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Foreword

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FOREWORD

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Perhaps I have been asked to contribute a foreword to the Law Journal Symposium Issue on Sentencing because in my ten years as a public defender in Cook County virtually all my clients ended up being sentenced for something. One might assume that out of all of that experience a coherent picture of sentencing goals and standards might emerge. It does not.

I am not able to make rhyme or reason out of the crazy quilt pattern of sentences imposed over the years upon my clients or upon my colleague's clients. Nor do I feel the fault lies solely with the trial judges. Many of the sentences they imposed seemed rational. What is worrisome is that they did not all seem rational. Some seemed to reflect racial bias, while others seemed to manifest the judge's intention to control his court call.

The lack of uniformity in sentencing as I experienced it in the courts of Cook County, Illinois may be attributed to two sources. First, a fundamental ambivalence about the goals of sentencing pervades the criminal justice system. A tension exists between two stated ends: the desire stated in the Illinois Constitution, article I, section II that "[a]ll penalties shall be determined both according to the seriousness of the offenses and with the objective of restoring the offender to useful citizenship," and the desire to achieve uniformity and predictability in sentencing in order to enhance the deterrent effect of sentences.

Second, although Illinois adopted a harsher penalty structure with the Class X legislation of 1978,[1] there has been no advance in uniformity because of the continuing pervasiveness of plea bargaining.

Class X legislation is a recent episode in the history of Illinois legislative attempts to resolve the fundamental philosophical questions of sentencing: Who should sentence? The judge, legislature,

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1. 1980 Ill. Laws 1099.

or some other person or agency? What is the goal of a criminal sentence? To punish the offender or to rehabilitate him? Through Class X legislation we have given ourselves over to harsher penalties, but have not made our sentencing process at the state level more coherent or effective in terms of deterrence.

An examination of the confusion of sentencing goals entails, first, a glimpse at the nature of these basic questions, and then a view of the emergence of Class X legislation itself. I shall analyze next the way in which this legislation has achieved harsher penalties but has not at the same time provided for sentence uniformity. Finally, I will argue that plea bargaining is the most significant impediment to true sentencing uniformity.

The basic philosophical questions of sentencing are interlocking. They have been answered historically by adoption of either the rehabilitative model of sentencing or the retributive model.[2] Curiously, the rehabilitative model, the concept that the purpose of a sentence is to reform the offender, has its roots in the idea of imprisonment. Although prison today is perceived rightly as a "school for scoundrels" at best, in its origins as a penal tool it was seen as a substitute for the brutalities of corporal punishment.[3] Imprisonment was designed to afford the inmate the opportunity to reform. Programs were made available to the inmate to assist him in transforming himself into a law abiding citizen.

With imprisonment viewed as the humane means toward reformation, it became obvious that the crucial decision in the sentencing process was made at the time of release from incarceration. It is at this time that the judgment is made whether an inmate has been rehabilitated. The procedure that placed the critical question at the time of release, however, also shifted principal sentencing responsibility to the prison or parole agencies which decided release dates. As a consequence, the roles of the legislature and the judge were reduced. The indeterminate sentence, a sentence to a broad range of years, became the mechanism by which the rehabilitative model operated. Under an indeterminate system, the legislature set a broad range of possible penalties, for example, one year to twenty years. The judge then imposed a sentence within that range. The sentence was stated by the judge as a minimum term of years and a maximum term of years, such as six to twenty years.

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2. TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT 83-93 (1976).

3. N. MORRIS, THE FUTURE OF IMPRISONMENT 1-9 (1974).

The inmate's actual release was determined by the parole or prison agency based upon its assessment of a congeries of factors. Principal among the factors was the performance of the inmate while in custody.

In the past ten years, however, support for the rehabilitative model has ebbed in the face of persistently high crime rates. Retribution, or simple punishment, has come to be viewed as the most effective answer to crime. The argument for the retributive model is based upon the painfully obvious perception that prisons do not reform, but instead ingrain criminal tendencies. Penologists have come to believe that no transformation of an inmate is possible unless voluntarily undertaken. Tying release to rehabilitation merely robs the attempted transformation of its essential ingredient: a commitment to change freely given.[4]

The change to the retributive model has been effected by changing the nature of the sentence. In place of an indeterminate sentence, sentences to a fixed or determinate period have been adopted, enhancing the deterrent effect of sentences by making their duration certain.

There is room in the retributive model for the notion of rehabilitation, but rehabilitation plays no role in the release decision. Under the retributive view, if the inmate wants to rehabilitate himself, he is free to attempt the transformation. Programs for reform will continue, but participation in them is not a condition of release. The release date is fixed and the inmate can neither accelerate nor defer it. Any attempt at transformation will be voluntary, unconditional and, therefore, more likely of success.[5]

In Illinois, the manifestation of the change from the rehabilitative to the retributive model of sentencing occurred through the adoption on February 1, 1978 of various sentencing provisions referred to as Class X.[6] Class X was a Joshua's trumpet call, demolishing the walls of the rehabilitative model. The legislation provided for determinate sentencing,[7] created a Class X, or more serious category of felonies,[8] transformed the charge of armed violence into a vehicle for imposing more severe sentences in virtually any felony,[9] expanded the scope of enhanced penalties by provid-

4. *Id.* at 17.
5. *Id.*
6. *See supra* note 1.
7. ILL. REV. STAT. ch. 38, ¶ 1005-8-1 (1981).
8. ILL. REV. STAT. ch. 38, ¶ 1005-5-1 (1981).
9. ILL. REV. STAT. ch. 38, ¶ 33-A (1981).

ing for extended terms[10] and for natural life for certain crimes,[11] and, most symbolically, abolished parole.[12]

Class X was an expression of popular frustration with "soft judges" and "criminals' rights." Yet, although it has dramatically altered the philosophy of sentencing in Illinois, it has not diminished the problems faced by individual judges imposing sentences. A review of recent case law reveals two conclusions. First, the Illinois appellate courts have placed their imprimatur upon Class X and particularly upon its various provisions for enhanced penalties. Second, in spite of harsher penalties and more "deterrence," Class X provides no greater basis for achieving sentencing uniformity than did its predecessor.

Various penalty enhancers form the nucleus of the Class X legislation. Excluding the death penalty, there are four significant provisions for, or crimes prompting, enhanced penalties: extended terms, natural life for certain murders, natural life for an habitual criminal, and armed violence.

An extended term of up to twice the normal maximum number of years may be imposed when the court finds that the offense committed "was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty" or when a defendant "is convicted of any felony after having been previously convicted in Illinois of the same or greater class felony, within 10 years. . . ."[13] The extended term provision has withstood constitutional attacks for vagueness and for denial of equal protection.[14]

But Illinois courts have gone beyond merely upholding the extended term legislation. They have also sanctioned attempts to impose extended terms in an expansive manner. These terms have been upheld, for example, when imposed upon an accomplice who has performed no heinous or brutal act herself because, in the court's view, the nature of the offense was more important than the degree of the offender's participation.[15] Moreover, extended terms have been upheld where the offender caused no serious

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10. ILL. REV. STAT. ch. 38, ¶¶ 1005-8-2, 1005-5-3.2 (1981).
11. ILL. REV. STAT. ch. 38, ¶¶ 1005-8-1(a)(1), 33-B (1981).
12. ILL. REV. STAT. ch. 38, ¶ 1005-8-1(d) (1981).
13. *See supra* note 10.
14. People v. Devine, 98 Ill. App. 3d 914, 424 N.E.2d 823 (1981); People v. Turner, 93 Ill. App. 3d 61, 416 N.E.2d 1149 (1981); People v. Hairston, 86 Ill. App. 3d 295, 408 N.E.2d 382 (1980); People v. Peddicord, 85 Ill. App. 3d 414, 407 N.E.2d 89 (1980); People v. Mays, 80 Ill. App. 3d 340, 399 N.E.2d 718 (1980).
15. People v. Gray, 87 Ill. App. 3d 142, 408 N.E.2d 1150 (1980).

physical harm, but clearly terrorized and psychologically traumatized the victim.[16]

Some limitations upon the use of the extended term have been erected. Double enhancement, for example, is forbidden. Where a minor charge is enhanced to a felony because of a prior felony conviction, the same prior conviction cannot be used as a basis for imposing an extended term.[17] In addition, extended terms may be imposed only for the offense of the most serious class of crime charged.[18]

Natural life is a possible sentence in two categories: certain murders,[19] and in those cases where a defendant is adjudged an habitual criminal.[20] Natural life is a permissible penalty upon conviction of murder where the court finds present any of the aggravating factors enumerated in the death penalty statute,[21] such as multiple murder, murder of a peace officer, murder in the course of certain felonies, or where the court finds that the murder was accompanied by exceptionally brutal or heinous conduct indicative of wanton cruetly.[22] By virtue of a legislative change effective July 1, 1980, the court *must* impose natural life if the defendant has previously been convicted of murder under any state or federal law, or is found guilty of murdering more than one victim.[23]

Further Illinois legislative change effective two days later, July 3, 1980, made the natural life penalty for the habitual criminal a real possibility.[24] Where a person "has been twice convicted in any state or federal court of an offense that contains the same elements as an offense now classified in Illinois as a Class X felony or murder," and such person is "convicted of a Class X felony or murder," he shall be sentenced to life imprisonment as an habitual criminal.[25] The law prior to this amendment required that all the offenses occur within Illinois and that they occur after February 1, 1978.[26] With these limitations removed and given high recidivism

16. People v. Clark, 102 Ill. App. 3d 414, 429 N.E.2d 1255 (1981).
17. People v. Hobbs, 86 Ill. 2d 242, 427 N.E.2d 558 (1981).
18. People v. Evans, 87 Ill. 2d 77, 429 N.E.2d 529 (1980); People v. Walsh, 101 Ill. App. 3d 1146, 428 N.E.2d 937, *reh'g denied*, 101 Ill. App. 3d 1149, 428 N.E.2d 940 (1981).
19. *See supra* note 11.
20. *Id.*
21. ILL. REV. STAT. ch. 38, ¶ 9-1(b) (1981).
22. *See supra* note 11.
23. ILL. REV. STAT. ch. 38, ¶ 1005-8-1(c) (1981).
24. ILL. REV. STAT. ch. 38, ¶ 33B (1981).
25. ILL. REV. STAT. ch. 38, ¶ 33B-1(a) (1981).
26. ILL. REV. STAT. ch. 38, ¶ 33B-1(a), (c) (1981) (amended by 1981 Ill. Laws 1270).

rates, the Illinois Habitual Criminal Act[27] has become a viable penalty enhancer. There is some hedge upon the prosecutorial use of this device, however, through the requirement of a formal petition and hearing as to the existence of the prior convictions.[28] But, if these criteria are met, natural life is a mandatory sentence under the Act.[29]

The armed violence statute in Illinois is a penalty-enhancing provision similar to the extended term.[30] Simply stated, if a person commits a felony while armed with a dangerous weapon he commits armed violence. If the dangerous weapon is a gun, a knife with a blade at least three inches long, or certain other dangerous weapons, the armed violence offense is a Class X felony punishable by a determinate period from six years to thirty years.[31]

As in their treatment of extended terms, Illinois courts have accorded wide latitude to use of the armed violence charge. The Illinois Supreme Court has upheld the statute against vagueness attacks.[32] In addition, the court upheld an armed violence conviction where the evidence showed that the defendant possessed a weapon while delivering a controlled substance.[33] The weapon was not used in any manner to facilitate the offense; it was merely on the defendant's person. Nevertheless, the conviction was affirmed on the ground that the Illinois statute, unlike that of some other states, is clearly designed to punish the mere possession of the weapon. Use of the weapon is not required for an armed violence conviction.[34]

There are limitations, however, upon the use of an armed violence charge as a penalty enhancer. As with extended terms, there can be no "double enhancement." If the presence of a weapon has raised the grade of the offense, such as transforming battery into aggravated battery, the same weapon cannot serve as a basis for an armed violence charge.[35] Further, a judgment of conviction may be entered only upon the more serious offense, either the armed violence or the underlying predicate felony. There cannot be multiple

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27. *See supra* note 24.
28. ILL. REV. STAT. ch. 38, ¶ 33B-2 (1981).
29. ILL. REV. STAT. ch. 38, ¶ 33B-1(c) (1981).
30. *See supra* note 9.
31. ILL. REV. STAT. ch. 38, ¶ 33A-3 (1981).
32. People v. Haron, 85 Ill. 2d 261, 422 N.E.2d 627 (1981).
33. *Id.*
34. *Id.* at 265-70, 422 N.E.2d at 628-31.
35. People v. Van Winkle, 88 Ill. 2d 220, 430 N.E.2d 987 (1981); People v. Haron, 85 Ill. 2d 261, 422 N.E.2d 627 (1981).

judgments.[36]

These changes have all fostered harsher penalties. In addition, the changes have once again shifted the focus of sentencing accountability, this time from the parole or prison agency to the legislature, and to a lesser extent to the judge, since he retains discretion to sentence within a given range of years. Although Class X appears to have made for harsher justice, and for more direct sentencing accountability in the elected representatives of the people, the problems of sentencing uniformity have not been mitigated. An examination of cases dealing with sentencing guidelines and with cases involving sentence disparity is instructive.

There is no better place to start than with *People v. Joseph*.[37] The trial judge in *Joseph* is one of the most experienced and respected judges in the criminal division of the Circuit Court of Cook County, Illinois. He is known for the courage of his rulings and the creativeness of his sentences. Upon Joseph's conviction for manslaughter, the judge coupled a sentence of thirty months probation with a seven-year term of imprisonment. In addition, he ordered Joseph to serve one day a year while in custody *in solitary confinement on bread and water*. The appellate court vacated the bread and water mandate, finding that the judge had exceeded his authority in ordering this unusual punishment.

It is true that in an era where death is an acceptable punishment, solitary confinement on bread and water for one day a year does not seem overly harsh. Yet the judge's order, because of its anachronistic ring, aptly symbolizes a continuing problem in criminal sentencing.

In the area of sentencing factors, *People v. La Pointe*[38] provides an apt focus. Young La Pointe, age seventeen, killed a cab driver in the course of an armed robbery. The trial court imposed a term of natural life upon the defendant, emphasizing the "heinous nature of this crime, its brutality, its [sic] a cold, calculating, cold-blooded act which is indicative of wanton cruelty."[39] The appellate court reduced the natural life sentence to a term of sixty years, suggesting that only rarely should natural life be imposed and also suggesting that the trial court must find that a defendant is be-

36. People v. Donaldson, 91 Ill. 2d 164, 435 N.E.2d 477 (1982); People *ex rel.* Carey v. Scotillo, 84 Ill. 2d 170, 417 N.E.2d 1356 (1981).

37. 105 Ill. App. 3d 568, 434 N.E.2d 453 (1982).

38. 88 Ill. 2d 482, 431 N.E.2d 344 (1982).

39. *Id.* at 491, 431 N.E.2d at 348.

yond all hope of rehabilitation before a life term can be imposed.[40]

The Illinois Supreme Court reversed the appellate court and affirmed the natural life sentence, carefully listing the factors that the trial judge had relied upon: "statutory factors in mitigation and aggravation, the presentence investigation, the credibility and demeanor of the witnesses, the defendant's premeditation and deliberation and the total absence of remorse on his part."[41]

Although La Pointe argued that his punishment should have been mitigated because at the time of the murder he was under extreme mental or emotional disturbance from using LSD, he did not stand before the court as a sympathetic figure.[42] While awaiting trial, he had walked about the DuPage County Jail wearing a t-shirt bearing the words "Elmhurst Executioner."[43]

Also, in determining La Pointe's sentence, the trial court considered the testimony of one Joseph Ray that the defendant had solicited him to participate in a robbery and to smuggle hashish into the jail.[44] The appellate court found the trial court's reliance upon this evidence of uncharged conduct to be error. Previously, the appellate courts of the various circuits in Illinois had differed as to the admissibility of such evidence at a sentencing hearing.[45] Those which allowed it did so where witnesses had been called and subjected to cross-examination. Such accusations were thereby tested for their reliability.[46]

In *La Pointe*, the Illinois Supreme Court sought to resolve any doubt about the propriety of considering such evidence. The court noted that:

> In implementing the concept that punishment should fit the offender and not merely the crime, the Supreme Court has repeatedly affirmed the "fundamental sentencing principle" that "a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come" (citing cases).[47]

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40. People v. La Pointe, 85 Ill. App. 3d 215, 407 N.E.2d 196 (1980), *rev'd*, 88 Ill. 2d 482, 431 N.E.2d 344 (1982).

41. People v. La Pointe, 88 Ill. 2d at 493, 431 N.E.2d at 349.

42. *Id.* at 494, 431 N.E.2d at 349.

43. *Id.* at 488, 431 N.E.2d at 346.

44. *Id.* at 494, 431 N.E.2d at 349.

45. *See* People v. Meeks, 81 Ill. 2d 524, 411 N.E.2d 9 (1980) and cases cited therein; and People v. Crews, 38 Ill. 2d 331, 231 N.E.2d 451 (1967).

46. *See* People v. Poll, 81 Ill. 2d 286, 408 N.E.2d 212 (1980).

47. 88 Ill. 2d at 496, 431 N.E.2d at 350.

The court found that due process was not offended by such evidence because the principal considerations in allowing the evidence, relevance and reliability, were satisfied.[48] Specifically, the evidence was relevant to the question of whether the defendant was likely to commit other offenses, and it was reliable in that La Pointe had the opportunity to face and cross-examine the witnesses against him.[49]

La Pointe emphasizes that the punishment must fit the offender, not merely the crime. To implement this goal, the court allows trial judges free run in the fields of a defendant's history. They may consider any reliable and relevant information. From such open and searching inquiry is to come a just sentence in the individual case. Yet, this reliance on all forms of information—much of which may benefit the defendant—dramatically affects sentence uniformity throughout the system. Thus, although Class X creates certainty as to the period of time an individual inmate will serve, the vexing tension for trial judges between sentence uniqueness and sentence uniformity remains. *La Pointe* exemplifies this tension.

The cases dealing with sentencing disparity reveal as well that the Illinois change to harsher sentences has not accomplished a corresponding advance toward uniformity in sentencing. In fact, disparity in sentencing exists in two forms: first, in the disparate sentences meted out to co-defendants, and second, in the disparate sentences offered at plea bargaining and imposed after trial.

Disparity in sentences imposed upon co-defendants has not posed a great problem. The criteria used by one appellate court in determining such sentences are the degree of participation in the offense and the nature of the defendant's criminal history.[50] In the most recent supreme court case dealing with disparate sentences, the court upheld a twenty-four year sentence imposed on the defendant, where his brother and co-defendant had received a sentence of fifteen years.[51]

The acute problem in sentence disparity occurs in cases where a plea bargain is struck, then later withdrawn, and after trial the defendant receives a more severe sentence than that bargained for. It thus appears that the defendant has been punished for exercising his right to trial.

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48. *Id.* at 498, 431 N.E.2d at 351.
49. *Id.*
50. People v. Godinez, 91 Ill. 2d 47, 434 N.E.2d 1121 (1982).
51. *Id.*

In general, the appellate courts have sanctioned the imposition of harsher sentences, masking the trial court's apparent vindictiveness with such phrases as "upon trial [the court] was better able to evaluate those who came before it. . . ."[52] This comment appeared in a case where the trial judge increased the sentence two and one-half times over the sentence imposed on a guilty plea which had been withdrawn. In another case, a sentence of 200 to 600 years for rape and murder was upheld where, according to the defendant, he had been offered eighteen to fifty years.[53] *People v. Dennis*,[54] a pre-Class X case, is rare in that the appellate court overturned a sentence of forty to eighty years imposed after an offer of two to six years, solely on the ground of the disparity between the sentences. The court found that the disparity itself created a presumption that the defendant had been punished for exercising his right to trial.

The cases dealing with sentence disparity before and after trial point out the significant role plea bargaining plays in the lack of sentence uniformity. It is not my purpose here to decry plea bargaining. The practice has received the imprimatur of the United States Supreme Court, which observed "[w]hatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered they can benefit all concerned."[55]

Rather, I wish to emphasize that the lack of sentence uniformity is one price we pay for plea bargaining. When a judge imposes a bargained-for sentence, each side has given something up. Such surrender is forced by problems in proof or by the pressure to try other "more significant" cases. The sentence reflects these pressures and not, principally, the defendant's guilt or the potential deterrent effect of the sentence upon him or upon others.

Class X represents a long stride toward more effective deterrence, but it is ultimately a limited step, one based upon harsher penalties. There is more certainty in sentencing, but the certainty resides only in the inmate's perception of the length of time he will serve. Although this has a salutary effect upon him, there is no

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52. People v. Davis, 93 Ill. App. 3d 187, 416 N.E.2d 1179, 1185 (1981).

53. People v. Franklin, 80 Ill. App. 3d 128, 398 N.E.2d 1071 (1979).

54. 28 Ill. App. 3d 74, 328 N.E.2d 135 (1975).

55. Blackledge v. Allison, 431 U.S. 63, 71 (1977). *See also* Bordenkircher v. Hayes, 434 U.S. 357 (1978) (upholding the power of the prosecution to threaten filing a more serious during plea bargaining).

necessary overall certainty as to sentences within offense and offender categories. Plea bargaining remains the Achilles' heel of sentencing uniformity.

The articles assembled in this symposium issue are thus particularly timely for Illinois lawyers and judges because, although not all are concerned explicitly with Illinois law, they touch upon the significant sentencing questions, from the problems of sentencing factors and guidelines through plea bargaining, to the larger issues of the rehabilitative versus the retributive model. The articles provide valuable insight into the continuing evaluation of our experiment in harsher penalties and determinate sentences.