The statutes provide no discussion of the principles which should govern the selection of an incarcerative as opposed to a non-incarcerative sentence.

62. M. FRANKEL, *supra* note 1, at 106.

Certainly it would be difficult to establish a statutory set of principles so comprehensive that it would articulate the sentence to be preferred in each and every case. This, of course, is neither needed nor desirable. Legislation should, however, at a minimum establish a paradigm articulating the proper role of competing penal philosophies.

### RECENT CHANGES IN CRIMINAL SENTENCING

During the past decade we have witnessed a substantial change in the sentencing and correctional practices in a growing number of states throughout the country. Discretion once vested in the sentencing judge, the correctional official, and the parole authority has been severely constrained or eliminated. The indeterminate sentence, once the hallmark of the rehabilitative ideal, has fallen into disfavor, and in its wake we have seen a variety of mechanisms arise which are designed to increase determinacy in the time-setting function. These mechanisms include fixed-term sentencing, non-discretionary parole release (where parole continues to exist), and the vesting of earned good time, to mention just a few.

California and Colorado have each substantially revised their sentencing and correctional practices in recent years. The changes extend far beyond mere cosmetic modifications; they demonstrate a change in the very character of the sanctioning process. A key to the fundamental nature of these reforms is the philosophical perspective within which the reforms are framed.

California, a state once known for its unflinching acceptance of the rehabilitative ideal and the vastness of its sentencing discretion, has recently modified its sentencing and correctional apparatus.<sup>63</sup> Rehabilitation is no longer the primary objective of criminal sentencing. Indeed, California has left little to the imagination in declaring the purposes of sentencing:

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63. CAL. PENAL CODE § 1170(a)(1) (West Supp. 1982). See also A. LIPSON & M. PETERSON, CALIFORNIA JUSTICE UNDER DETERMINATE SENTENCING: A REVIEW AND AGENDA FOR RESEARCH (Report No. R-2497-CRB prepared for the State of California, Bd. of Prison Terms) (1980); Lagoy, Hussey, and Kramer, *A Comparative Assessment of Determinate Sentencing in the Four Pioneer States*, 24 CRIME & DELINQ. 385-400 (1978); Messinger and Johnson, *California's Determinate Sentencing Statute: History and Issues*, in DETERMINATE SENTENCING: REFORM OR REGRESSION? 13-58 (Mar. 1978) (Proceedings of the Special Conference on Determinate Sentencing, June 2-3, 1977, Boalt Hall School of Law, University of California, Berkeley).

The Legislature finds and declares that the purpose of imprisonment for crime is *punishment*. This purpose is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances. The Legislature further finds and declares that the elimination of disparity and the provision of uniformity of sentences can best be achieved by determinate sentences fixed by statute in proportion to the seriousness of the offense as determined by the Legislature to be imposed by the court with specified discretion.<sup>64</sup>

California has thus declared, in uncommonly explicit language, that the controlling factors in establishing the length of a prison term are 1) uniformity in sentencing, 2) punishment proportionate in severity to the seriousness of the crime, and 3) strictly limited judicial discretion.

Colorado, while not as explicitly as California, has placed a heavy emphasis on the concept of criminal desert in the revision of its sentencing practices, but has retained and emphasized its commitment to deterrence and rehabilitation:

Purposes of code with respect to sentencing. (1) The purposes of this code with respect to sentencing are:

- (a) To punish a convicted offender by assuring the imposition of a sentence he deserves in relation to the seriousness of his offense;
- (b) To assure the fair and consistent treatment of all convicted offenders by eliminating unjustified disparity in sentences, providing fair warning of the nature of the sentence to be imposed, and establishing fair procedures for the imposition of sentences.
- (c) To prevent crime and promote respect for the law by providing an effective deterrent to others likely to commit similar offenses; and
- (d) To promote rehabilitation by encouraging correctional programs that elicit the voluntary cooperation and participation of convicted offenders.<sup>65</sup>

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64. CAL. PENAL CODE § 1170(a)(1) (West. Supp. 1982) (emphasis added).

65. COLO. REV. STAT. § 18-1-102.5 (Supp. 1982).

Colorado has constructed a philosophical framework that comprehends the complex array of penal functions our sanctions are designed to accommodate. Striking a reasonable balance between retributive strictures and utilitarian objectives, this new sentencing and correctional legislation has recognized the importance of equity in decisionmaking as well as the deterrent and rehabilitative aims to which any reasoned penal system must direct itself.

Colorado's legislation is a fairly comprehensive model establishing the relative importance of several competing penal philosophies. The primary function of the penal code is to assure the equitable treatment of those who enter the system. Thus, the concept of criminal desert emerges as the governing force in criminal punishment. Within the confines of deserved punishment, Colorado has announced the purposes of legal sanctions: deterrence and rehabilitation. Rehabilitation programs are designed to be voluntary in nature. Although rehabilitation is encouraged, a prisoner's release from confinement will neither be accelerated nor delayed on the basis of participation or non-participation in institutional programs.

Although many jurisdictions share common concerns and objectives in modifying their criminal sentencing system, the actual penalty provisions enacted into legislation vary considerably from state to state. California's is perhaps the most rigorous of the early reform efforts. Eliminating parole release discretion and strictly narrowing judicial discretion, California's new penal code provides offenses with neatly circumscribed sentencing ranges.<sup>66</sup> In contrast, Maine, Indiana and Illinois continue to grant the sentencing judge wide latitude in decisionmaking.<sup>67</sup> Colorado's code demonstrates something of a compromise by providing a reasonably narrow range of presumptive sentences, yet still allowing the judge to sentence outside of these ranges where aggravating or mitigating factors are present.<sup>68</sup> Table 1 presents a comparison of the sentencing and correctional provisions of a sample of states.

66. For a direct comparison, see generally CAL. PENAL CODE §§ 1170-1170.7 (West Supp. 1982) and *infra* Table 1 (accompanying notes 69-87).

67. ME. REV. STAT. ANN. tit. 17-A, § 1252 (1983); IND. CODE ANN. §§ 35-50-2-3 to -2-8 (Burns 1979); ILL. ANN. STAT. ch. 38, § 1005-8-1 (Smith-Hurd 1982).

68. COLO. REV. STAT. § 18-1-105 (Supp. 1982).

**Table 1**  
**Sentencing Provisions:**  
**A Comparison of a Sample of States<sup>69</sup>**

**CALIFORNIA:**<sup>70</sup>

Good time: 4 months for 8 months served.<sup>71</sup> Earned good time vests every 8 months.

Parole: Nondiscretionary release.<sup>72</sup> One year parole for all offenders.

| Presumptive Sentence | Range in Aggravation | Range in Mitigation | Example(s)                      |
|----------------------|----------------------|---------------------|---------------------------------|
| 6 years              | + 1 year             | - 1 year            | Murder (second degree)          |
| 4 years              | + 1 year             | - 1 year            | Rape; sale of heroin            |
| 3 years              | + 1 year             | - 1 year            | Robbery (unarmed); manslaughter |
| 2 years              | + 1 year             | - 8 months          | Burglary; grand theft           |

**MAINE:**<sup>73</sup>

Good time: 10 days per month regular.<sup>74</sup>  
2 days per month special.

Parole: Abolished.<sup>75</sup>

| Class   | Maximum term                                                    | Fine (max.) | Example(s)                                                          |
|---------|-----------------------------------------------------------------|-------------|---------------------------------------------------------------------|
| Murder  | Life or any term of imprisonment that is not less than 25 years |             |                                                                     |
| Class A | 20 years                                                        | None        | Felony Murder; kidnapping; rape                                     |
| Class B | 10 years                                                        | \$10,000    | Trafficking in narcotic drugs; robbery (unarmed); theft (\$5,000 +) |
| Class C | 5 years                                                         | \$ 2,500    | Manslaughter by motor vehicle; burglary (unarmed, no injury)        |
| Class D | 1 year                                                          | \$ 1,000    | Unlawful gambling                                                   |
| Class E | 6 months                                                        | \$ 500      | Prostitution; theft (less than \$500)                               |

**INDIANA:**<sup>76</sup>

Good time: Class I = 1 day for each day served.<sup>77</sup>  
Class II = 1 day for every two days.  
Class III = no good time.

Parole: Released after expiration<sup>78</sup> of maximum less good-time. Terminated after one year if no parole revocation.

69. The material for the states of California, Maine, Indiana and Illinois, as well as the format of the table, was drawn directly from Lagoy, *supra* note 63. The material on good time and parole was not contained in their original table, but was added by the author. The material for Colorado was compiled by the author.

70. See generally CAL. PENAL CODE §§ 1170-1170.7 (West Supp. 1982).

71. CAL. PENAL CODE § 2931(b) (West Supp. 1982).

72. CAL. PENAL CODE §§ 3040-3065 (West 1982 & Supp. 1983).

73. ME. REV. STAT. ANN. tit. 17-A, §§ 1251-1256 (1983).

74. ME. REV. STAT. ANN. tit. 17-A, §§ 1253(3-A) and (4) (1983).

75. ME. REV. STAT. ANN. tit. 17-A (1983).

76. IND. CODE ANN. §§ 35-50-2-3 to -2-7 (Burns 1979).

77. IND. CODE ANN. § 35-50-6-3 (Burns 1979).

78. IND. CODE ANN. § 35-50-6-1(a) (Burns Supp. 1982).

| Class                 | Presumptive Sentence | Range in Aggravation | Range in Mitigation | Fine (max.) | Example(s)                                           |
|-----------------------|----------------------|----------------------|---------------------|-------------|------------------------------------------------------|
| Murder <sup>79</sup>  | 40 years             | + 20 years           | - 10 years          | \$10,000    |                                                      |
| Class A               | 30 years             | + 20 years           | - 10 years          | \$10,000    | Kidnapping (for ransom); dealing in major narcotics. |
| Class B               | 10 years             | + 10 years           | - 4 years           | \$10,000    | Rape; armed robbery                                  |
| Class C               | 5 years              | + 3 years            | - 3 years           | \$10,000    | Robbery (unarmed); burglary                          |
| Class D <sup>80</sup> | 2 years              | + 2 years            | 0                   | \$10,000    | Theft                                                |

ILLINOIS:<sup>81</sup>

Good time: One day for each day<sup>82</sup> served. Up to 90 days for meritorious service. Does not vest, but not more than 1 year of credit may be revoked.

Parole: Nondiscretionary "Man.<sup>83</sup> datory Supervised Release Term" imposed by the sentencing judge based upon the class of the offense.

| Class                           | Regular Terms       | Extended Terms      | Example(s)                                                       |
|---------------------------------|---------------------|---------------------|------------------------------------------------------------------|
| Murder                          | Life or 20-40 years | Life or 40-80 years |                                                                  |
| Habitual Criminal <sup>84</sup> | Mandatory Life      |                     |                                                                  |
| Class X                         | 6-30 years          | 30-60 years         | Rape; armed robbery; aggravated kidnapping                       |
| Class 1                         | 4-15 years          | 15-30 years         | Dealing in major narcotics                                       |
| Class 2                         | 3- 7 years          | 7-14 years          | Burglary; arson; robbery (unarmed); voluntary manslaughter       |
| Class 3                         | 2- 5 years          | 5-10 years          | Theft (over \$150); involuntary manslaughter; aggravated battery |
| Class 4                         | 1- 3 years          | 3- 6 years          | Possession of marijuana (30-50 grams); sale of child pornography |

COLORADO<sup>85</sup>

Good time: Fifteen days per month<sup>86</sup> which vests semiannually. Earned time not to exceed fifteen days every six months.

Parole: Nondiscretionary release.<sup>87</sup> One year parole for all offenders.

79. The death sentence may be imposed in instances where the state proves the existence of aggravating circumstances as defined by law. IND. CODE ANN. § 35-50-2-9 (Burns 1979).

80. The judge has the discretion to treat such offenses as Class A misdemeanors. IND. CODE ANN. § 35-50-2-7(b) (Burns 1979).

81. See generally ILL. ANN. STAT. ch. 38, § 1005-8-1 (Smith-Hurd 1982).

82. ILL. ANN. STAT. ch. 38, § 1003-6-3 (Smith-Hurd 1982).

83. ILL. ANN. STAT. ch. 38, § 1005-8-1(d) (Smith-Hurd 1982).

84. ILL. ANN. STAT. ch. 38, § 1005-8-1(a)(2) (Smith-Hurd 1982). Habitual criminals are defined as persons with two prior convictions for murder or Class X offenses. ILL. ANN. STAT. ch. 38, § 33B-1 (Smith-Hurd 1982).

85. See generally COLO. REV. STAT. § 18-1-105 (Supp. 1982).

86. COLO. REV. STAT. §§ 17-22.5-101 and -102 (Supp. 1982).

87. COLO. REV. STAT. § 17-22.5-103 (Supp. 1982).

| Class   | Presumptive Range          | Range in Aggravation | Range in Mitigation | Example(s)                                                               |
|---------|----------------------------|----------------------|---------------------|--------------------------------------------------------------------------|
| Class 1 | Life imprisonment or death |                      |                     | 1st Degree Murder                                                        |
| Class 2 | 8-12 years                 | + 12 years           | - 4 years           | 2nd degree murder; 1st degree kidnapping; 1st degree sex. aslt. (injury) |
| Class 3 | 4- 8 years                 | + 8 years            | -2 years            | 1st degree assault; 1st degree burglary; aggravated robbery              |
| Class 4 | 2- 4 years                 | + 4 years            | -1 year             | Manslaughter; robbery; 2nd degree assault; theft (\$200-\$10,000)        |
| Class 5 | 1- 2 years                 | + 2 years            | -6 months           | Criminal impersonation; 1st degree criminal trespass                     |

In California the judge is directed to impose a definite term of years in sentencing the convicted felon.<sup>88</sup> The presumptive sentence identified in Table 1 is mandated, except for cases in which an aggravating or mitigating factor listed by statute is present. Where the judge imposes a sentence either above or below the prescribed presumptive term, he must set forth the facts on which he relied.<sup>89</sup> An interesting and seemingly paradoxical provision of California's law is the provision of good time. All inmates earn good time at the rate of three months for every eight months served.<sup>90</sup> However, inmates may earn an additional month off their sentence every eight months for participation in rehabilitative programs.<sup>91</sup> This system appears inconsistent because even though rehabilitation is eliminated as a principle function of the penal process,<sup>92</sup> offenders may earn reasonably substantial reductions to their sentences for participation in programs traditionally conceived of as rehabilitative.

Maine's revised criminal code varies significantly from California's. Instead of limiting the entire range of available

88. CAL. PENAL CODE §§ 1170(a)(2) and (b) (West Supp. 1982).

89. CAL. PENAL CODE § 1170(b) (West Supp. 1982).

90. CAL. PENAL CODE § 2931(b) (West Supp. 1983).

91. CAL. PENAL CODE § 2931(c) (West Supp. 1983).

92. CAL. PENAL CODE § 1170(a)(i) (West Supp. 1982).

penal sanctions, Maine has enacted legislation that places only upper limits on the penal sanctions available.<sup>93</sup> The sentencing judge must impose a definite term of years but the term is limited only by the applicable maximum provided by statute. For a Class A felony this amounts to a considerable amount of discretion.<sup>94</sup>

Indiana's penal code establishes presumptive sentences for each of four classes of felonies and for murder.<sup>95</sup> These presumptive sanctions may be substantially modified in the presence of aggravating or mitigating factors.<sup>96</sup> The judge is required to impose a definite term of years which may, however, be modified within 180 days of imposition.<sup>97</sup> Parole is granted all inmates at the expiration of the court-imposed sentence, minus applicable good time.<sup>98</sup> All inmates entering the penal system begin earning Class I good time, though they may subsequently be reduced to a slower earning rate as a result of rule violations.<sup>99</sup> When an inmate violates parole and is reincarcerated before the expiration of one year, the parole board then exercises its customary discretion in determining re-release on parole.<sup>100</sup>

The new legislation in Illinois continues to afford judges wide sentencing discretion. Though judicial decision making is constrained to some degree through the provision of statutory minimums and maximums, judges retain the freedom to sentence a felon to any term within the legislative range provided.<sup>101</sup> In addition to the regular terms authorized for given crimes, the legislature has made provision for extended terms where the crime involves "exceptionally brutal or heinous behavior indicative of wanton cruelty."<sup>102</sup> The extended terms provide a minimum sentence equal to the regular maximum

93. ME. REV. STAT. ANN. tit. 17-A, § 1252 (1983).

94. ME. REV. STAT. ANN. tit. 17-A, § 1252 (1983). The judge may sentence a person convicted of a Class A felony to any term of years not exceeding 20 years.

95. IND. CODE ANN. §§ 35-50-2-3 to -2-7 (Burns 1979).

96. IND. CODE ANN. §§ 35-50-2-3 to -2-7 (Burns 1979).

97. IND. CODE ANN. § 35-50-1A-18 (Burns 1979).

98. IND. CODE ANN. § 35-50-6-1(a) (Burns Supp. 1982).

99. IND. CODE ANN. §§ 35-50-6-3(a)-(c) (Burns 1979).

100. IND. CODE ANN. § 35-50-6-1(c) (Burns Supp. 1982).

101. ILL. ANN. STAT. ch. 38, § 1005-8-1 (Smith-Hurd 1982).

102. ILL. ANN. STAT. ch. 38, § 1005-8-1 (Smith-Hurd 1982). Mitigating factors are set forth in ILL. ANN. STAT. ch. 38, § 1005-5-3.1 (Smith-Hurd 1982). Aggravating factors are set forth in ILL. ANN. STAT. ch. 38, § 1005-5-3.2 (Smith-Hurd 1982).

term, and double that for the extended maximum term.<sup>103</sup> Parole under the new law has been redefined as "mandatory supervised release" and specific terms are specified by the legislation, based on the class of the offense.<sup>104</sup> For murder and Class X offenses, the mandatory supervised release term is three years; for Class 1 and Class 2 felonies it is equal to two years; and for either Class 3 or Class 4 felonies it is set at one year.<sup>105</sup> The Illinois legislation also provides for the impaneling of a sentencing commission which is responsible for promoting uniformity, certainty, and fairness in sentencing through the development of guidelines and other recommendations.

The presumptive sentencing ranges provided in Colorado's new legislation present the judge with a reasonably narrow range of alternatives. The judge must impose a sentence of a definite term of years, normally within the statutory presumptive range.<sup>106</sup> However, Colorado's statutes do allow substantial enhancement or diminution of the penalty where specified aggravating or mitigating factors are present.<sup>107</sup> Where the judge sentences outside the prescribed range, he must specifically articulate his reasons for doing so and the factors he relied upon.<sup>108</sup>

Minnesota has taken a different approach in the revision of its sentencing practices. Rather than follow the lead of other states in modifying the statutory sentencing ranges available, Minnesota has enacted guidelines for use by sentencing judges.<sup>109</sup> The new legislation creates the Minnesota Sentencing Guidelines Commission, which is responsible for promulgating advisory guidelines for district courts that establish "(1) The circumstances under which imprisonment of an offender is proper; and (2) A presumptive, fixed sentence for offenders for whom imprisonment is proper, based on each appropriate combination of reasonable offense and offender characteristics."<sup>110</sup> The commission is specifically directed to

103. ILL. ANN. STAT. ch. 38, § 1005-8-2 (Smith-Hurd 1982).

104. ILL. ANN. STAT. ch. 38, § 1005-8-1(d) (Smith-Hurd 1982). See *supra* Table 1 in text accompanying note 83.

105. ILL. ANN. STAT. ch. 38, § 1005-8-1(d) (Smith-Hurd 1982).

106. COLO. REV. STAT. § 18-1-105(1)(b) (Supp. 1982).

107. COLO. REV. STAT. §§ 18-1-105(6) and (9) (Supp. 1982).

108. COLO. REV. STAT. § 18-1-105(7) (Supp. 1982).

109. MINN. STAT. § 244.09 (Supp. 1983).

110. MINN. STAT. § 244.09(5) (Supp. 1983).

take into consideration current sentencing and correctional practices and resources in the creation of sentencing guidelines.<sup>111</sup> The commission is further directed to develop guidelines which recognize sentencing as a two-stage process.<sup>112</sup>

The sentencing decision may be dissected into essentially two component parts: 1) the "in/out" decision, and 2) the durational decision.<sup>113</sup> The "in/out" decision is the initial determination by the trial court judge as to whether the sentence he imposes will involve incarceration. If the judge selects confinement of the offender, a second decision, involving the duration of the confinement, must be addressed. If the trial judge selects a non-incarcerative disposition, he must then determine which of the other available sanctions to impose.

Following an extensive research project, which examined judicial sentencing practices and the releasing practices of the Minnesota Corrections Board, the commission established sentencing guidelines based on current practices. The guidelines developed follow the legislative mandate in establishing both dispositional and durational presumptive sentences.

Table 2 presents the sentencing guidelines grid developed by the guidelines commission. The offenses on the left side of the matrix are structured according to their severity,<sup>114</sup> with Unauthorized Use of a Motor Vehicle and Possession of Marijuana ranked the least serious, and 2nd Degree Murder as the most serious.

111. MINN. STAT. § 244.09(5)(2) (Supp. 1983).

112. MINN. STAT. § 244.09(5) (Supp. 1983). For a general discussion of sentencing as a bifurcated decision, see L. WILKINS, J. KRESS, D. GOTTFREDSON, J. CALPIN, & A. GELMAN, SENTENCING GUIDELINES: STRUCTURING JUDICIAL DISCRETION, FINAL REPORT OF THE FEASIBILITY STUDY 1-2 (1978).

113. WILKINS, *supra* note 112, at 1.

114. The offense severity scores were assigned by the commission through a process in which each commission member sorted cards containing descriptions of the criminal offenses in the order of their severity. The sorted cards were then aggregated for all commission members and an aggregate weighting agreed upon by the commission as a whole. MINNESOTA SENTENCING GUIDELINES COMM'N, REPORT TO THE LEGISLATURE 6-7 (1980).

**Table 2**  
**Minnesota Sentencing Guidelines<sup>115</sup>**  
*Presumptive Sentence Lengths in Months*

Italicized numbers within the grid denote the range within which a judge may sentence without the sentence being deemed a departure.

| SEVERITY LEVELS OF<br>CONVICTION OFFENSE                                      |      | CRIMINAL HISTORY SCORE |         |         |         |         |         |              |
|-------------------------------------------------------------------------------|------|------------------------|---------|---------|---------|---------|---------|--------------|
|                                                                               |      | 0                      | 1       | 2       | 3       | 4       | 5       | 6 or<br>more |
| <i>Unauthorized Use of<br/>Motor Vehicle</i>                                  | I    | 12*                    | 12*     | 12*     | 15      | 18      | 21      | 24           |
| <i>Possession of Marijuana</i>                                                |      |                        |         |         |         |         |         |              |
| <i>Theft Related Crimes<br/>(\$150-\$2500)</i>                                | II   | 12*                    | 12*     | 14      | 17      | 20      | 23      | 27           |
| <i>Sale of Marijuana</i>                                                      |      |                        |         |         |         |         |         | 25-29        |
| <i>Theft Crimes (\$150-\$2500)</i>                                            | III  | 12*                    | 13      | 16      | 19      | 22      | 27      | 32           |
|                                                                               |      |                        |         |         |         | 21-23   | 25-29   | 30-34        |
| <i>Burglary - Felony Intent<br/>Receiving Stolen Goods<br/>(\$150-\$2500)</i> | IV   | 12*                    | 15      | 18      | 21      | 25      | 32      | 41           |
|                                                                               |      |                        |         |         |         | 24-26   | 30-34   | 37-45        |
| <i>Simple Robbery</i>                                                         | V    | 18                     | 23      | 27      | 30      | 38      | 46      | 54           |
|                                                                               |      |                        |         |         | 29-31   | 36-40   | 43-49   | 50-58        |
| <i>Assault, 2d Degree</i>                                                     | VI   | 21                     | 26      | 30      | 34      | 44      | 54      | 65           |
|                                                                               |      |                        |         |         | 33-35   | 42-46   | 50-58   | 60-70        |
| <i>Aggravated Robbery</i>                                                     | VII  | 24                     | 32      | 41      | 49      | 65      | 81      | 97           |
|                                                                               |      | 23-25                  | 30-34   | 38-44   | 45-53   | 60-70   | 75-87   | 90-104       |
| <i>Assault, 1st Degree<br/>Criminal Sexual Con-<br/>duct, 1st Degree</i>      | VIII | 43                     | 54      | 65      | 76      | 95      | 113     | 132          |
|                                                                               |      | 41-45                  | 50-58   | 60-70   | 71-81   | 89-101  | 106-120 | 124-140      |
| <i>Murder, 3rd Degree</i>                                                     | IX   | 97                     | 119     | 127     | 149     | 176     | 205     | 230          |
|                                                                               |      | 94-100                 | 116-122 | 124-130 | 143-155 | 168-184 | 195-215 | 218-242      |
| <i>Murder, 2nd Degree</i>                                                     | X    | 116                    | 140     | 162     | 203     | 243     | 284     | 324          |
|                                                                               |      | 111-121                | 133-147 | 153-171 | 192-214 | 231-255 | 270-298 | 309-339      |

1st Degree Murder is excluded from the guidelines by law and continues to have a mandatory life sentence.

\*one year and one day

115. This table was taken directly from *id.* at 38.

The criminal history score, which frames the top of the matrix, is based on four factors pertaining to the prior criminal record of the offender, including 1) prior felony record; 2) the custody status of the offender at the time of the current offense (e.g., was the offender on probation or parole at the time the current offense was committed?); 3) prior misdemeanor record; and 4) the prior juvenile record of young adult felons.<sup>116</sup> These items are individually scored and then totaled for an aggregate criminal history score.

In order to determine the sentence recommended by the guidelines, one needs to find the appropriate cell in which the conviction offense and criminal history scores intersect. For example, for an offender who was convicted of simple robbery and receives a criminal history score of 4, the guidelines recommend a presumptive sentence of confinement for 38 months. The judge may impose a sentence within the 36 to 40 month range without falling outside the guidelines.

Where compelling mitigating or aggravating factors are present, the trial judge may sentence outside the presumptive range.<sup>117</sup> Whenever a judge sentences outside of the ranges, however, he must provide written reasons describing the mitigating or aggravating factors he relied on. This procedure is required so that the guidelines can accommodate changing attitudes regarding the seriousness of offenses and problems that may exist in the current construction of the guidelines.<sup>118</sup>

The heavy black line that intersects the grid is the dispositional line. For cases with combined offense and criminal history scores that place them in a cell below and to the right of this dispositional line, the presumption is that the offender will receive an incarcerative disposition. Similarly, for cases that fall above and to the left of the dispositional line, the presumption is that the offender will receive a sentence not involving confinement.

The commission, in establishing its sentencing guidelines, relied upon both desert and incapacitative penal philos-

116. *Id.* at 27.

117. *Id.* at 30.

118. *Id.* at 20.

ophies.<sup>119</sup> The seriousness of the offense and the severity of the offender's prior criminal record play central roles in determining the sentence to be imposed.

The sentencing reform efforts discussed in this section vary substantially in the approaches they have taken. While some state legislatures have attempted to restructure penalty provisions, others have concentrated on guiding the discretion exercised by sentencing judges within existing statutory parameters. Each of the states discussed was motivated in the initiation of their reforms by the desire to enhance the equity and uniformity of sentencing practices.

### CRIMINAL SENTENCING IN WYOMING

The sentencing of convicted adult felons in Wyoming is a complex task which must take into account the operation of parole, good time, and executive clemency. Sentencing is not a single function controlled solely by the trial court judge, but a *process* in which the Governor, the Board of Parole, and the correctional official may, and do, participate in varying degrees.

The Governor has the power to commute any sentence and to pardon any offense, with the exceptions of treason and impeachment.<sup>120</sup> With respect to the commutation of sentences, the Governor generally acts upon the recommendation of the Board of Parole, who will recommend commutation "only in rare and exceptional cases."<sup>121</sup> The board includes life sentences and mandatory minimum sentences which allow no judicial discretion in sentencing among those "rare and exceptional cases."<sup>122</sup>

The Board of Parole has the power to parole all inmates of any correctional institution upon the completion of their minimum sentences, with the exception of those serving life sentences and those who have committed an assault with a dangerous weapon upon a correctional official or employee, or

119. *Id.* at 9.

120. WYO. CONST. art. 4, § 5.

121. Rules and Regs. of the Bd. of Parole, Ch. VI, § 1 (1974).

122. Rules and Regs. of the Bd. of Parole, Ch. VI, § 1 (1974).

another inmate.<sup>123</sup> The board is further charged with the responsibility of establishing the conditions of parole under which the parolee must live, the criteria and procedures for the granting and revocation of parole, and the rules and regulations regarding the granting of good time and special good time.<sup>124</sup>

The Board of Parole is comprised of five members, having recently been increased from three, who are appointed by the Governor for six year terms.<sup>125</sup> Wyoming's parole board is part-time, as it is in sixteen other states.<sup>126</sup> Members are compensated at the rate of fifty dollars per day for each day of service.<sup>127</sup>

Rules of the board indicate that all inmates may be paroled upon service of their minimum sentences provided that the board is satisfied that the convict will refrain from committing further crimes; that he has not assaulted anyone in the institution with a deadly weapon, or escaped, or attempted escape; and that he has agreed to the conditions of parole and has a reasonable plan for life outside of the facility.<sup>128</sup> Precisely what constitutes service of the minimum sentence becomes an important element in the criminal sentencing process since the board paroles inmates only upon service of their minimum sentences.

The Attorney General in a 1974 opinion found that the board may not grant parole to any inmate who has not served his minimum sentence.<sup>129</sup> The Attorney General noted, however, that the board does have the power to establish a system of good time and special good time which could operate

123. WYO. STAT. § 7-13-402(a)(1977).

124. WYO. STAT. § 7-13-402(c) (Supp. 1982).

125. WYO. STAT. § 7-13-401(b) (Supp. 1982).

126. The parole board is part-time in Alaska, Arkansas, Idaho, Iowa, Kansas, Maine, Montana, New Hampshire, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Utah, and Vermont. The chairman of the board is full-time with the rest of the board part-time in four jurisdictions, i.e., Connecticut, Delaware, Hawaii, and Mississippi. The chairman and two members are full-time with two other members serving part-time in Nebraska. In all other jurisdictions the board is full-time. *ACA Directory of Juvenile and Adult Correctional Dep'ts, Institutions, Agencies and Paroling Auths.*, in SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS - 1980 149 (M. Hindelang, M. Gottfredson & T. Flanagan eds. 1981).

127. WYO. STAT. § 7-13-401(d) (Supp. 1982).

128. Rules and Regs. of the Bd. of Parole, Ch. V, § 2 (1974).

129. 2 Op. Att'y Gen. 84 (1974).

to reduce the amount of time an inmate must serve to less than the judicially imposed minimum sentence:

[T]he granting of "good time" and "special good time" is a matter resting in the discretionary rulemaking power of the Board. We are unable to find any statute or other authority which would in any way indicate that the Board is prohibited from devising a good time formula which would allow the good time to be counted against the minimum sentence.<sup>130</sup>

Present regulations allow the granting of good time at the rate of 25 percent off the maximum sentence.<sup>131</sup> Therefore, on a twenty-year maximum sentence, the inmate is eligible for five years of good time. In addition, the inmate may earn additional reductions to his sentence by earning special good time.<sup>132</sup> The board, however, has provided that "[g]ood time allowance[s] shall not be granted or awarded to an inmate so as to reduce the time served to less than the minimum sentence."<sup>133</sup>

The net effect of the parole board's regulations is that an inmate may not be released prior to complete service of the minimum judicially imposed sentence. Where an inmate receives a sentence of, say, 1 to 20 years, he may earn up to five years of good time and, perhaps, additional special good time allowances. Assuming no loss of good time, the inmate must be released upon service of his maximum sentence, less good time earned. In the case of an inmate with a 19-to-20 year sentence, however, effectively only one year of good time and special good time may be earned, and the inmate may not be released on parole or discharged prior to the expiration of the 19-year minimum sentence.<sup>134</sup>

Good time that has been awarded by the board may also be revoked or withheld when "an inmate is [found] to have an

130. *Id.* at 85.

131. Present regulations actually allow the granting of good time at the rate of 10 days at the end of each month of confinement. Rules and Regs. of the Bd. of Parole, Ch. IV, § 2 (1974). In practice, however, the chart used by the board indicates an equivalent reduction of 25% off of the maximum sentence. Rules and Regs. of the Bd. of Parole, app. 1B (1974).

132. Rules and Regs. of the Bd. of Parole, Ch. IV, § 3 (1974).

133. Rules and Regs. of the Bd. of Parole, Ch. IV, § 1 (1974).

134. The inmate would have to serve the full 19-year minimum sentence assuming there is no sentence change authorized by the sentencing court and no commutation authorized by

attitude, conduct and/or behavior which is not good, proper and/or helpful and/or not to have adhered to the rules of the institution."<sup>135</sup> Before good time may be revoked the inmate must be given a hearing; this policy accords with the requirement of the United States Supreme Court's decision in *Wolff v. McDonnell*.<sup>136</sup> There exists in the provisions of the Board of Parole, however, no limitation on the amount of good time that may be withheld or revoked from an inmate for any particular infraction.<sup>137</sup> Good time that has been forfeited may, at the discretion of the board, be restored in whole or in part.<sup>138</sup>

The ambiguity of the standard authorizing good time forfeiture where an inmate has an "attitude conduct and/or behavior which is not good, proper and/or helpful" grants the correctional official and the parole board extraordinary power. Correctional and parole authorities thus have powers which are tantamount to those of a sentencing judge in punishing institutional infractions.<sup>139</sup>

The power of the Governor to commute judicially imposed sentences and the parole board's decisions regarding parole release and good time credits have a substantial impact on the entire criminal sentencing process. The sentence actually imposed by the trial judge, particularly the minimum sentence, is, of course, still the most important factor in criminal sentencing.

### District court judges throughout Wyoming frequently find themselves confronted with the demanding task of sentencing

135. Rules and Regs. of the Bd. of Parole, Ch. IV, § 4 (1974).

136. 418 U.S. 539, 556 (1974). Specifically, the board provides the inmate with 1) written notice of the alleged violation; 2) opportunity for a hearing within five days of the alleged violation; 3) opportunity for confrontation and cross-examination of adverse witnesses; 4) opportunity to present witnesses and evidence on his own behalf; 5) a hearing examiner who was not involved in the incident leading to the violation; and 6) written findings of fact. Rules and Regs. of the Bd. of Parole, Ch. IV, §§ 3-4 (1974).

137. Good time does not vest in Wyoming. Inmates may lose all or any part of the amount of good time they have earned for violation of specified institutional rules. See BOARD OF CHARITIES AND REFORM, WYOMING STATE PENITENTIARY INMATE RULES HANDBOOK Ch. 31, § 7 (1982). Some jurisdictions allow good time to vest or restrict the amount of good time which may be lost for a single infraction. See *supra* Table 1 and text accompanying notes 70-108.

138. Rules and Regs. of the Bd. of Parole, Ch. IV, § 6 (1974).

139. Given the ability of the board to revoke all or any part of an inmate's good time, this may amount to several years in cases where the offender has received a lengthy maximum term. The board may choose to "flatten-out" an inmate for an infraction, in which case the inmate would forfeit all good time earned or available to be earned. In the case of an inmate with a sentence of one to 20 years, this would amount to a loss of five years good time.

the convicted felon. Judges have consistently acknowledged that sentencing is the most burdensome responsibility they routinely face.<sup>140</sup> Indeed, it is difficult to imagine a more awesome challenge than that facing the official charged with determining the fate of a fellow human. The extraordinary power possessed by the sentencing judge must be exercised, at least in Wyoming, with virtually no legislative guidance and with substantially free and unfettered discretion. District courts are merely directed that they

[s]hall not fix a definite term of imprisonment, but shall establish a maximum and minimum term for which said convict shall be held in said prison. The maximum term shall not be longer than the longest term fixed by law for the punishment of the offense of which he was convicted, and the minimum term shall be not less than the shortest term fixed by law for the punishment of the offense of which he was convicted.<sup>141</sup>

While judges are specifically directed not to impose a sentence of a definite term of years, the statutes explicitly provide that such a sentence "shall not for that reason be void."<sup>142</sup> Beyond these dubious parameters judges are free to devise any conceivable range of sentence, provided that its aggregate term does not exceed the generous provisions of the law.

Wyoming departs from national standards and from the trend in a great many states which favor the creation of broad legislative classes of offenses, ordered by the seriousness of the crime and the severity of the penalty assigned.<sup>143</sup> The criminal code of Wyoming attaches a separate penalty provision to each of the criminal offenses defined by statute. A classification of offenses by their statutory penalty ranges appears to produce 19 separate classes of offenses.<sup>144</sup>

140. *Meeting of the Criminal Code Subcomm. of the Joint Judiciary Interim Comm., Wyoming State Legislature* (June 20, 1981) (comments of Wyoming District Court Judge Joseph F. Maier).

141. WYO. STAT. § 7-13-201 (1977).

142. WYO. STAT. § 7-13-202 (1977).

143. See MODEL PENAL CODE § 6.01 (1962); ABA STANDARDS—SENTENCING ALTERNATIVES, *supra* note 15, Standard 2.1(a) (Approved Draft 1968).

144. Examples of these 19 different sentences are: WYO. STAT. § 6-4-101 (1977) (murder in the first degree—under certain circumstances, death); § 6-1-110 (1977) (habitual criminal [4 convictions of felony]—life); § 6-4-104 (1977) (murder in the second degree—20 years to life); § 6-4-306(c)(i) (1977) Sexual assault in the first or second degree, extended—five years to life); § 6-1-109 (1977) (habitual criminal [3 convictions of felony]—10 years to 50

The discretion allowed sentencing judges by Wyoming statutes is not significantly limited by case law. Although the Wyoming Supreme Court has recently recommended that trial judges provide some discussion of the factors relied upon in sentencing, this recommendation fails to rise to the level of a mandate.<sup>145</sup> Provided the sentence imposed does not exceed the maximum ranges allowed by law, the district judge has consistently been assured that his discretion will not be abridged or constrained by the appellate court in any manner.

Present Wyoming law places no limitations and provides no guidance to the trial judge in the imposition of a minimum sentence. Although the American Bar Association recommends limiting the length of the minimum sentence to not more than one-third of the maximum sentence imposed,<sup>146</sup> no such limitation presently exists in Wyoming. Indeed, the inviolability of the trial court's sentencing discretion has been reaffirmed by the Wyoming Supreme Court in two recent cases.

In *Scheikofsky v. State*<sup>147</sup> the defendant appealed from a 10-to-15-year sentence for voluntary manslaughter, alleging that the trial judge abused his discretion in sentencing the defendant to so lengthy a term. A sentence of not more than 20 years is authorized by statute for manslaughter.<sup>148</sup> The Wyoming Supreme Court, apparently noting the leniency of the trial judge in "sentenc[ing] appellant to a minimum term of ten

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years); § 6-4-402 (1977) (aggravated robbery—five years to 50 years); § 6-7-305 (1977) (Embezzlement of public funds—not more than 21 years); § 6-7-101 (1977) (arson, first degree—two years to 20 years); § 6-4-306(a)(ii) (1977) (sexual assault in the second degree—one year to 20 years); § 6-2-102 (1977) (forging public securities—one year to 15 years); § 6-7-201 (1977) (burglary—not more than 14 years); § 6-8-710 (1977) (bringing weapons or explosives into prison—three years to ten years); § 6-4-306(c)(ii) (1977) (sexual assault in the third degree, extended—two years to ten years); § 6-7-301 (1977) (grand larceny—not more than ten years); § 6-8-302 (1977) (escape or attempt to escape by violence—not more than 10 years); § 6-5-202 (1977) (mutilation of dead human bodies—two years to five years); § 6-7-601 (1977) (blackmailing—not more than five years); § 6-8-501 (1977) (false jurat—not more than three years); § 6-1-115 (1977) (accessory after the fact—not more than two years).

145. *Daniel v. State*, 644 P.2d 172 (Wyo. 1982). Several standards presently recommend a statement by the sentencing judge as to the factors relied upon and the reasoning underlying the sentence imposed. See MODEL PENAL CODE § 10 (1962); ABA STANDARDS—SENTENCING ALTERNATIVES, *supra* note 15, Standard 5.6 (Approved Draft 1968). See also ILL. ANN. STAT. ch. 38, § 1005-4-1(c) (Smith-Hurd 1982).

146. ABA STANDARDS—SENTENCING ALTERNATIVES, *supra* note 15, Standard 3.2(c)(iii) (Approved Draft 1968). See also MODEL PENAL CODE § 6.06 (1962) (mandates that the minimum sentence shall not be more than one-half of the maximum sentence imposed).

147. 636 P.2d 1107 (Wyo. 1981).

148. Wyo. STAT. § 6-4-107 (Supp. 1982).

years—half the time allowed by statute”<sup>149</sup> stated, “If a trial court’s determination of the terms of imprisonment is within the statutory limits, it will not be disturbed absent a clear abuse of discretion.”<sup>150</sup> Chief Justice Rose, reluctantly concurring with the court’s decision regarding the sentencing issue, excoriated the court’s self-imposed “hands-off doctrine” and the failure of the court to establish viable standards for appellate review of sentencing:

[T]he majority opinion relies upon this court’s time-honored principle which says that if a sentence falls within the statutory limits, it will not be disturbed absent a clear abuse of discretion. . . . Ergo, since appellant’s sentence fell within the statutory limits, it was *automatically upheld*. In view of the fact that we have never adopted sentencing standards, the end result is that there is no possibility for this court to find an abuse of discretion where the trial judge’s sentence is within statutory parameters.<sup>151</sup>

In *Daniel v. State*,<sup>152</sup> the court once again affirmed the trial judge’s discretion in sentencing the defendant, this time to 19-to-20 years for involuntary manslaughter. The court ignored data presented by both the defendant and the state that indicated that the defendant received a minimum sentence “12 years longer than any minimum sentence imposed for involuntary manslaughter in any recent case in Wyoming.”<sup>153</sup> Reasoning that “[W]ere we to require uniformity in sentencing and be guided by statistics, we would, in effect, mandate sentencing by computer,”<sup>154</sup> the court again refused to find an abuse of judicial discretion, and noted that the sentence imposed was within the statutory range—thereby meeting the sole criterion of constitutionality mandated by the court. Again Chief Justice Rose felt compelled to concur in the sentencing aspect of the decision, though he lamented the lack of standards for appellate review of sentences.<sup>155</sup>

149. 636 P.2d at 1112.

150. *Id.*

151. *Id.* at 1115 (Rose, C.J., dissenting in part and concurring in part) (emphasis added) (citation omitted).

152. 644 P.2d 172, 180 (Wyo. 1982).

153. *Id.* at 188 (Rose, C.J., specially concurring).

154. *Id.* at 180.

155. *Id.* at 188 (Rose, C.J., specially concurring).

In order to assess current sentencing practices in Wyoming, data have been extracted from the Offender Demographic/Status Data System (ODDS), a correctional management information system jointly designed by the Division of Criminal Identification of the Attorney General's Office and the Board of Charities and Reform.<sup>156</sup> The ODDS system was designed to provide both management information for the proper administration of correctional agencies throughout the state, and to establish a firm research and criminal history data base. The ODDS system was implemented July 1, 1980, and currently maintains data in all persons who were residents in one of the correctional facilities on that date, or who have been sentenced to one of the institutions since then.

Table 3 presents data regarding statutory sentence authorizations and average sentences imposed by Wyoming District Court Judges for a sample of adult felons confined in either the Wyoming State Penitentiary or the Wyoming Women's Center.<sup>157</sup> The Severity Ranking is a variable calculated by the author and is based on the maximum sentence authorized for the offense by current Wyoming statutes.<sup>158</sup>

156. The ODDS system is an automated management information system currently operated on a daily basis by the Center for Criminal Justice Research, Division of Criminal Identification, Wyoming Attorney General's Office.

157. All adult inmates for whom the Division of Criminal Identification had accurate and error-free data were included in the sample. The sample includes data on adults who were confined in either the Wyoming State Penitentiary or the Women's Center between July 1, 1980 and June 1, 1982. The data are sentence-based rather than offender-based, which means that a separate record was recorded for each sentence imposed on an offender in confinement. The majority of offenders for whom data was analyzed had only one offense and sentence. A small number of offenders, however, were convicted of more than one offense and received multiple sentences. For these offenders, a separate record was recorded for each offense and sentence for which they were confined.

158. The Severity Rank, which was calculated by the author, is based on the maximum sentence available under current Wyoming statutes. The coding scheme is as follows:

| Maximum Sentence Authorized | Severity Rank |
|-----------------------------|---------------|
| Death                       | [None]        |
| Life                        | [None]        |
| 50 years                    | 25            |
| 21 years                    | 10.5          |
| 20 years                    | 10            |
| 14 years                    | 7             |
| 10 years                    | 5             |
| 5 years                     | 2.5           |
| 3 years                     | 1.5           |
| 2 years                     | 1             |

Offenses with maximum authorized sentences of either death or life were not assigned a severity rank since they cannot assume a numeric value relative to the specific term or years imposed for the other offenses.

**Table 3**  
**Sentences Authorized by Wyoming Statutes**  
**and**  
**Average Sentences Imposed**

| Offense                                                     | Statute Citation | Sentence Authorized <sup>159</sup> by Wyoming Statutes |                          | Sentence Imposed <sup>159</sup> Average |         | No. of Cases | Severity <sup>160</sup> Rank |
|-------------------------------------------------------------|------------------|--------------------------------------------------------|--------------------------|-----------------------------------------|---------|--------------|------------------------------|
|                                                             |                  | Minimum                                                | Maximum                  | Minimum                                 | Maximum |              |                              |
| Habitual Offender (3 Convictions)                           | 6-1-109          | 120                                                    | 600                      | 120.0                                   | 293.3   | 9            | 25                           |
| Habitual Offender (4 Convictions)                           | 6-1-110          | Life                                                   | Life                     | Life                                    | Life    | 1            | — <sup>161</sup>             |
| Accessory After The Fact                                    | 6-1-115          | -0 <sup>162</sup>                                      | 24                       | 15.3                                    | 24.0    | 4            | 1                            |
| Criminal Conspiracy                                         | 6-1-117          | -0-                                                    | 120                      | 39.9                                    | 66.6    | 20           | 5                            |
| Forgery                                                     | 6-2-101          | -0-                                                    | 168                      | 26.7                                    | 52.8    | 115          | 7                            |
| Obtain Money by False Pretenses                             | 6-3-106          | -0-                                                    | 120                      | 25.4                                    | 47.9    | 37           | 5                            |
| Fraudulent Checks                                           | 6-3-113          | -0-                                                    | 60                       | 18.4                                    | 42.0    | 20           | 2.5                          |
| Fraud by Checks                                             | 6-3-124          | -0-                                                    | 36                       | 18.8                                    | 31.6    | 8            | 1.5                          |
| 1st Degree Murder                                           | 6-4-101          | Death/Life                                             | Death/Life               | Death                                   | Death   | 1            | — <sup>163</sup>             |
| 2nd Degree Murder                                           | 6-4-104          | 240/Life                                               | Life                     | Life                                    | Life    | 65           | — <sup>161</sup>             |
|                                                             |                  |                                                        |                          | Life                                    | Life    | 8            |                              |
|                                                             |                  |                                                        |                          | 360.0                                   | Life    | 1            |                              |
|                                                             |                  |                                                        |                          | 240.0                                   | Life    | 1            |                              |
| Manslaughter                                                | 6-4-107          | -0-                                                    | 240                      | 247.1                                   | 396.7   | 17           |                              |
| Kidnap for Ransom                                           | 6-4-201          | Death/-0-                                              | Death/240 <sup>164</sup> | 82.6                                    | 159.5   | 46           | 10                           |
| Child Stealing or Harboring                                 | 6-4-202          | 12                                                     | Life                     | 82.6                                    | 140.7   | 9            | — <sup>163</sup>             |
| Involuntary Transfer of Custody of Child                    | 6-4-204          | -0-                                                    | 24                       | 240.0                                   | 360.0   | 1            | — <sup>161</sup>             |
| Involuntary Transfer of Custody of Child: Abduct for Profit | 6-4-205          | -0-                                                    | 120                      | 12.0                                    | 18.0    | 1            | 1                            |
| 1st Degree Sexual Assault                                   | 6-4-302          | 60/60                                                  | 600/Life <sup>165</sup>  | 60.0                                    | 84.0    | 1            | 5                            |
|                                                             |                  |                                                        |                          | Life                                    | Life    | 3            | — <sup>161</sup>             |
|                                                             |                  |                                                        |                          | 420.0                                   | Life    | 2            | — <sup>161</sup>             |
|                                                             |                  |                                                        |                          | 113.3                                   | 223.9   | 53           | 25                           |

159. Both the sentences authorized by Wyoming statutes and those imposed are presented in months.

160. See *supra* note 158.

161. No severity rank assigned since the maximum authorized sentence is life. See *supra* note 158.

162. While the statutes provide that no one shall be sentenced to imprisonment in the penitentiary for less than one (1) year (WYO. STAT. § 6-1-106 (1977)), the offenses with a designated minimum of "-0-" authorize a sentence of "not more than" the maximum sentence provided.

163. No severity rank assigned since the maximum authorized sentence is death. See *supra* note 158.

164. The penalty provided in statute for this offense authorizes the jury to impose a sentence of death. If the death sentence is not imposed or does not apply (where the kidnapped victim has been released unharmed prior to the commencement of the trial) "the convicted person shall be punished by imprisonment in the state penitentiary for a period of not more than twenty (20) years." WYO. STAT. § 6-4-201 (1977).

165. The sentence authorized by statute for first degree sexual assault is "imprisonment for not less than five (5) years nor more than fifty (50) years." WYO. STAT. § 6-4-306(a)(i) (1977). The statutes also provide for extended sentencing where the offender is being

| Offense                                              | Statute Citation | Sentence Authorized <sup>166</sup> by Wyoming Statutes |                         | Sentence Imposed <sup>169</sup> Average |         | No. of Cases | Severity <sup>160</sup> Rank |
|------------------------------------------------------|------------------|--------------------------------------------------------|-------------------------|-----------------------------------------|---------|--------------|------------------------------|
|                                                      |                  | Minimum                                                | Maximum                 | Minimum                                 | Maximum |              |                              |
| 2nd Degree Sexual Assault                            | 6-4-303          | 12/60                                                  | 240/Life <sup>166</sup> | 47.0                                    | 81.5    | 12           | 10                           |
| 3rd Degree Sexual Assault                            | 6-4-304          | 12/24                                                  | 60/120 <sup>167</sup>   | 19.4                                    | 40.6    | 13           | 2.5                          |
| Attempted Sexual Assault                             | 6-4-314          | 12                                                     | 60                      | 30.0                                    | 60.0    | 2            | 2.5                          |
| Robbery Generally                                    | 6-4-401          | -0-                                                    | 168                     | 28.0                                    | 54.8    | 45           | 7                            |
| Aggravated Robbery                                   | 6-4-402          | 60                                                     | 600                     | 85.4                                    | 156.7   | 69           | 25                           |
| Assault & Battery with Felonious Intent              | 6-4-503          | -0-                                                    | 168                     | 72.4                                    | 114.7   | 18           | 7                            |
| Child Abuse: Person Under 16 Years of Age            | 6-4-504          | -0-                                                    | 60                      | 22.7                                    | 47.0    | 7            | 2.5                          |
| Aggravated Assault                                   | 6-4-506          | -0-                                                    | 168                     | 45.8                                    | 89.5    | 76           | 7                            |
| Kill Unborn Child                                    | 6-4-507          | -0-                                                    | 168                     | 144.0                                   | 168.0   | 1            | 7                            |
| 1st Degree Arson                                     | 6-7-101          | 24                                                     | 240                     | 24.0                                    | 60.0    | 3            | 10                           |
| 2nd Degree Arson                                     | 6-7-102          | 12                                                     | 120                     | 29.4                                    | 68.6    | 7            | 5                            |
| 3rd Degree Arson                                     | 6-7-103          | 12                                                     | 36                      | 18.0                                    | 36.0    | 2            | 1.5                          |
| 4th Degree Arson                                     | 6-7-104          | 12                                                     | 24                      | 16.0                                    | 24.0    | 1            | 1                            |
| Burglary                                             | 6-7-201          | -0-/60                                                 | 168/600 <sup>168</sup>  | 90.0                                    | 230.0   | 6            | 25 <sup>169</sup>            |
| Grand Larceny                                        | 6-7-301          | -0-                                                    | 120                     | 32.3                                    | 64.3    | 302          | 7                            |
| Unlawful Conversion by Bailee                        | 6-7-303          | -0-                                                    | 120                     | 26.4                                    | 53.9    | 114          | 5                            |
| Receiving Stolen Goods                               | 6-7-304          | -0-                                                    | 120                     | 21.5                                    | 44.4    | 10           | 5                            |
| Embezzlement of Public Funds                         | 6-7-305          | -0-                                                    | 252                     | 37.4                                    | 74.7    | 18           | 5                            |
| Embezzlement by Employees                            | 6-7-310          | -0-                                                    | 168                     | 18.2                                    | 37.6    | 11           | 10.5                         |
| Embezzlement by Innkeeper or Bailee                  | 6-7-311          | -0-                                                    | 168                     | 14.5                                    | 42.0    | 6            | 7                            |
| Fraudulent Procurement of Food or Accommodations     | 6-7-311          | -0-                                                    | 168                     | 16.0                                    | 56.0    | 3            | 7                            |
| Dispose of Mortgaged Property with Intent to Deprive | 6-7-502          | 12                                                     | 60                      | 18.0                                    | 30.0    | 2            | 2.5                          |
|                                                      | 6-7-603          | -0-                                                    | 120                     | 32.0                                    | 80.0    | 3            | 5                            |

sentenced for two or more acts of first or second degree sexual assault, or has previously been convicted of a crime which contains the same or similar elements. WYO. STAT. §§ 6-4-306(b)(i) to (ii) (1977). The extended sentence for first degree sexual assault is "imprisonment for not less than five (5) years nor more than life." WYO. STAT. § 6-4-306(c)(i) (1977).

166. The sentence authorized by statute for second degree sexual assault is "imprisonment for not less than one (1) year nor more than twenty (20) years." WYO. STAT. § 6-4-306(a)(ii) (1977). The extended sentence for second degree sexual assault is the same as that provided for first degree sexual assault. *See supra* note 165.
167. The sentence authorized for third degree sexual assault is "imprisonment for not less than one (1) year nor more than five (5) years." WYO. STAT. § 6-4-306(a)(iii) (1977). The extended sentence for third degree sexual assault is "imprisonment for not less than two (2) years nor more than ten (10) years." WYO. STAT. § 6-4-306(c)(ii) (1977).
168. The sentence authorized for burglary is imprisonment for not more than 14 years. WYO. STAT. § 6-7-201(a) (1977). Extended sentencing is also provided where one of the following four factors are present: 1) The offender was armed with a dangerous weapon; 2) the offender armed himself with a dangerous weapon while in the burglarized enclosure; 3) the offender used an explosive to open the depository; or 4) the offender committed a battery upon a person while in the burglarized enclosure. WYO. STAT. § 6-7-201(b) (1977). The sentence for burglary, where any one of these factors is present, is imprisonment for "not less than five (5) years nor more than fifty (50) years." WYO. STAT. § 6-7-201(b) (1977).
169. For purposes of analysis, burglary sentences with a maximum sentence greater than 14 years were assigned a severity ranking of 25.

| Offense                                                       | Statute Citation | Sentence Authorized <sup>169</sup> by Wyoming Statutes |         | Sentence Imposed <sup>169</sup> |                 | No. of Cases | Severity <sup>160</sup> Rank |
|---------------------------------------------------------------|------------------|--------------------------------------------------------|---------|---------------------------------|-----------------|--------------|------------------------------|
|                                                               |                  | Minimum                                                | Maximum | Average Minimum                 | Average Maximum |              |                              |
| Escaping from County Jail                                     | 6-8-301          | -0-                                                    | 36      | 17.9                            | 30.0            | 10           | 1.5                          |
| Escape by Violence or While Armed                             | 6-8-302          | -0-                                                    | 120     | 50.7                            | 80.7            | 11           | 5                            |
| Aid or Abet Escape: Person Charged/Convicted of Felony        | 6-8-304          | -0-                                                    | 168     | 23.4                            | 62.3            | 7            | 7                            |
| Escape from Penal Institution                                 | 6-8-305          | 12                                                     | 120     | 25.6                            | 54.4            | 15           | 5                            |
| Willful Injury to Property                                    | 6-10-105         | 12                                                     | 60      | 21.0                            | 43.5            | 8            | 2.5                          |
| Possession of Firearms                                        | 6-11-101         | -0-                                                    | 60      | 28.5                            | 54.0            | 4            | 2.5                          |
| Possession of Weapon by Person Convicted of Crime of Violence | 6-11-115         | -0-                                                    | 60      | 28.6                            | 40.8            | 5            | 2.5                          |
| Killing Livestock of Another                                  | 11-30-101        | 12                                                     | 60      | 18.0                            | 60.0            | 3            | 2.5                          |
| Butchering Stolen Animals                                     | 11-30-103        | -0-                                                    | 120     | 18.0                            | 42.0            | 2            | 5                            |
| Immoral or Indecent Acts                                      | 14-3-105         | -0-                                                    | 120     | 52.3                            | 84.0            | 7            | 5                            |
| Desertion: Generally                                          | 20-3-101         | -0-                                                    | 36      | 18.0                            | 36.0            | 1            | 1.5                          |
| Unauthorized Use of Automobile (Auto Theft)                   | 31-11-102        | 12                                                     | 120     | 23.0                            | 52.8            | 93           | 5                            |
| Sale of Stolen Automobiles or Parts                           | 31-11-103        | 12                                                     | 120     | 18.0                            | 36.0            | 2            | 5                            |
| Theft of Parts of Value More than \$20.00                     | 31-11-104        | 12                                                     | 120     | 15.0                            | 36.0            | 2            | 5                            |
| Deface Motor Numbers                                          | 31-11-108        | 12                                                     | 120     | 24.0                            | 60.0            | 1            | 5                            |

The severity ranking can be useful in comparing sentences imposed for offenses that share the same statutory penalty provision. For example, for severity level 7, which includes offenses with a maximum penalty range of not more than fourteen years, the following sentencing practices are observed:

Table 4

| Offense                                 | Sentences Imposed <sup>170</sup> |                 | No. of Cases      |
|-----------------------------------------|----------------------------------|-----------------|-------------------|
|                                         | Average Minimum                  | Average Maximum |                   |
| Forgery                                 | 26.7                             | 52.8            | 115               |
| Robbery: Generally                      | 28.0                             | 54.8            | 45                |
| Burglary                                | 32.3                             | 64.3            | 302               |
| Aggravated Assault                      | 45.8                             | 89.5            | 76                |
| Assault & Battery with Felonious Intent | 72.4                             | 114.7           | 18 <sup>171</sup> |

170. Average minimum and maximum sentences imposed are presented in months.

171. The value of the average becomes less stable when the number of cases is small.

Although the statutory sentencing limit for each of the above offenses is identical—not more than fourteen years—it is apparent that judges distinguish between the offenses and sentence accordingly. Lacking guidance in the assignment of specific penalties within broad legislative categories, judges are forced to assume the task of ranking offenses within penalty ranges and to sentence according to their own perceptions of the severity of the offenses. Such practices provide fertile ground for the seeds of disparate decision making.

A related analysis compares sentencing practices across levels of severity. Table 5 presents data comparing the judicially imposed sentences for a sample of offenses, each of which has a different sentence authorized by statute.

Table 5

| Offense                                                                | Sentences Imposed <sup>172</sup> |                    | Severity <sup>173</sup><br>Ranking | No. of<br>Cases |
|------------------------------------------------------------------------|----------------------------------|--------------------|------------------------------------|-----------------|
|                                                                        | Average<br>Minimum               | Average<br>Maximum |                                    |                 |
| No Account Checks<br>Unauthorized Use of<br>Automobile (Auto<br>Theft) | 18.4                             | 42.0               | 2.5                                | 20              |
| Burglary                                                               | 23.0                             | 52.8               | 5                                  | 93              |
| Manslaughter                                                           | 32.3                             | 64.3               | 7                                  | 302             |
| Aggravated Robbery                                                     | 82.6                             | 159.5              | 10                                 | 46              |
|                                                                        | 85.4                             | 156.7              | 25                                 | 69              |

For no-account checks, auto theft, and burglary a reasonable progression in the severity of sentences imposed is both expected and observed, given the climbing severity ranking of each of the offenses. The average sentences imposed for manslaughter and aggravated robbery, however, are notable for their similarity despite the substantial differences in the sentences authorized for those crimes. The sentence authorized for manslaughter is not more than 20 years,<sup>174</sup> while the sentence authorized for aggravated robbery is 5-to-50 years imprisonment.<sup>175</sup> The fact that the average sentence imposed for aggravated robbery so closely approximates that imposed for manslaughter perhaps indicates that in practice judges perceive little difference in the severity of the two offenses.

172. Average minimum and maximum sentences imposed are presented in months.

173. For a discussion of the Severity Rank and how it was calculated, see *supra* note 158.

174. WYO. STAT. § 6-4-107 (Supp. 1982).

175. WYO. STAT. § 6-4-402 (1977).

This would seem to indicate that the legislative ranking of the severity of offenses, in terms of the sentence authorized, is modified in practice by the sentencing judge.

The legislature has created broad and overlapping penalty ranges for offenses, leaving the task of distinguishing the seriousness of offenses to the sentencing judge. Sentencing judges sanction offenses according to their perceived seriousness, both within and across levels of legislative severity. Questions challenging the equity of decision making must surface where the sentencing system is so broadly constructed and rife with discretion.

In order to assess the extent to which sentencing disparity exists in Wyoming, Table 6 presents the average sentences imposed by severity rank for each of Wyoming's nine judicial districts.

**Table 6**  
**Average Sentences Imposed**  
**by Judicial District**  
**Within Offense Severity Ranks<sup>176</sup>**

|                          | Dist A | Dist B | Dist C | Dist D | Dist E | Dist F | Dist G | Dist H | Dist I | State-wide |
|--------------------------|--------|--------|--------|--------|--------|--------|--------|--------|--------|------------|
| <b>Severity Rank 1</b>   |        |        |        |        |        |        |        |        |        |            |
| Average Minimum          | 16.3   | 12.0   | 12.0   |        | 16.0   |        |        |        |        | 14.8       |
| Average Maximum          | 24.0   | 24.0   | 18.0   |        | 24.0   |        |        |        |        | 23.0       |
| Number of Cases          | 3      | 1      | 1      |        | 1      |        |        |        |        | 6          |
| <b>Severity Rank 1.5</b> |        |        |        |        |        |        |        |        |        |            |
| Average Minimum          | 12.0   | 26.5   | 13.0   | 16.5   | 36.0   | 24.0   | 18.0   | 12.0   | 18.0   | 17.7       |
| Average Maximum          | 12.0   | 36.0   | 28.0   | 24.3   | 36.0   | 36.0   | 36.0   | 36.0   | 36.0   | 29.8       |
| Number of Cases          | 1      | 2      | 6      | 4      | 1      | 1      | 1      | 1      | 2      | 19         |
| <b>Severity Rank 2.5</b> |        |        |        |        |        |        |        |        |        |            |
| Average Minimum          | 15.0   | 22.0   | 26.9   | 15.9   | 42.0   | 27.4   | 13.5   | 19.7   | 30.0   | 23.6       |
| Average Maximum          | 36.0   | 44.0   | 45.6   | 36.1   | 81.0   | 53.3   | 38.0   | 54.0   | 51.0   | 48.1       |
| Number of Cases          | 4      | 9      | 10     | 14     | 6      | 9      | 2      | 7      | 4      | 65         |
| <b>Severity Rank 5</b>   |        |        |        |        |        |        |        |        |        |            |
| Average Minimum          | 25.6   | 28.9   | 27.5   | 27.1   | 22.3   | 33.8   | 29.1   | 27.1   | 27.1   | 27.4       |
| Average Maximum          | 66.3   | 55.4   | 49.3   | 47.2   | 48.5   | 61.1   | 60.3   | 64.7   | 53.6   | 55.8       |
| Number of Cases          | 38     | 54     | 43     | 23     | 52     | 36     | 24     | 38     | 21     | 319        |

176. The average minimum and maximum sentences imposed are presented in months. Judicial Districts A through I are labels randomly assigned to Wyoming Judicial Districts 1 through 9. For a discussion of the Severity Rank, see *supra* note 158.

|                           | Dist A | Dist B | Dist C | Dist D | Dist E | Dist F | Dist G | Dist H | Dist I | State-wide |
|---------------------------|--------|--------|--------|--------|--------|--------|--------|--------|--------|------------|
| <b>Severity Rank 7</b>    |        |        |        |        |        |        |        |        |        |            |
| Average Minimum           | 21.7   | 36.2   | 33.5   | 28.6   | 26.1   | 37.4   | 35.8   | 31.5   | 40.0   | 32.7       |
| Average Maximum           | 61.3   | 66.6   | 58.6   | 50.2   | 57.2   | 73.2   | 69.6   | 76.7   | 67.3   | 64.7       |
| Number of Cases           | 72     | 49     | 121    | 29     | 55     | 102    | 47     | 43     | 57     | 575        |
| <b>Severity Rank 10</b>   |        |        |        |        |        |        |        |        |        |            |
| Average Minimum           | 39.0   | 66.3   | 93.0   | 63.0   | 71.3   | 194.3  | 74.0   | 70.3   |        | 72.7       |
| Average Maximum           | 90.0   | 134.2  | 169.5  | 141.0  | 126.0  | 240.0  | 142.7  | 149.1  |        | 138.6      |
| Number of Cases           | 8      | 19     | 4      | 4      | 6      | 3      | 9      | 7      |        | 60         |
| <b>Severity Rank 10.5</b> |        |        |        |        |        |        |        |        |        |            |
| Average Minimum           |        | 36.0   | 24.0   |        | 20.0   |        | 14.0   | 12.0   |        | 18.2       |
| Average Maximum           |        | 48.0   | 36.0   |        | 48.0   |        | 28.5   | 36.0   |        | 37.6       |
| Number of Cases           |        | 1      | 1      |        | 3      |        | 2      | 2      |        | 11         |
| <b>Severity Rank 25</b>   |        |        |        |        |        |        |        |        |        |            |
| Average Minimum           | 77.7   | 143.1  | 71.5   | 76.8   | 81.2   | 120.0  | 98.4   | 125.1  | 113.0  | 97.4       |
| Average Maximum           | 153.5  | 216.9  | 209.7  | 162.0  | 125.5  | 214.8  | 164.0  | 250.3  | 195.0  | 187.8      |
| Number of Cases           | 20     | 13     | 23     | 10     | 13     | 10     | 15     | 14     | 12     | 130        |

While several of the severity ranks contain too few cases for accurate comparisons, ranks 5, 7 and 25 each contain a sufficient number of cases for review. For severity rank 5 the average minimum sentences imposed vary from 22.3 months for District E to 33.8 months for District F. Even larger variations are noted for the average maximum sentences, which range from 47.2 months in District D to 66.3 months in District A.

Similar and larger variations are noted for both levels 7 and 25. At rank 7, which includes offenses with a maximum penalty range of 14 years, average minimum sentences imposed range from 21.7 months for District A to 37.4 months for District F. Average maximum sentences at this level indicate a low of 50.2 months in District D and a high of 76.7 months in District H.

The range of sentences judicially imposed is even more apparent for severity rank 25, where average minimum sentences vary from 71.5 months for District C, to twice that, or 143.1 months in District B. Similarly, average maximum sentences observed range from a low of 125.5 months in District E, to nearly double that, or 250.3 months in District H.

While these data would seem to indicate that sentencing disparity in fact does exist in Wyoming, a host of other variables that are typically relied upon by sentencing judges have not yet been taken into account. For example, the number of prior felony convictions, the number of prior incarcerations, and the number of offenses involved in the conviction are factors that may account for some of the variation that has been observed among the judicial districts. A more sophisticated analysis would require that the effects of these factors be controlled for when looking at sentencing variation across districts.

A sophisticated and generally accepted statistical procedure, known as multiple regression, was utilized in an analysis of our sample to assess sentencing practices across judicial districts.<sup>177</sup> This procedure allows the researcher to address the question, "Does knowing the judicial district from which an offender was sentenced significantly increase our ability to predict the length of sentence the offender received?"

Because of the small number of cases in all severity ranks but 5 and 7, only those rankings were individually analyzed. With the exception of minimum sentences imposed for

177. Multiple regression is a statistical technique frequently used in the social sciences to measure relationships between variables and to predict one variable from the knowledge of several variables. See generally H. BLALOCK, JR., *SOCIAL STATISTICS*, 381-552 (rev. 2d ed. 1979); G. GLASS & J. STANLEY, *STATISTICAL METHODS IN EDUCATION AND PSYCHOLOGY* 133-94 (1970). For the purpose of analyzing sentencing variation across judicial districts, the minimum and maximum sentences judicially-imposed were treated as the dependent variables, i.e., they were the variables we wished to predict. The number of prior convictions, the number of prior incarcerations, and the number of offenses the offender was convicted of for his present incarceration were the independent variables from which the minimum and maximum sentences were predicted.

In assessing the impact of judicial decisionmaking on sentencing, and particularly when addressing the issue of sentencing disparity, it is also important to enter either the judge or the judicial district as an independent variable in the multiple regression equation. The coding of this variable, however, is nominal, meaning that the number assigned in the coding of the variable has no intrinsic value except to identify the decisionmaker. In order to correct this methodological problem, statistical techniques allow the creation of dummy variables to account for the specific judicial districts. See BLALOCK, *supra* at 534-38; N. NIE, C. HULL, J. JENKINS, K. STEINBRENNER, & D. BENT, *STATISTICAL PACKAGE FOR THE SOCIAL SCIENCES* 373-82 (2d ed. 1975).

The dummy variables which were created were D1 through D8, which correspond to judicial districts A through H. The coding of each of the dummy variables was dichotomous, equaling 1 or 0. If an individual were sentenced by a judge located in judicial district A, dummy variable D1 was coded to equal 1. If the offender was sentenced by a judge from some other district, dummy variable D1 was coded 0. Similarly, for those persons who were sentenced from district B, dummy variable D2 was coded 1. For all other people in the data set, D2 was coded 0. This is the process used in the coding of each of the dummy variables D1 through D8.

offenses at severity level 5, the data indicate that knowing the judicial district from which an offender was sentenced does indeed significantly increase one's ability to predict the sentence imposed. The data indicate that an offender's prior felony conviction record, his prior incarceration history, and the number of offenses involved on the conviction account for between 11.5 percent and 26.5 percent of the variation in sentences imposed by district judges.<sup>178</sup> When we add the knowledge of

178. The tables below present the result of four separate multiple regression analyses.

Table F

**SEVERITY RANK 7**  
**DEPENDENT VARIABLE = MINIMUM SENTENCE**

| Independent Variable           | Simple r | Multiple r | R Square | R Square Change | Significance of R Square Change |
|--------------------------------|----------|------------|----------|-----------------|---------------------------------|
| V3 No. of Convictions          | .26260   | .26260     | .06896   |                 |                                 |
| V4 No. of Incarcerations       | .31670   | .31670     | .10030   | .03134          | p < .001                        |
| V8 No. Offenses of Conviction  | .08235   | .34001     | .11561   | .15131          | p < .01                         |
| D1-D8 Dummy Judicial Districts |          | .37551     | .14101   | .02540          | p < .01                         |

**SEVERITY RANK 7**  
**DEPENDENT VARIABLE = MAXIMUM SENTENCE**

| Independent Variable           | Simple r | Multiple r | R Square | R Square Change | Significance of R Square Change |
|--------------------------------|----------|------------|----------|-----------------|---------------------------------|
| V3 No. of Convictions          | .31129   | .31129     | .09690   |                 |                                 |
| V4 No. of Incarcerations       | .36896   | .37898     | .14363   | .04673          | p < .001                        |
| V8 No. Offenses of Conviction  | .02154   | .38533     | .14848   | .00485          | N.S.                            |
| D1-D8 Dummy Judicial Districts |          | .43057     | .18539   | .03691          | p < .01                         |

**SEVERITY RANK 5**  
**DEPENDENT VARIABLE = MINIMUM SENTENCE**

| Independent Variable           | Simple r | Multiple r | R Square | R Square Change | Significance of R Square Change |
|--------------------------------|----------|------------|----------|-----------------|---------------------------------|
| V3 No. of Convictions          | .30068   | .30068     | .09041   |                 |                                 |
| V4 No. of Incarcerations       | .32808   | .32927     | .10842   | .01801          | p < .05                         |
| V8 No. Offenses of Conviction  | .41038   | .51524     | .26547   | .15705          | p < .001                        |
| D1-D8 Dummy Judicial Districts |          | .53507     | .28630   | .02083          | N.S.                            |

**SEVERITY RANK 5**  
**DEPENDENT VARIABLE = MINIMUM SENTENCE**

| Independent Variable           | Simple r | Multiple r | R Square | R Square Change | Significance of R Square Change |
|--------------------------------|----------|------------|----------|-----------------|---------------------------------|
| V3 No. of Convictions          | .35692   | .35692     | .12739   |                 |                                 |
| V4 No. of Incarcerations       | .40808   | .40808     | .16653   | .03914          | p < .001                        |
| V8 No. Offenses of Conviction  | .33249   | .51517     | .26540   | .09887          | p < .001                        |
| D1-D8 Dummy Judicial Districts |          | .55970     | .31326   | .05786          | p < .01                         |

The "Simple R" is a measure of the simple correlation between the dependent variable and each of the independent variables. The correlation coefficient varies from -1.00 to 0 to +1.00. This statistic measures the strength and direction of a relationship. Where the statistic equals 0, or very close to it, one may conclude that the two variables being measured are unrelated, i.e., each operates independently of the other. As the value of the coefficient approaches 1.00 (either positive or negative) the conclusion may be drawn that the variables under study are strongly related. Where the value of the coefficient is positive, this indicates that as the value of one variable (X) increases, so does the value of the other variable (Y). A negative correlation would indicate that as the value of one variable (X) increases, the value of the other variable (Y) decreases.

"Multiple R," in the above table, is the same statistic calculated to assess the aggregate relationship between a dependent variable and several independent variables. "R Square" is simply the square of the multiple r value. The "R Square" value may be interpreted as the proportion of variance in the dependent variable which is explained by knowledge of the independent variables. For example, in the above table, for severity rank 7 with the minimum sentence as the dependent variable, "R Square" is equal to .06896 when the variable "No. of Convictions" is entered into the equation. This value indicates that knowing the number of convictions an offender has, when the offender has been convicted of an offense of severity rank 7, would explain nearly 7% of the variation in the minimum sentence imposed (precisely, it would explain 6.896%). When we know both the number of prior convictions and incarcerations an offender has, we can explain a total of 10% (10.030) of the variation in minimum sentences.

which judicial district the offender was sentenced in, we can explain an additional amount of variation in sentences imposed, ranging from 2.1 percent to 5.8 percent.

While knowledge of the judicial district an offender was sentenced in explains a statistically significant amount of sentencing variation, it is important to note that the magnitude of variation is not extraordinarily large. What this means is that, while the district makes a statistically significant difference in the sentences meted out to offenders, the differences do not appear to be exceedingly broad.

Nevertheless, the presence of sentencing disparity must be a concern to all who value equity in the treatment of offenders. That the sentence an offender receives will be determined in part by the judicial district in which he is sentenced is an indication of our failure to construct a just and equitable system of criminal punishment.

### RECOMMENDATIONS

The data presented in this paper indicate that sentencing disparity does exist in Wyoming.<sup>179</sup> While reasonable controls were utilized in the analysis, further research is needed to take into consideration factors not included in this study. The severity of injury in person-to-person crimes and the dollar amount of property loss or damage in property crimes are two variables not included in this research that may have a substantial impact on sentencing decisions. Similarly, the defendant's plea and the relationship between the victim and the offender may play important roles in explaining variation in the sentences imposed.<sup>180</sup>

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The "R Square Change" value allows us to examine the contribution of a subset of variables to the total amount of variation explained. This is the substance of the statistical test which indicates that knowledge of judicial district significantly increases the amount of variation explained in sentences imposed. The "R Square Change" value for the same example above indicates that knowledge of the offender's prior incarceration history explains an additional 3.134% of the variation in the minimum sentence imposed, above and beyond the 6.896% explained by knowing the number of prior felony convictions.

The "Significance of R Square Change" indicates whether the "R Square Change" increase for knowledge of a particular variable is statistically significant. The notation "N.S." indicates that knowledge of the applicable variable does not significantly contribute to the total amount of variation explained in the sentences imposed.

179. For a similar view on sentencing in Wyoming, see generally Morgan, *supra* note 15, at 534-38.

180. Britt and Larnitz, *The Effects of Plea Bargaining on the Disposition of Person and Property Crimes: A Research Note*, in INDICATORS OF CRIME AND CRIMINAL JUSTICE: QUAN-

The findings that indicate that there is unexplained variation in sentencing practices between judicial districts throughout Wyoming portend inequitable treatment of offenders. While some have argued that district court judges should reflect community standards in sentencing,<sup>181</sup> significant questions must surface where the length of sentence an individual receives is based on the geographic location of the sentencing court.

That sentencing disparity exists in Wyoming testifies to the need for broad-based criminal justice reforms. As has been observed, sentencing is not simply the lonely and awesome responsibility of the district court judge. It is, instead, a process in which the responsibility is shared with the legislature, the Governor, prison officials, and the Boards of Parole and Charities and Reform. Any attempt at reform must recognize the interplay between these agencies and actors.

Before any substantive reforms can responsibly take place, however, a point of reference—a statement of the principles which will guide the system of criminal punishment—is required. Such a statement will lend coherence both to reform efforts and to the daily operation of the penal system.

*RECOMMENDATION 1: The legislature should enact a comprehensive statement articulating the goals and objectives of our penal system.*

Wyoming statutes presently offer little guidance to the sentencing judge in selecting a proper sanction for the convicted adult felon. It is imperative that the legislature provide a comprehensive and articulate statement of a philosophical framework to guide and direct the exercise of the state's punitive powers. The lack of adequate guidelines substantially increases the complexity of the task facing the sentencing

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titative Studies 70-73 (S. Fienberg & A. Reiss, Jr. eds. 1980); U.S. DEP'T OF JUSTICE, L. SUTTON, PREDICTING SENTENCES IN FEDERAL COURTS: THE FEASIBILITY OF A NATIONAL SENTENCING POLICY, ANALYTIC REP. 19 (1978). See generally sources cited *supra* note 15.

181. *Meeting of the Criminal Code Subcomm., Joint Judiciary Interim Comm., Wyoming State Legislature* (Aug. 1, 1980) (comments of Wyoming State Sen. David R. Nicholas). *But see* HOGARTH, *supra* note 15, at 200, whose findings indicate that magistrates selectively perceive public opinion in ways which maximize consistency with their own beliefs: "[N]on-punitive magistrates tend to view the social influences in their environment as being supportive of a non-punitive sentencing policy. The reverse is true for punitive magistrates, and this held true for each area examined."

judge and cultivates fertile soil for the seeds of sentencing disparity.

The current sentencing statutes in Wyoming vest broad discretionary authority in the district court judges, without substantial guidance or review from either the legislature or the Wyoming Supreme Court. A system which is charged with such consequential decisionmaking power, yet burdened with so little formal structure, produces inequitable treatment almost by design.

Wyoming can take one of several paths charted in recent years across the landscape of sentencing reform. Essentially, those reform efforts can be distilled into two distinct approaches. Under the first approach, the legislature undertakes to rewrite the penalties authorized for each offense defined by state statute. This is the basic approach taken by California, Maine, Indiana, Illinois, and Colorado, although the actual sentencing provisions vary substantially from state to state.<sup>182</sup>

The other approach to sentencing reform was taken by Minnesota. In that approach, large-scale legislative reform of the statutory sentencing provisions was not required. Minnesota opted for sentencing guidelines which can be added to most current sentencing systems with little legislative modification. The legislature need only appoint a sentencing commission with responsibility for formulating guidelines that take into consideration the current practices and experiences of trial judges and mandate that district court judges utilize the guidelines thus produced.<sup>183</sup>

In comparing the wisdom of the two approaches, several factors should be weighed. The first approach requires an exhaustive review of current statutes and a legislative package detailing the new sentencing provisions that will attach to each and every offense defined by the criminal code. Such a process is, of course, subject to all of the convulsions of the legislative process. As one commentator has observed:

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182. See *supra* text accompanying notes 60-108.

183. See *supra* text accompanying notes 109-119.

Once a determinate sentencing bill is before a legislative body, it takes only an eraser and pencil to make a one-year "presumptive sentence" into a six-year sentence for the same offense. The delicate scheme of priorities in any well-conceived sentencing proposal can be torpedoed by amendment with ease and political appeal.<sup>184</sup>

The sentencing guidelines approach offers substantive reform without the necessity of large-scale legislative revision. It also draws trial court judges, who will have the continuing responsibility of sentencing the convicted adult felon, into the process. In addition, the legislature may require in the enabling legislation that the guidelines specifically consider current sentencing practices and correctional resources, thereby forestalling a disastrous explosion in prison population.

*RECOMMENDATION 2: The legislature should create a Sentencing Guidelines Commission to construct sentencing guidelines and mandate that district court judges utilize the guidelines constructed by the Commission in sentencing the convicted adult felon.*

Sentencing guidelines<sup>185</sup> would operate to assist the trial judge in selecting a proper sentence for the convicted felon. The guidelines would recommend a sentence or range within which the judge may sentence, taking into consideration the severity of the offense and the seriousness of the offender's prior criminal record. The sentences recommended by the guidelines should be based on several factors: 1) current sentencing practices of the district courts; 2) current correctional practices as they pertain to the actual amount of time served in prison; 3) current institutional populations and resources; and 4) substantive input by the legislature, judges, and the public at large regarding the proper framework for criminal sentencing.

The recommended sentences would be advisory in nature. Trial judges would retain discretion to sentence outside of the guideline ranges where exceptional factors exist. The sentenc-

184. F. ZIMRING, *Making the Punishment Fit the Crime*, HASTINGS CENTER REPORT 17 (Dec. 1976).

185. See generally, e.g., REPORT TO THE LEGISLATURE, *supra* note 114.

ing judge would be required to provide a written explanation of his reasons for sentencing outside the guidelines so that the commission could identify changing standards and weaknesses in the guidelines. The commission would have no power to challenge a particular sentence or to sanction the sentencing judge.

*RECOMMENDATION 3: The legislature should enact legislation that mandates the quarterly vesting of earned good time credits.*

Equitable decision making in criminal sanctioning must take into consideration correctional practices that affect the length of sentence actually served, as well as the sentencing decision itself. Good time presently operates to reduce only the maximum judicially imposed sentence and does not reduce the amount of time to be served below the minimum sentence.<sup>186</sup> Any or all of the good time an inmate has earned may be revoked for the violation of prison rules and regulations.<sup>187</sup>

The system, as presently constituted, provides the correctional official and parole board a varying range of institutional sanctioning power. Inmates whose sentence is one in which the minimum is very close in length to the maximum sentence (e.g., a 19-to-20 year sentence for involuntary manslaughter), can earn little good time and the correctional official must rely on other measures for institutional discipline. At the other extreme, for inmates who receive a relatively short minimum sentence and a lengthy maximum sentence (e.g., a 5-to-50 year sentence for armed robbery), the prison official and parole board retain a power to punish institutional infractions tantamount to that of the sentencing judge.

The proposal for vesting of earned good time would restrict the amount of good time which the parole board could revoke to that time which the inmate has earned during the

186. See *supra* text accompanying notes 124-139.

187. Neither the rules of the parole board nor the rules of the State Penitentiary place any limit on the amount of good time that may be withheld or revoked from an inmate for violation of the institutional rules. The *Wyoming State Penitentiary Inmate Rules Handbook*, however, lists loss of good time as a possible sanction for only class I and class II offenses. WYOMING INMATE RULES HANDBOOK, *supra* note 137, at 130.

last quarter.<sup>188</sup> In addition, the board would be allowed to place the errant inmate in a "time-out" or non-earning status for a specified period of time during which the inmate would be ineligible to earn any good time.

The practical effect of this recommendation would be that an inmate who serves three months in the institution would earn *X* amount of good time. Once the inmate completed serving the fourth month of confinement without violation, the good time that was earned during the first month would vest: it would not be subject to revocation. In this way, the board and the correctional official could revoke up to one quarter's accumulation of good time, but no more. They could also place the inmate in a "time-out" status for a prescribed period of time.

### CONCLUSION

Implementation of the reforms presented here would enhance the equity of criminal sentencing and punishment without unduly restricting the exercise of judicial discretion. Judges would still be able to sentence outside of the sentencing guidelines, though their discretion would largely be structured within the guidelines. Correctional authorities would retain the full range of disciplinary measures presently available to sanction institutional misbehavior.

Parole would continue to function, though its operation might necessitate revision depending upon the specific structure of the sentencing guidelines developed. For example, if the guidelines were structured to provide fixed-term sentencing by the district court judges, it might be necessary to remove discretionary release decisions from the parole board.<sup>189</sup> Similarly, should the guidelines retain the current

188. See Conrad, *The Law and its Promises: Flat Terms, Good Time, and Flexible Incarceration*, in DETERMINATE SENTENCING, *supra* note 63, at 109, for a compelling discussion of the need for allowing good time to vest.

189. The sentencing guidelines proposed here could operate either under a fixed-term sentencing system or the current indeterminate sentencing scheme. Should the decision be made that fixed-term sentencing replaces our current system, the guidelines could be structured very much along the lines of the Minnesota sentencing guidelines. Discretionary parole release under a fixed-term sentencing scheme, however, appears cumbersome. Where the prison term pronounced by the sentencing judge is fixed in length, the discretionary nature of the parole release decision becomes obsolete—all offenders will be released upon service of their fixed-term sentence, minus any earned good time. In the event fixed-term sentencing is preferred, the state may wish to enact a mandatory parole release period which must be served by all prison inmates upon release from confinement.

indeterminate sentencing structure, the legislature might wish to consider the option of allowing good time credits to accrue toward the minimum sentence for the limited purpose of accelerating parole release eligibility.<sup>190</sup> In this manner, virtually all inmates would earn good time credits; mandatory release would continue to be governed by good time reductions from the maximum sentence only; and inmates would see the direct influence of their institutional behavior on their release options.

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190. Should the legislature choose to enact sentencing guidelines which retain the present indeterminate sentencing structure, it might also consider the option of allowing good time to accrue toward the minimum sentence for the limited purpose of accelerating parole release eligibility. Under such a system, all inmates, except those serving life sentences for which no definite term of years can be assumed, would earn good time reductions to their sentences. Good time would accrue to the maximum sentence, as it presently does, to accelerate mandatory discharge. Good time would also accrue toward the minimum sentence to accelerate parole eligibility. The inmate would not be automatically released, but the Board of Parole would have parole discharge as an option once the minimum sentence, minus earned good time, had been served.