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DEFINITE SENTENCING IN NEW MEXICO: THE 1977 CRIMINAL SENTENCING ACT

In February, 1977, the New Mexico legislature enacted the Criminal Sentencing Act,¹ which will replace current sentencing laws² when it becomes effective on July 1, 1979.³ On that date, New Mexico will join the other states which have substituted definite sentencing for indefinite sentencing.⁴ The 1977 Act institutes definite sentencing through the abolition of the Parole Board's discretion to parole prisoners⁵ and the creation of a requirement that judges pronounce sentences of a specific number of years.⁶ The specific sentence is to be chosen from a range of sentences permitted under the Act.⁷

The current system, called "indefinite" or "indeterminate" sentencing, derives its name from the indefinite nature of the sentences pronounced. Under this system, the judge pronounces a sentence that is a range of years,⁸ and the Parole Board decides exactly when the prisoner will be released from prison.⁹ If he is released before the expiration of his maximum sentence, he is released conditionally, or on parole.¹⁰ No one is eligible for parole until he has served one

1. 1977 N.M. Laws, Ch. 216.

2. The following statutes are repealed: N.M. Stat. Ann. §§ 40A-29-1 to 3.1, 40A-29-5 to 11, 41-17-30, and 42-1-54 (being 1963 N.M. Laws, Ch. 303, §§ 29-1 through 29-3, and §§ 29-5 through 29-11, 1969 N.M. Laws, Ch. 273, § 1, 1955 N.M. Laws, Ch. 232, § 19, and 1889 N.M. Laws, Ch. 76, § 47; as amended).

3. 1977 N.M. Laws, Ch. 216, § 19.

4. A definite sentence has been defined as being one "fixed by the judge (or jury) at a term of years which may be less than (but not more than) the maximum provided by the statute for the particular crime." S. Rubin, *Law of Criminal Correction*, 157-158 (2nd Ed. 1973). There are many variations in definite and indefinite sentencing schemes. See, *Survey: The Range of Indeterminacy*, 3 *Corrections Magazine* 14 (Sept. 1977). Three states besides New Mexico have recently revised their criminal codes to make sentences definite. They are Maine (1976), California (1977), and Indiana (1977). Cole, *Will Definite Sentences Make a Difference?*, 61 *Judicature* 58, 59-60 n. 5 (1977). Articles discussing definite sentences include: May, *Officials Fear Long Flat Terms*, 3 *Corrections Magazine* 43 (Sept. 1977); Wilson, *Changing Criminal Sentences*, *Harper's* 16 (Nov. 1977). See also, *Symposium: Law and the Correctional Process in Washington*, 51 *Wash. L. Rev.* 491 (1976).

5. 1977 N.M. Laws, Ch. 216 § 12(C).

6. 1977 N.M. Laws, Ch. 216 § 4(C).

7. 1977 N.M. Laws, Ch. 216 § 4(A).

8. N.M. Stat. Ann. § 31-818-3 (1978), reprinted note 46 *infra*.

9. N.M. Stat. Ann. § 31-21-10 (1978).

10. *Id.*

third of his minimum sentence.¹¹ For example, robbery is classified by statute as a third degree felony,¹² and a person convicted of it must be sentenced, as are all third degree felons, to "two to ten years" in the penitentiary.¹³ If the judge does not suspend or defer the sentence,¹⁴ the offender will be incarcerated anywhere from eight months to ten years, depending on when the Parole Board decides to release him.¹⁵

This comment will discuss the intent of the authors of the 1977 Act and examine the changes to be effected through it, concentrating on the redistribution of discretion from the Parole Board to the judiciary. It will criticize the purposes of the Act and the means chosen to effectuate them. The objectives of the Act are seen to be inappropriate in light of the cost of implementing them and of available information on criminals and current sentencing in New Mexico. Even if the objectives should be desirable, they cannot be achieved, as envisioned by the authors of the Act, by harsher punishment alone. The broad discretion currently employed by prosecutors and prison authorities, and soon to be exercised by the judiciary as well, will result inevitably in disparate punishments for similar offenders. Such disparity will subvert the purposes of the Act. The comment concludes that the Act will not help reduce crime in New Mexico and suggests new directions in a definite sentencing act.

LEGISLATIVE HISTORY OF THE 1977 ACT

The 1977 Act was conceived in response to public pressure "to get tough on criminals."¹⁶ Its primary objective was to require lengthier periods of incarceration. The impetus for the Act came from the Criminal Justice Study Committee, which thought that sentencing, as administered under the present scheme, did not adequately protect society.¹⁷ In the spring of 1976, it held hearings and heard testi-

11. *Id.* Besides having completed one third of his minimum sentence, an inmate must have a clear conduct record for the six months prior to the parole hearing. Consequently, release before having served six months imprisonment is impossible.

12. N.M. Stat. Ann. § 30-16-2 (1978).

13. N.M. Stat. Ann. § 31-18-3(C) (1978), note 8 *supra*.

14. N.M. Stat. Ann. § 31-20-3 (1978).

15. Eight months is one third of the minimum sentence of two years. Hence, the offender would be eligible for parole at that time and could be released then at the discretion of the Parole Board. He could also be held, at their discretion, up to the maximum sentence of ten years.

16. Interview with John Anderson, drafter of the original bill, (Sept. 3, 1977).

17. Interview with Senator Joseph Mercer, formerly a Representative, and a sponsor of the bill, (Aug. 29, 1977).

Members of the Committee were: Sen. I. M. Smalley, Chairman, Rep. Thomas P. Foy, Vice Chairman, Sen. John Conway, Sen. Alexander G. Martinez, Sen. R. Wayne Radosevich, Rep. Thomas J. Horan, Rep. Fred Luna, Rep. Joseph Mercer, Rep. Louis J. Romero.

mony that the Parole Board's practice of paroling inmates meant that criminals were being released too early.¹⁸ At least one member of the committee felt that rehabilitation, the rationale justifying parole release, was not a viable goal of punishment.¹⁹ The committee may have been concerned as well over the disparate punishments resulting from indefinite sentences.²⁰

Consequently, the initial draft submitted by the committee mandated a single maximum sentence for each felony classification and abolition of the Parole Board.²¹ By the time that bill was finally enacted, however, the Parole Board had been reinstated, albeit stripped of most of its powers.²² Single sentences were replaced with a wide range of sentences within which a judge would pick a parti-

18. Alan Pope, an Albuquerque citizen, testified on July 23, 1976, that there were too many criminals walking the streets because of the leniency of judges and the Parole Board. Interview with John Gilles, former staff member for the Legislative Finance Council (Aug. 5, 1977). Former Warden Aaron also testified that the current law allows the Parole Board to release criminals too early. Transcript of the Criminal Justice Study Committee's interview with Warden Aaron, 6, 13, 15 (May 28, 1976) (no longer in existence).

19. "Rehabilitation does not work. If kept it will be to make custodial work easier—prisoners must be doing something." Interview with Sen. Joseph Mercer (Aug. 8, 1977).

20. Disparity has been a major criticism of indefinite sentencing elsewhere in the country. Model Sentencing Act, Introduction (2nd Ed. 1972). Sen. Edward Kennedy has written:

[s]entencing disparity is a national scandal. . . . [I]n 1974, a study by the Federal Judicial Center affirmed the existence of "glaring disparity" [in sentencing]. Fifty federal judges, most from the Second Circuit, were given twenty identical files drawn from actual cases and asked what sentence they would impose on each defendant. Disparity was found in almost all cases. In one extortion case the range of sentences varied from twenty years imprisonment and a \$65,000 fine to three years imprisonment and no fine!

Kennedy, *Criminal Sentencing: A Game of Chance*, 60 *Judicature* 208, 210 (1976). For evidence of disparate sentences, see Seymour, *1972 Sentencing Study for the Southern District of New York*, 45 N.Y.S.B.J. 163 (1973), Partridge and Eldridge, *The Second Circuit Sentencing Study* (1974). See also note 112 *infra*.

Another criticism of indefinite sentences is that they are a subtle form of psychological torture. J. Mitford, *Kind and Usual Punishment* 90 (1974). Indefinite sentencing forces a prisoner to endure the uncertainty of never knowing how long his imprisonment will last. For this reason, prisoners generally dislike indefinite sentencing. See generally, American Friends Service Committee, *Struggle for Justice*, 93, 94 (1971); M. Frankel, *Criminal Sentences*, 97 (1973). Indefinite sentences have been noted as one of the causes of violence and unrest in prisons. See generally, *The Official Report of the New York State Special Commission on Attica*, *Attica*, 93 (1972); D. Fogel, *We Are the Living Proof*, 295 (1975).

21. Discussion Draft No. 1, Legislative Criminal Justice Study Committee (1976) (no longer in existence). Information on the content was provided by John Anderson, *supra* note 16. The sentences mandated were as follows:

1st degree felony	life imprisonment
2nd degree felony	seven years imprisonment
3rd degree felony	four years imprisonment
4th degree felony	eighteen months imprisonment

These sentences are an appreciable increase in the average sentences currently served in New Mexico. See note 67, *infra*, for a chart on average time served.

22. 1977 N.M. Laws, Ch. 216 § 12.

cular one.²³ The single term had been successfully attacked by a group of Albuquerque judges who thought that the elimination of judicial discretion was unjust because it precluded any consideration of individual differences among offenders.²⁴

The length of sentences also proved a source of contention. The Senate preferred long sentences²⁵ while the House, worried about the punitive nature of the bill²⁶ and the cost of implementation,²⁷ wanted shorter ones. The House also amended the bill so that it would not be effective until July 1, 1979,²⁸ in order to provide time for the bill to be amended in light of cost data and criticisms of the bill.²⁹

As its history indicates, the 1977 Act is primarily punitive.³⁰ It is intended to increase sentence lengths by abolishing the Parole Board's authority to release prisoners before they have served the full terms of their judicially imposed sentences. Long sentences serve to incapacitate criminals by removing them from society for lengthy periods of time.³¹ They also are intended to deter persons with criminal propensities by making punishment more severe.³² Because there is no mention of rehabilitation in the Act and no provision for rehabilitative programs, it seems clear that the Act signals a shift in emphasis from rehabilitation to incapacitation and deterrence as the primary purposes of punishment.³³

23. *Supra* note 7.

24. Interview by the Coalition for Prisoners' Rights with Judge Franchini, printed in *Judge Blasts New Law*, 2. Coalition for Prisoners' Rights Newsletter 10 (July/Aug. 1977), and interviews with Anne Murray, staff member of the Legislative Council (Oct. 5, 1977) and with John Anderson, *supra* note 16.

The need for adjusting the sentence to the individual offender must not be forgotten when shifting from indefinite to definite sentencing schemes. For discussions on the importance of individualized justice, see ABA Sentencing Alternatives and Procedures § 2.1, Commentary d, (Approved draft 1968); *Conference Takes a Hard Look at Proposals*, 3. Corrections Magazine 64, 67 (Sept. 1977); Evans and Gilbert, *The Case for Judicial Discretion in Sentencing*, 61 Judicature 66 (Aug. 1977).

25. The Senate version set the first degree felony sentence range from 15 to 20 years; the House lowered it to 10 to 25 years in the Act as passed. The second degree felony ranges were originally 5 to 25 years, and were modified to become 7 to 15 years. Compare Senate Bill 18, 33rd Legislature, 1st Session § 3, and the 1977 Act.

26. Interview with Rep. Raymond Sanchez (Oct. 13, 1977).

27. House Memorial 79 of the 33rd Legislature, 1st Session (1977) ordered that a study be done on the cost of implementing the 1977 Act.

28. *See* note 3, *supra*.

29. Interview with John Anderson, *supra* note 16.

30. *See* note 67, *infra*, for a chart comparing sentences under the current law and the Criminal Sentencing Act.

31. *See* discussion on incapacitation, text accompanying note 68, *infra*.

32. *See* discussion on deterrence, notes 79, 80, 81, and 82, *infra*, and text accompanying.

33. Rehabilitation is the historical justification for indefinite sentencing. *See* discussion on rehabilitation, text accompanying notes 91 and 92, *infra*. Without specific provisions for them, rehabilitative programs are likely to suffer. Already some programs have been cut because there is not sufficient room in the penitentiary. Interview with Bob Beauvais, Director of Research and Planning, Dept. of Corrections (March 7, 1978).

THE 1977 CRIMINAL SENTENCING ACT—DEFINITE SENTENCING

The most radical and important feature of the 1977 Act is the elimination of the Parole Board's discretion to release non-capital felons on parole. This is effected through the inter-relationship of three statutes. Section 2(A) provides:

Unless otherwise provided in this section, all persons convicted of a crime under the laws of New Mexico shall be sentenced in accordance with the provisions of the Criminal Sentencing Act.³⁴

Section 4(C) provides:

The court shall include in the judgment and basic sentence of each person convicted of a first, second, third or fourth degree felony, authority for a period of parole to be served in accordance with law after the completion of any actual time of imprisonment. The period of parole shall be deemed to be part of the sentence of the convicted person.³⁵

Section 12(C) provides:

An inmate who was convicted of a non-capital felony and who has served the sentence of imprisonment imposed by the court, shall be required to undergo a two-year period of parole. During the period of parole, the person shall be under the guidance and supervision of the board.³⁶

Since there are no provisions to the contrary, the new Act, by virtue of the first statute quoted above, becomes the sentencing law of New Mexico. However, the Act applies only to felonies. Misdemeanors are not addressed and, consequently, the law prior to the passage of the Act governs sentencing for misdemeanors.

The second and third statutes quoted above restrict the Parole Board in two ways. First, parole will be served only after completing the sentence of imprisonment imposed by the court. Second, parole for non-capital felons must be two years. Under the current law, the Parole Board determines, within statutory limits,³⁷ the appropriate time to release each prisoner on to and from parole. In effect, once an offender is sent to the penitentiary, the Parole Board determines the length of his imprisonment. The 1977 Act requires the judge to make this determination by pronouncing a definite sentence which cannot be shortened through the operation of parole. The Parole Board's discretion to determine the actual imprisonment has been

34. 1977 N.M. Laws, Ch. 216 § 2(A).

35. 1977 N.M. Laws, Ch. 216 § 4(C).

36. 1977 N.M. Laws, Ch. 216 § 12(C).

37. N.M. Stat. Ann. § 31-21-10 (1978)

taken from it and given to the judiciary. Its attendant authority to vary the length of parole has been frozen into a statutory length.

While the above statutes establish fairly clearly the new requirement that a prisoner serve the full term of his judicially imposed sentence, they are ambiguous in stating whether he must serve all of it in prison, or the last two years of it on parole. One statute indicates that the two-year parole period is included in the judicial sentence, and so implies the last two years of the sentence would be served on parole.

The court shall include in the judgment and basic sentence . . . authority for a period of parole to be served in accordance with law. . . . *The period of parole shall be deemed to be part of the sentence of the convicted person.*³⁸

The other, however, seems to require that the two years of parole are additional to the judicial sentence that is spent in prison.

An inmate who was convicted of a non-capital felony and who has served the sentence of imprisonment imposed by the court, shall be required to undergo a two-year period of parole. . . .³⁹

Read together, these two provisions might authorize the judge to set the length of imprisonment and then require him to order an additional two years of parole, but to avoid litigation over the proper interpretation, § 12(C) should be amended to be consistent with § 4(C). Despite ambiguities regarding the basic sentence, the legislative intent that prisoners not be released early is clear. Through these provisions, the 1977 Act institutes definite sentencing.

The changes discussed above pertain only to non-capital felons. Capital felons are to be punished by life imprisonment.⁴⁰ This is the same punishment as is currently used.⁴¹ The only change in the law regarding capital felons also concerns parole. Under the 1977 Act, a person sentenced to life imprisonment is not eligible for parole for thirty years.⁴² The suggested length of parole is five years.⁴³ Under the current system, persons sentenced to life imprisonment are eligible for parole after ten years.⁴⁴

38. 1977 N.M. Laws, Ch. 216 (emphasis added).

39. 1977 N.M. Laws, Ch. 216 § 12(C) (emphasis added).

40. 1977 N.M. Laws, Ch. 216 § 3.

41. A mandatory death penalty was instituted in 1973. N.M. Stat. Ann. § 31-18-2 (1978), but was declared unconstitutional in 1976 by the New Mexico Supreme Court in *State v. Rondeau*, 89 N.M. 408, 553 P.2d 688 (1976). Consequently, persons who would be sentenced to death under the statute are sentenced instead to life imprisonment. The death penalty is repealed under the 1977 Criminal Sentencing Act, 1977 N.M. Laws, Ch. 216, § 17.

42. 1977 N.M. Laws, Ch. 216 § 12(A).

43. 1977 N.M. Laws, Ch. 216 § 12(B).

44. N.M. Stat. Ann. § 31-21-10(D)(4) (1978).

PRINCIPAL EFFECT OF THE ACT—REDISTRIBUTION OF DISCRETION

The termination of the Parole Board's release authority will effect a radical redistribution of discretion. Under the new Act, the judiciary will have the major responsibility for deciding the length of sentences. The prison authorities will have the sole authority to modify them.^{4 5}

Judicial Discretion

The minimum and maximum sentences appropriate to each felony classification are slightly modified in the 1977 Act. The Act provides:

If a person is convicted of a non-capital felony, the court shall set the basic sentence of imprisonment as follows:

- (1) for a first degree felony, the court shall set a definite term of not less than ten years nor more than twenty-five years;
- (2) for a second degree felony, the court shall set a definite term of not less than seven years nor more than fifteen years;
- (3) for a third degree felony, the court shall set a definite term of not less than two years nor more than ten years; or
- (4) for a fourth degree felony, the court shall set a definite term of not less than one year nor more than five years.^{4 6}

45. Prison authorities have power to shorten sentence lengths pursuant to 1977 N.M. Laws, Ch. 216 § 15. Since the Parole Board can no longer shorten sentences, and there is no provision in New Mexico for appellate review of sentences, prison authorities alone will have this authority.

46. 1977 N.M. Laws, Ch. 216 § 4(A). Compare this with current sentence ranges found in N.M. Stat. Ann. § 40A-29-3 (Repl. 1972) (emphasis added):

A. Where the defendant has been convicted of a crime constituting a *first degree felony*, the judge shall sentence such person to the term of *life imprisonment* in the penitentiary or to the payment of a fine of not more than fifteen thousand dollars (\$15,000), or to both a sentence of life imprisonment and a fine in the discretion of the judge.

B. Where the defendant has been convicted of a crime constituting a *second degree felony*, the judge shall sentence such person to be imprisoned in the penitentiary for *the term of not less than ten [10] years nor more than fifty [50] years*, or to the payment of a fine of not more than ten thousand [dollars] (\$10,000), or to both such imprisonment and fine in the discretion of the judge.

C. Where the defendant has been convicted of a crime constituting a *third degree felony*, the judge shall sentence such person to be imprisoned in the penitentiary for *the term of not less than two [2] years nor more than ten [10] years*, or to the payment of a fine not more than five thousand dollars (\$5,000), or to both such imprisonment and fine in the discretion of the judge.

Where the defendant has been convicted of a crime constituting a *fourth degree felony*, the judge shall sentence such person to be imprisoned in the penitentiary for *the term of not less than one [1] year nor more than five [5] years*, or to the payment of a fine of not more than five thousand dollars (\$5,000), or to both such imprisonment and fine in the discretion of the judge.

Within these minimum and maximum limits, a judge is free to choose whatever sentence he thinks best. Since judicial discretion to suspend all or part of a sentence is retained,⁴⁷ the statutory minimums operate only as legislative recommendations. While this is also true under indefinite sentencing in New Mexico, the new scheme requires the judge not only to decide whether incarceration is appropriate for a particular defendant, but also precisely what length incarceration is appropriate.

The 1977 Act provides amazingly few restraints on judicial discretion to determine sentence lengths. The major restraints are the upper limits on sentence lengths just described and the deadly weapon and habitual offender enhancement provisions. The deadly weapon enhancement provision of the new Act reads as follows:

A. When a separate finding of fact by the court or jury shows that a *deadly weapon* was used in the commission of a non-capital felony, the basic sentence of imprisonment prescribed for the offense in Section 40A-29-28 N.M.S.A. 1953 shall be increased by one year, and *the sentence imposed by this subsection shall be the first year served and shall not be suspended or deferred.*

B. For a second or subsequent non-capital felony in which a *deadly weapon* is used, the basic sentence of imprisonment prescribed in Section 40A-29-28 N.M.S.A. 1953 shall be increased by three years, and *the sentence imposed by this subsection shall be the first three years served and shall not be suspended or deferred.*⁴⁸

In other words, if a deadly weapon is used in the offense, the judge *must* order a minimum of one year imprisonment for the first offense, and three years for any further offenses with a deadly weapon. The current weapon enhancement provision is not so strict regarding a first offender, since it allows the judge to defer the enhancement.⁴⁹ Neither is the current statute requiring a sentence increase only if a *firearm*⁵⁰ is used in the offense, as broad as the new

47. N.M. Stat. Ann. § 31-20-3 (1978).

48. 1977 N.M. Laws, Ch. 216 § 5(A) and (B) (emphasis added).

49.

A. When a separate finding of fact by the court or jury shows that a *firearm* was used in the commission of:

(1) any felony except a capital felony, the minimum and maximum terms of imprisonment prescribed by the Criminal Code shall each be increased by five [5] years; and

(2) for any crime constituting a felony other than a capital felony, *the court shall not suspend* the first one [1] year of any sentence imposed.

B. For second and subsequent felonies other than a capital felony in which a firearm is used, the minimum and maximum terms of imprisonment prescribed by the Criminal Code shall be increased by five [5] years and *the Court shall not suspend or defer* all or any part of the sentence nor shall parole be considered unless the minimum sentence has been served.

N.M. Stat. Ann. § 31-18-4(A) and (B) (1978) (emphasis added).

50. *Id.*

provision which substitutes the term "deadly weapon" for "firearm." "Deadly weapon" is defined in the Criminal Code as:

... any firearm, *whether loaded or unloaded*; or any weapon which is capable of producing death or great bodily harm, including but not restricted to any types of daggers, brass knuckles, switchblade knives, bowie knives, poniards, butcher knives, dirk knives, and all such weapons with which dangerous cuts can be given or with which dangerous thrusts can be inflicted, including swordcanes, and any kind of sharp pointed canes, also slingshots, slung shots, bludgeons; *or any other weapons with which dangerous wounds can be inflicted*.⁵¹

Since the definition is not altered by the 1977 Act, it will be effective under the new law. By broadening the classification to which the enhancement provisions applies, the 1977 Act will require stiffer sentences for more people. It should be noted that for purposes of the enhancement provisions, under both the current system and the new one, no distinction is made between crimes in which violence is actually used against a person and when it is merely threatened. The enhancement provision applies equally to both situations.

The 1977 Act mandates the following sentence increases for habitual offenders:

B. Any person convicted of a non-capital felony in this state who has incurred *one prior felony conviction* which was part of a separate transaction or occurrence is a habitual offender and his basic sentence shall be increased by *one year*.

C. Any person convicted of a non-capital felony in this state who has incurred *two prior felony convictions* which were parts of separate transactions or occurrences is a habitual offender and his basic sentence shall be increased by *two years*.

D. Any person convicted of a non-capital felony in this state who has incurred *three or more prior felony convictions* which were parts of separate transactions or occurrences is a habitual offender and his basic sentence shall be increased by *four years*.⁵²

A "prior felony conviction" is defined in the 1977 Act, with some elaboration, essentially as under current law.⁵³ A person with even one prior felony conviction, no matter where obtained in the United

51. N.M. Stat. Ann. § 30-1-12(B) (1978) (emphasis added).

52. 1977 N.M. Laws, Ch. 216 § 6(B), (C), and (D) (emphasis added).

53. The definition of habitual offender is currently as follows:

Any person who, after having been convicted within this state of a felony, or who has been convicted under the laws of any other state government or country, of a crime or crimes which if committed within this state would be a felony, commits any felony within this state not otherwise punishable by death or life imprisonment,

N.M. Stat. Ann. § 31-8-5 (1978).

States, under whatever conditions, for whatever offense, and irrespective of how long ago, is considered an habitual offender for purposes of punishment.⁵⁴

An important difference between the habitual offender and the weapon enhancements provisions in the 1977 Act is that the former fails to mention deferred or suspended sentences. Arguably, therefore, the sentences for habitual offenders may be suspended or deferred. Thus, the provision is a guideline as to what sentence should be imposed, but not a mandate requiring that it be served. In comparing the enhancement provisions one is struck by the strictness of the weapons enhancement, which operates even if no violence has been perpetrated and no firearm used, and the loophole of the habitual offender enhancement, which allows recidivists to escape imprisonment.

Besides the maximum sentence lengths on all non-capital felonies, the minimum sentences for felonies committed with a deadly weapon, and the suggestions that habitual offenders should be sentenced to longer terms than first offenders, the 1977 Act imposes only one other limit on judicial discretion: the judge can no longer decide to fine a felon rather than imprison him. The Act reads:

D. The court *may, in addition to* the imposition of a basic sentence of imprisonment, impose a fine not to exceed:

- (1) for a first degree felony, fifteen thousand dollars (\$15,000);
- (2) for a second degree felony, ten thousand dollars (\$10,000); or
- (3) for a third or fourth degree felony, five thousand dollars (\$5,000).⁵⁵

54. Under the 1977 Act, an offender with a prior felony conviction is an habitual offender.

For the purposes of this section, "prior felony conviction" means:

- (1) a conviction for a prior felony committed within New Mexico whether within the Criminal Code or not; or
- (2) any prior felony for which the person was convicted other than an offense triable by court-martial if:
 - a) the conviction was rendered by a court of another state, the United States, a territory of the United States or the commonwealth of Puerto Rico;
 - b) the offense was punishable, at the time of conviction, by death or a maximum term of imprisonment of more than one year; or
 - c) the offense would have been classified as a felony in this state at the time of conviction.

1977 N.M. Laws, Ch. 216 § 6A.

55. 1977 N.M. Laws, Ch. 216 § 4(D) (emphasis added). Another possible limit on judicial discretion was passed in the same session of the legislature. A new law entitled "Victim Restitution" states that:

If the trial court exercises either of the sentencing options under Section 31-20-6 N.M. Stat. Ann. 1978, the court shall require as a condition of probation or parole that the defendant, in cooperation with the probation or

The new Act, on its face, does not allow the judge discretion to consider the type of felony committed or the character of the defendant and determine that a fine is the most appropriate punishment.⁵⁶ Under the current system fines are an alternative to incarceration.⁵⁷

Once the judge has determined that the defendant should not be probationed, he must decide the most appropriate term of imprisonment. The 1977 Act suggests that only the three factors already discussed be considered, namely: (1) the classification of the felony; (2) whether the felony was committed with a deadly weapon; and (3) whether the offender has any prior felony convictions. Presumably, the judge is allowed wide discretion in determining the length of the sentence to be given each offender so that he may pronounce a sentence appropriate to the circumstances, yet he is not required to obtain any more information about the defendant than that properly brought up at trial. For example, the factors revealed in a pre-sentence report need never be considered by the judge. The use of these reports is discretionary under the present system.⁵⁸ Since the Criminal Sentencing Act fails to mention them, they probably will con-

parole officer assigned to the defendant, promptly prepare a plan of restitution, including a specific amount of restitution to each victim and a schedule of restitution

N.M. Stat. Ann. § 31-17-1(B) (1978). The sentencing options of § 31-20-6 N.M. Stat. Ann. (1978), referred to are those of a suspended or deterred sentence. Hence, the new system appears to require a victim restitution plan as a condition for a suspended or deferred sentence. An ambiguity arises because § 31-20-6, as amended in the 1977 session, is still entitled "Conditions of order deferring or suspending sentence" and provides in part that the "defendant upon conviction *may* be required . . . to make restitution pursuant to the provisions of § 31-17-1 N.M. Stat. Ann. (1978) N.M. Stat. Ann. § 31-20-6 (1978) (emphasis added). This implies that victim restitution might be required as a condition of a deferred or suspended sentence. Read together, the statutes could be interpreted to require a victim restitution plan as a condition of a suspended or deferred sentence, without actually requiring that the plan be implemented. N.M. Stat. Ann. § 31-17-1 (1978), supports this interpretation and indirectly suggests reasons why implementation of the plan should not be a prerequisite for a suspended or deferred sentence. One might question if this were the legislative intent, however, since the requirement of formulating a plan in situations where it cannot be implemented seems pointless. A more reasonable requirement would be simply that victim restitution should be a condition of a suspended or deferred sentence wherever practicable.

56. The effect of this change is actually limited to persons using deadly weapons. Except for them, the judge is still free to order a suspended or deferred term of imprisonment. If he believes a fine the most appropriate punishment, he need only order both the fine and the imprisonment and then suspend or defer the imprisonment.

57. N.M. Stat. Ann. § 31-18-3 (1978) under which a felon may be sentenced to a term of years in prison or fined. See note 46, *supra*, for text of statute.

58. N.M. Stat. Ann. § 31-21-9 (1978). See *State v. Serrano*, 76 N.M. 655, 417 P.2d 795 (1966). The pre-sentence report currently used in Bernalillo County contain information concerning the defendant's past criminal record, family and educational background, mental and physical health, religious affiliation and financial status.

tinue to be used haphazardly, depending on the judge involved.⁵⁹ Judicial sentences assume stark finality under the 1977 Act because they are essentially unmodifiable. Neither the Parole Board nor an appellate court can modify them. There is no provision for appellate review of sentences in the law. Even if there were, there is no standard for determining when a sentence is excessive. For a first degree felon, a judge may decide any imprisonment up to the statutory maximum of twenty-five years, for a second degree felon, any sentence up to fifteen years, and so forth.⁶⁰ Further, there is no way to determine why a trial judge chose any particular sentence length, since the Act does not require that judges write reasons for their sentences.

Discretion of the Prison Authorities

Sole authority to reduce sentences, under the 1977 Act, resides in the prison authorities. This is accomplished by allowing the authorities to release prisoners early for behaving well in prison. By this means, any judicially imposed sentence may be reduced by slightly over one-third. The Act continues the use of the two types of deductions that are currently employed by the prison authorities, meritorious good time and exceptionally meritorious good time.

Any convict confined in the penitentiary of New Mexico or other institution designated by the corrections commission for confinement of adult criminal offenders may be awarded a deduction of twelve days' meritorious good time per month based on exemplary conduct, outstanding work and continuing effort toward self-improvement and rehabilitation, upon recommendation of the classification committee and approval of the warden.

A prisoner whose record of conduct shows that he has performed exceptionally meritorious service or performed duties of exceptional importance in connection with institutional operations, evincing desire toward self-improvement and rehabilitation, and whose record of conduct shows that he has otherwise faithfully observed the rules of the institution, may be eligible for a lump-sum good time award, not to exceed one year, which may be deducted from the length of maximum sentence then remaining unserved. The classification com-

59. Interview with Ms. Patricia Kenny, Pre-Sentence Section, Dept. of Corrections, Field Service Division, Area 2, District 2 (March 3, 1978). "While judges are not required to consider any of this information, (*i.e.*, pre-sentence reports and psychiatric evaluations) most judges do look at the FBI rap sheet," Ms. Kenny said. She also mentioned that the rap sheet is frequently inaccurate, as it often fails to mention that an earlier charge was dropped or that the person was acquitted. Generally, the information is limited to whether the defendant has ever had any previous charges brought against him.

60. See maximum sentences under the Criminal Sentencing Act in the text accompanying note 46, *supra*.

mittee and the warden shall determine the number of days to be awarded in each case based upon the particular merits. Allowance for exceptionally meritorious service shall be in addition to commutation of time for good behavior . . .⁶¹

The retention of discretionary good time in the new criminal system will make prison authorities extremely powerful, since they alone are able to reduce the actual length of imprisonment.⁶² Further, statutory good time, operating automatically to reduce a prisoner's term, will not be in effect under the 1977 Act.⁶³ Good time may be withdrawn at any time, at the discretion of the prison authorities.

Meritorious deductions may be terminated upon recommendation of the classification committee and approval of the warden if the convict does not properly maintain the standard upon which the award was based.⁶⁴

Recognizing that the unfettered discretion to shorten a prison term or not to do so might easily be abused, the legislature has ordered the corrections department to fashion rules governing the use of good time.

The corrections department shall promulgate rules and regulations for the implementation and determination of meritorious deductions pursuant to this section, and such rules or regulations shall be matters of public record.⁶⁵

Nevertheless, even with departmental rules and regulations, it is difficult to imagine that bias and personal animosity will not affect sentence length as long as sentence reductions are not determined by a tribunal further removed and more detached from the prison

61. N.M. Stat. Ann. § 33-2-34(A) and (B) (1978). An inmate may also be awarded an additional ten days industrial good time per month. N.M. Stat. Ann. § 33-7-10 (1978).

62. "If judges can't modify sentences under the new act, there will be virtually unchecked power with the prison authorities." Interview with Joe Gutierrez, Dept. of Corrections, March 3, 1978. See also Fogel, *supra* note 20, at 191, for a discussion of the power of prison authorities. With good time as the only means for an early release under determinate sentences, the potential for abuse by prison guards is heightened. George Denton, Ohio Corrections Director, has stated that good time under determinate sentencing "would place discretion with the lowest paid and lowest educated man in the system, the guard." *Fixed Sentencing Becomes Law in Three States; Other Legislatures Wary*, 3 Corrections Magazine 16, 22 (Sept. 1977).

63. See "General Consideration" in compilation notes following N.M. Stat. Ann. § 33-2-33 (1978).

64. N.M. Stat. Ann. § 33-2-34(C) (1978).

65. 1977 N.M. Laws, Ch. 216 § 15(D), repealed and reenacted to require the criminal justice department to promulgate the rules. 1978 N.M. Laws, Ch. 40 § 1, but not codified in the 1978 New Mexico Statutes.

environment than the prison authorities themselves.⁶⁶ Under this set-up the accuser is also the judge, a situation which elsewhere in American law would be considered repugnant to justice.

CRITICISMS OF THE 1977 ACT

The objectives of the 1977 Act, to incapacitate criminals and deter criminal behavior, fail to take cognizance of the conditions generating crime in New Mexico, or of the criminals themselves. Consequently, these goals by themselves, regardless of the act which would attempt to implement them, enjoy little prospect of realization. Even if these objectives could be achieved through some sentencing act, they could not be achieved through this one. The Act itself subverts the goals it was intended to promote.

Inappropriate Objectives

A. Incapacitation

A primary objective of the 1977 Act is to reduce crime by incapacitating criminals for longer periods of time.⁶⁷ This theory is based on debatable assumptions concerning human beings, crime, and society. Further, incapacitation requires great expenditures of public funds.

The assumption underlying incapacitation as a theory of punishment is that criminals are incorrigible and must be rendered harmless,

66. Even under indefinite sentencing, the administration of good time has been criticized as arbitrary. Interview with Michelle Ryals, Alternative Worker, Dept. of Public Defender, Santa Fe (March 8, 1978).

67. The intent to increase the length of incarceration is evident from the chart below comparing sentence lengths under the current law and the 1977 Act. Note that the *average* sentences currently served are shorter than the *minimums* for second, third, and fourth degree felons under the Act. Data on the average time currently served was provided by Sam Larcombe, former Director of Research and Development, New Mexico Dept. of Corrections.

<i>Felony Conviction</i>	<i>Current Law Sentence</i>	<i>1977 Act Sentence</i>	<i>Current Law Average Time Served</i>
Capital	Life	Life	
1st eligible for parole	10 yrs.	30 yrs.	
First Degree	10 yrs. to life	10-25 yrs.	11 yrs.
Second Degree	10-50 yrs.	7-15 yrs.	3 yrs., 3 mos.
Third Degree	2-10 yrs.	2-10 yrs.	18 months
Fourth Degree	1-5 yrs.	1-5 yrs.	8 months

See also text accompanying note 30, *supra*. However, lengthy incapacitation may not affect the crime rate. A study of effectiveness of incapacitation concluded that it does not prevent much crime. Conrad/Dinitz, In Fear of Each Other 103 (1977).

usually by incarceration. Proponents of this theory place no hope in improving the prisoner by punishing him. They merely hope to protect society by removing criminals from it.⁶⁸ A further assumption required under this theory is that most crimes are committed by a small group of repeat offenders. Otherwise, if crimes were generally committed by new criminals, incarcerating convicted offenders would not protect society. These assumptions may or may not be correct concerning criminals in New Mexico. An analysis of the current prison population in New Mexico done by a private California firm for the Governor's Council for Criminal Justice Planning noted that most offenders are young and have received some education.⁶⁹ Most of them are also serving their first prison term.⁷⁰ It may be that all criminals are incorrigible, but if any of them can be reformed, it most likely would be those who, like the average New Mexico offender, are young, and hence not yet hardened by a life of crime.

Incapacitation does not look to the causes of crime. It fails to take cognizance of evidence that certain socio-economic conditions are criminogenic, because this would mean that society is faced with the unpleasant prospect of locking up an endless stream of people, or perhaps, a whole segment of the population. However, a correlation has been shown between the rate of unemployment and that of crime.⁷¹

Proponents of the incapacitation theory also assume most criminals are, or could be, caught and convicted; but, statistics show that only a small percentage of crimes result in arrest. Of those arrested, only a percentage are prosecuted, and of those prosecuted, only a percentage are convicted. In brief, of crimes committed, only a small percentage of those persons responsible for them are actually punished.⁷² This does not mean that those who are caught should

68. See generally E. van den Haag, *Punishing Criminals*, 51-55 (1975).

69. *New Mexico Master Plan for Adult and Juvenile Corrections*; Inmate Profile, Technical Report No. 6 at 31 (1977), (hereinafter cited as *New Mexico Master Plan*). See text accompanying notes 97 and 99, *infra*, for quotations referring to the youth and education of New Mexico offenders.

70. See text accompanying note 99, *infra*.

71. A study done by the Library of Congress found a strong correlation between prison admission and the annual unemployment rate in the United States. The report found that "the unemployment rate can statistically describe over eighty percent of the year-to-year variation in prison admission at the federal level and seventy-nine percent at the state level" Bob Eckhardt, D. Texas, U.S. House of Representatives, in *Two Hundred Years of Social and Economic Change have Shaped our Crime Problem*, 10 *Center Magazine* 33, 35 (July/Aug. 1977). In New Mexico, a rise in property crimes in the less populated districts has been attributed to economic conditions by judges in those districts. *New Mexico Master Plan for Adult and Juvenile Corrections*, Phase II, Technical Report No. 4 at 12 (1977).

72. van den Haag, *supra* note 68, at 158.

not be incapacitated. But it does indicate that as a means of protecting society from crime, incapacitation does not enjoy much prospect of success.

Incapacitation is a costly method of dealing with crime, and it is merely one alternative. Caleb Foote, speaking at a Special Conference on Determinate Sentencing held in June of 1977 at Boalt Hall, University of California School of Law, clearly presented the choices confronting state legislatures.

Faced with . . . (current) realities . . . we have . . . alternative courses of action: the first is to multiply by five or ten times the size of correctional budgets. . . . Second would be a comprehensive adjustment of criminal penalties to the limited supply of punishment resources available . . . (which) would involve massive decriminalization and intensive use of nonincarceration punishment. The third alternative to to continue, as at present, with symbolic punishment, combining excessively severe prison sentences for the few with excessively lenient dispositions for the many. . . .⁷³

In passing the 1977 Criminal Sentencing Act, the New Mexico legislature clearly opted for the first alternative. The Act will be costly because it relies entirely on lengthy incarceration for effective punishment. Prisons are probably the most expensive method of punishment, certainly more so than half-way houses and other alternative programs.⁷⁴ The cost of keeping a man locked up in the penitentiary for one year is roughly equivalent to the cost of sending him to Harvard for the same period. The Department of Corrections has estimated that under present indeterminate sentencing, the population of the prison in 1985 would be 3,845, whereas under the definite sentencing act, the population will range between 3,897 and 4,840.⁷⁵ Such an increase in population will require an *additional* five to ten million dollars *a year* just to provide essential services. This does not include any capital outlays.⁷⁶ The cost of constructing

73. Quoted in 3 Corrections Magazine, *supra* note 24, at 68.

74. The expensive item in the correctional budget is the cost of incarceration, not the probation or other services. See generally, Model Sentencing Act, *supra* note 20, at § 5; and see New Mexico Criminal Justice Standards, *infra* note 109, at 4.

75. Legislative Finance Committee, Governor's Council on Criminal Justice Planning, Dept. of Corrections, *Response to House Memorial 8* (undated). Different estimates are proposed in the *New Mexico Master Plan*. Its authors believe the prison population in 1985-86 could reach as high as 5,015 under the Criminal Sentencing Act, whereas it would reach only 2,890 if the current indefinite sentencing scheme remained in effect. *New Mexico Master Plan*, *supra* note 71, at 36.

76. *Response to House Memorial 8*. Essential services under determinate sentencing are estimated at \$21,449,867 to \$26,640,328. The same services would cost \$16,209,869 under the current indefinite sentencing system.

adequate facilities to house this projected population is estimated between \$59,373,000 and \$84,834,000.⁷⁷

B. Deterrence

Another objective of the 1977 Act is to deter criminal behavior through the imposition of harsh sentences.⁷⁸ However, because of the physical and economic condition of many of the persons committing crimes in New Mexico, it is doubtful that harsh sentences will deter effectively.

Deterrence is a utilitarian theory which postulates that men are rational beings who, before acting, carefully calculate the pleasure and pain each act might bring. If the punishment is more painful than the pleasure derived from the crime, a man will not engage in criminal behavior.⁷⁹ Proponents of deterrence seek to prevent recidivism and to discourage other potential offenders.⁸⁰ However, there is disagreement as to which aspects of punishment deter. Some theorists believe that harsh sentences are essential,⁸¹ others argue that mild but certain punishment is more effective.⁸²

Proponents of deterrence assume that people commit crimes out of a rational calculation of pleasure and pain, but such an assumption fails to account for those crimes committed out of passion or because of drug addiction. The principal of deterrence is that punishment, despite the condition of the criminal, will reduce crime. Nevertheless, it can be argued that harsh sentences can succeed in deterring only if the persons committing the crimes are not suffering from drug addiction or under other forms of compulsion.⁸³

77. *Id.* at 8.

78. See text accompanying note 32, *supra*.

79. Becaria, *On Crimes and Punishments*, (1964) excerpted in Grupp, *Theories of Punishment* 117, 126 (1971); Bentham, *Principles of Penal Law*, in Bentham's Works 396, 402 (Bowring Ed. 1843); Andenaes, *The Morality of Deterrence*, 37 U. Chi. L. Rev. 649 (1970).

80. S. Kadish & M. Paulsen, *Criminal Law and Its Process* 26 (1975); E. Sutherland, *Principles of Criminology* 381 (1934); Allen, *Criminal Justice, Legal Values and the Rehabilitation Ideal*, 50 J. Crim. L.C. & P.C. 226 (1959); Bayley, *Good Intentions Gone Awry*, 51 Wash. L. Rev. 529, 544 (1976).

81. Andenaes, note 79, *supra*. The view that harsh sentences deter is shared by District Judge Philip Baiamonte, *Albuquerque Tribune*, Oct. 13, 1976, at B-12, Col. 5.

82. Dershowitz, *Background Paper*, 20th Century Fund, Task Force on Criminal Sentencing, Fair and Certain Punishment 72 (1976); A. von Hirsch, *Doing Justice* 35-37 (1976).

83. The 1973 New York bill on drugs, which was heralded as the most punitive act to emerge from any legislature, is remarkable for the little effect that it had. A report by the Joint Committee on New York Drug Law Evaluation which was published by the Association of the Bar of the City of New York in 1977 concluded that despite expenditure of substantial resources neither of the objectives of the 1973 drug law was achieved; neither heroin use nor drug-related crime declined in New York State. The report found the following:

However, this is most often not the case in New Mexico. *The New Mexico Master Plan for Adult and Juvenile Corrections* noted that most prisoners in the New Mexico penal system have a history of drug or alcohol abuse related to their criminal behavior and from which they were suffering at the time of arrest.⁸⁴ Is it really to be supposed that someone suffering from drug addiction or under the influence of alcohol will calculate rationally the effect of his act before committing a crime, or that the remote possibility of a prison term for an act not even yet contemplated will prevent anyone from becoming an addict in the first place? Alcoholism and drug addiction will not disappear because prison sentences are increased, yet surely their prevalence among prisoners is an indication that they are factors contributing to crime in New Mexico.

Further, proponents of deterrence assume that crime may be reduced without attacking its social and economic roots; yet a correlation has been shown between the rate of unemployment and that of crime.⁸⁵ The hopelessness engendered by poverty should be con-

A. Findings on Drug Use

1) New York City: Heroin use was as widespread in mid-1976 as it had been when the 1973 revision took effect, and ample supplies of the drug were available.

2) New York City: The pattern of stable or slightly rising heroin use between 1973 and mid-1976 was not appreciably different from the average pattern of other East Coast cities.

...

4) New York State as a whole and the area of the State excluding New York City: There is no evidence of a sustained reduction in heroin use after 1973.

B. Findings on Crime

1) New York State: Serious property crime of the sort often associated with heroin users increased sharply between 1973 and 1975. The rise in New York was similar to increases in nearby states.

2) New York City: There was a sharp rise in non-drug felony crimes between 1973 and 1975. However, the rise was apparently unconnected with illegal narcotics use: non-drug felony crimes known to have been committed by narcotics users remained stable during that period.

3) New York City: The available evidence suggests that the recidivist sentencing (predicate felony) provision of the 1973 law did not significantly deter prior felony offenders from committing additional crimes.

The report stated that the causes of addiction are much too complicated to be resolved in a single bill. It implied that social and economic conditions must be dealt with before the problem could be solved. Association of the Bar of the City of New York, *The Nation's Toughest Drug Law: Evaluating the New York Experience* 7-9 (1978).

84. "Substance abuse (which includes both drugs and alcohol) is recognized as the primary and major cause of criminal activity throughout New Mexico." *New Mexico Master Plan*, note 71, *supra* at 12. Of male prisoners, 86.3% have a history of substance abuse and 92.7% of the female prisoners have similar histories. Seventy-four and seven tenths percent of the men and 78.2% of the women were under the influence of drugs or alcohol when arrested. *New Mexico Master Plan*, note 69, *supra* at 25.

85. See note 71, *supra*.

sidered in evaluating the effectiveness of harsh punishment as a deterrent. As one author has noted, "Deterrence does not deter, does not threaten those whose lot in life is already miserable beyond the point of hope."⁸⁶ If most convicted criminals in New Mexico were from the lower income brackets or unemployed,⁸⁷ harsh punishment would deter them less effectively than it would those with more to lose.

Lastly, in concentrating solely on imprisonment as punishment, the authors of the Act failed to consider that the crimogenic atmosphere of prisons may actually work to increase crimes by prisoners when released.⁸⁸ Judge Frankel of New York has written, "There is powerful evidence that the majority of prisoners deteriorate—become poorer risks and lesser people—rather than improve in prison."⁸⁹ If prisons teach prisoners to become artful criminals rather than peaceful citizens, deterrence through incarceration is not a realistic aim.

C. Rehabilitation

The 1977 Act ignores rehabilitation as a goal of punishment.⁹⁰

86. Packard, *The Limits of the Criminal Sanctions* 64 (1968).

87. Although statistics concerning the income of inmates in the state's penal institutions at the time of arrest are unavailable, it is probably correct to assume that most inmates are from the low end of the economic scale. The *New Mexico Master Plan Inmate Profile*, *supra* note 69, at 20, found only three inmates who had some professional credentials out of two hundred and fifty inmates interviewed. The others relied on manual skills to earn a living. Some had no skills at all. *See also*, New Mexico PIRG, *Summary Report to the Legislature on the Proposed Prison and Criminal Sentencing Act* 8 (Jan. 1977).

88. A study in Florida seems to show that people who are less exposed to prison life, are less apt to commit crimes after release. After the decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963), over 1000 inmates were released. A study 28 months later comparing recidivism in the prisoners released early and those released at the expiration of their sentences showed that those released early had a rate of recidivism equal to one half of the rate of the other group. ABA *Sentencing Alternatives and Procedures*, *supra* note 24, at 58.

Many people doubt that the prison environment teaches prisoners to become law-abiding on release. "I would like to say one thing this committee should consider: that one of the astounding facts about prisons is this; that they are probably the most lawless place in our society." Hon. Richard Kelly, Judge 6th Cir. Ct. State of Florida, testifying before the Select Committee on Crime, House of Rep., Dec. 1971, quoted in Mitford, *supra* note 20, at 271.

Figures on recidivism make it clear that society today is not protected . . . by incarcerating offenders, for many offenders return to crime shortly after release from prison. Indeed, there is evidence that the longer a man is incarcerated, the smaller is the chance that he will lead a law-abiding life on release.

National Advisory Commission on Criminal Justice Standards and Goals, *A National Strategy to Reduce Crime* 113 (1973) quoted in Ringold, *A Judge's Personal Perspectives on Criminal Sentencing*, 51 Wash. L. Rev. 631, 633 (1976). For the harsh effect of solitary confinement on a reporter who spent one night in the Bernalillo County jail, *see* Williams, *Reporter Spends Ghostly Night in Solitary*, *Albuquerque Tribune*, Oct. 18, 1977, at 1, Col. 2.

89. Frankel, *supra* note 20, at 93.

90. *See* text accompanying note 33, *supra*.

Yet considering the characteristics of offenders in this state, rehabilitation is particularly appropriate here.

Rehabilitation is the only theory of punishment that mandates treating the offender as an individual with potential for growth and change and would attempt to help him to become law abiding. Historically, rehabilitation has been the justification for indefinite sentencing.⁹¹ Since the time required for rehabilitation varies with each individual, definite sentences cannot be pronounced at the time of sentencing.⁹² Consequently, rehabilitation, as a justification for punishment, has resulted in great disparities.⁹³ It has also resulted in longer prison terms than under old definite sentencing laws.⁹⁴ Having been tried with varying intensity for the last fifty years in the United States, it is now popularly considered a failure.⁹⁵ Nevertheless, if it is not made the basis of the sentence, as is currently done, rehabilitation might be effective in New Mexico.

The New Mexico Master Plan for Adult and Juvenile Corrections concludes that prisoners in New Mexico could benefit most from rehabilitative, educational, and other programs designed as alternatives to total incarceration.

Consultants believe that the State of New Mexico has an unusually high potential for successful rehabilitative and community-based programming. The data suggests that New Mexico prisoners are "less criminally sophisticated" or "hardened" than in many other states, and our *impression* is that inmates also retain a stronger attachment to traditional values of family, religion, and the work ethic than prisoners in some of the more urbanized states.⁹⁶

The conclusion is reached from compiling a "profile" of the average

91. Allen, note 80, *supra*; McCutcheon v. Cox, 71 N.M. 274, 278, 377 P.2d 683, 686 (1962); Meyerson, *The Board of Prison Terms and Paroles and Indeterminate Sentencing: A Critique*, 51 Wash. L. Rev. 617, 621, 622 (1976).

92. Wilson, *Release: Should Parole Boards Hold the Key?*, 3 Corrections Magazine 47 (Sept. 1977).

93. von Hirsch, *supra* note 82, at 27-29, Meyerson, *supra* note 91, at 622, 623. See note 20, *supra*, for evidence of disparity.

94. Mitford, *supra* note 20, at 92-93.

95. W. Gaylin, *Partial Justice* 20-24 (1974); Frankel, *supra* note 20, at 100.

The simple fact is that prison rehabilitation programs have not been successful—at least in those cases where such programs are compulsory in nature and forced on the prisoner . . . Indeterminate sentencing is a failure therefore because we simply cannot predict the likelihood of a prisoner's criminal conduct in the community by observing how such a prisoner responds to certain prison rehabilitation programs.

Sen. Edward Kennedy, D. Mass., 12 *Trial*, 14, 15 (March 1, 1976). But for an excellent article in support of rehabilitation, see Sturup, *Indeterminacy as Individualization*, 14 San Diego L. Rev. 1039 (1977). For a defense of indeterminate sentencing, see, Reid, *A Rebuttal to the Attack on the Indeterminate Sentence*, 51 Wash. L. Rev. 565 (1976).

96. *New Mexico Master Plan*, *supra* note 69, (Technical Report No. 6) at 33.

person incarcerated in the prison system in New Mexico and from comparing his characteristics with those of the average prisoner in other states. The study found New Mexican offenders to be younger than prisoners elsewhere. Over two-thirds of the offenders are under thirty years of age, and nearly half are under twenty-five.⁹⁷ This is younger than the national average.⁹⁸ New Mexico offenders are also better educated than offenders elsewhere.

A composite picture of the statistically "average" inmate in New Mexico's state correctional institutions would show a man in his mid-twenties, who has a criminal record but is serving his first term in the state prison system after having committed a property crime or a crime involving some form of fraud or forgery. He would have a Spanish surname, and be a native of New Mexico, probably from Albuquerque or another of the cities in the state. *He would have some high school education and some job skills, probably in a field with a relatively unstable demand for labor.* He would almost certainly have a history of drug or alcohol abuse . . . which was related to his criminal behavior and from which he suffered at the time of arrest.⁹⁹

The findings of the California study clearly indicate that a particularly valuable opportunity exists in New Mexico to try innovative alternatives to total incarceration that would concentrate on rehabilitation and education. This opportunity is ignored in the 1977 Act.

Failure to Accomplish Objectives

The Act may not accomplish the purposes its framers intended for two reasons. First, those purposes are not sufficiently enunciated to guide the judiciary in exercising the broad discretion entrusted to it. Second, the means of circumventing the legislative purposes are provided in the Act itself. The broad discretion granted the judiciary under the Act will promote disparate sentences which in turn will frustrate the intent of the framers to incapacitate and deter criminals. The discretion already exercised by prosecutors and prison authorities is not limited by the 1977 Act and consequently will contribute to disparate punishments for similar offenders.

A. Lack of Guidelines

The lack of adequate guidelines is evident everywhere, but presents a particular obstacle with respect to incapacitation. Except for

97. *Id.* at 6.

98. *Id.* at 43.

99. *Id.* at 31 (emphasis added).

persons using deadly weapons, the Act fails to specify which criminals are to be incapacitated and for how long. Should all criminals be incarcerated, or only violent ones? Should the length of a prison sentence depend on the judge's estimate of the likelihood that the defendant will commit more crimes if not incarcerated for a lengthy period? If the legislature intended to incapacitate all criminals, it should retract judicial discretion to suspend or defer sentences. Such a plan would be extremely impractical because of its exorbitant cost.¹⁰⁰ If the legislature intended to incapacitate only violent criminals, it should include a provision in the Act distinguishing between violent and non-violent offenders. The deadly weapon provision is obviously an attempt to do this. However, its very breadth precludes its use as an effective tool to discriminate between actual violence and threatened injury. If the legislature intended to incapacitate only future repeat offenders, it has set the judges the same hopeless task of predicting recidivism that is presently required of the Parole Board. Studies have shown that human behavior cannot be predicted with any accuracy,¹⁰¹ yet a judge may soon find himself voted out of office because of his inability to predict which criminals will be repeat offenders.¹⁰² The legislative intent regarding incapacitation has not been sufficiently articulated to be realizable.

B. Effects of Discretion on Incapacitation

The discretion provided by the Act is the means by which the legislative intent to lengthen sentences may be thwarted. Certain factors may cause a judge to exercise his discretion in a manner subversive of the legislative purpose to incapacitate. For example, he may use his power to suspend or defer sentences in order to mitigate the severity of the Act.¹⁰³ As the Twentieth Century Fund Task Force on Criminal Sentencing noted:

100. See text accompanying notes 74, 76 and 77, *supra*.

101. Even psychologists and psychiatrists cannot predict future dangerousness accurately. See Ennis and Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 Cal. L. Rev. 693 (1974). For discussions of the predictability of dangerousness among prisoners, see Bayley, note 66, *supra*; D. Stanley, *Prisoners Among Us: The Problem of Parole* (1976); Bronstein, *Rules for Playing God*, Civil Liberties Rev. 116 (Summer 1974); Frankel, *Lawlessness in Sentencing*, 41 Cinn. L. Rev. 29 (1972); Martinson, *What Works—Questions and Answers About Prison Reform*, 35 Public Interest 22 (Spring 1974); Monahan and Monahan, *Prediction Research and the Role of Psychologists in Correctional Institutions*, 14 San Diego L. Rev. 1028 (1977); von Hirsch, *Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons*, 21 Buff. L. Rev. 717 (1972).

102. The new law will force judges to make predictions concerning the potential dangerousness of the defendants before them. *New Mexico Master Plan*, *supra* note 71, at 21.

103. Overly harsh sentences put the judge in the unhappy position of imposing an injustice or rendering the statute ineffective by reducing the charge or even acquitting the defendant. ABA Sentencing Alternatives and Procedures, *supra* note 24, at 56. The prereq-

There is a reluctance of some judges to send people to prison when it is overcrowded because it is overcrowded, inadequately staffed, and a breeding ground for more crime.¹⁰⁴

Or, as is more likely, the judge could use his ability to suspend and defer sentences to avoid prison overcrowding. Already, the state penitentiary is severely overcrowded and judges, alerted to the problem, will have to limit their sentences.¹⁰⁵ If, ignoring pleas from prison authorities, judges should continue to flood the prison with inmates, the federal district court might order them released. A federal judge in Alabama found prison overcrowding to be a violation of the Eighth Amendment and released inmates from the state prison.¹⁰⁶ A suit charging cruel and unusual punishment on similar grounds is currently pending before the district court in New Mexico.¹⁰⁷ Thus, if large expenditures are not made to expand the prison system, the punitive intent of the Act probably will be thwarted either by the state judiciary or by the federal courts.

Discretion in other parts of the system may also thwart the legislature's purpose to incapacitate. There is no guarantee that prosecutors will use their power in plea bargaining to increase sentence lengths. Prosecutors, like judges, may have to suggest low sentences to keep the prison population within limits. For the same reason, prison authorities will probably release most prisoners at the earliest time permissible under the 1977 Act.¹⁰⁸ Lastly, under the operation of good time, there is no assurance that the most dangerous criminals will be incarcerated longest, but merely those most disliked by the prison authorities.

uisite of general prevention is that the law be enforced. Experience shows that excessively severe penalties actually reduce the risk of conviction and so lead to results contrary to their purpose. Andenaes, *The General Preventive Effects of Punishment*, 114 U. Pa. L. Rev. 940, 965-70 (1960).

104. Twentieth Century Fund Task Force on Criminal Sentencing, *Fair and Certain Punishment* 7 (1976).

105. "More convicts will be placed on probation or referred to programs outside prison walls as a result of severe overcrowding at the State Penitentiary," according to Dist. Judge Philip Baiamonte, *Albuquerque Tribune*, Oct. 20, 1977, at A-9, Col. 1. The State Penitentiary has already had to release prisoners early. Day, *Prison Overcrowding Forces Release of 39*, *Albuquerque Journal*, April 16, 1978, at A-1, Col. 5.

106. After finding that prison overcrowding constituted "cruel and unusual punishment," Judge Frank Johnson ordered that the number of inmates in each institution in the Alabama penal system shall not exceed the design capacity for that institution. *Pugh v. Locke*, 406 F. Supp. 199 (Ala. 1976), *aff'd* 559 F.2d 283 (5th Cir. 1977). *See also* *James v. Metzger*, 456 F.2d 854 (6th Cir. 1972); *Inmates DC Jail v. Jackson*, 416 F. Supp. 119 (D.C. 1976); *James v. Wallace*, 382 F. Supp. 1177 (Ala. 1974); *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd* 442 F.2d 304 (8th Cir. 1971).

107. *Duran v. Apodaca*, No. 77-721 (D. New Mexico, filed July 6, 1978).

108. *See* note 105, *supra*. Early release then results in harsher legislation which in turn results in officials using discretion to mitigate harsh sentences, thus perpetuating the cycle. *See Cole, supra* note 4, at 65.

C. Effects of Discretion on Deterrence

To deter effectively, a sentencing act must provide a modicum of certainty as to what the sentence would be if a person were convicted.¹⁰⁹ By ignoring the problems caused by unguided discretion,¹¹⁰ the 1977 Act fails to institute any more certainty in punishment than currently exists. In fact, under the Criminal Sentencing Act, sentences will be more disparate than ever due to the broad discretion of the judiciary to determine what length sentence, if any, should be imposed.

The existing discretion of prosecutors and prison authorities will only exacerbate the problem of disparate punishments, as will the demise of the Parole Board's release authority. Disparity of sentences engenders uncertainty as to punishment, and thereby subverts the legislative intent to deter criminals. Further, the grave disparity fostered by the 1977 Act can only promote resentment and disrespect for the criminal justice system and for the society of which it is a part.

A system in which a judge must pick the appropriate length of imprisonment out of a permissible range of zero to twenty-five years for a first degree felon,¹¹¹ without guidelines, and without giving reasons, must inevitably result in disparity of punishments for similar offenses. With a wide range of possible sentence lengths and inadequate guidelines, different judges will sentence differently.¹¹² Each judge will have his own reasons for sentencing as he does, and none will know how others are sentencing. An LEAA study quoted in the Federal Register shows that even under indefinite sentencing, judges do not sentence consistently with each other.

109. Fair and Certain Punishment, *supra* note 104, at 5; Sen. Edward Kennedy, *Crime Reform or Social Reform is the Wrong Question; We Need Both*, 10 Center Magazine 25 (1977); Governor's Council on Criminal Justice Planning, New Mexico Standards and Goals for The Criminal Justice System 293 (1976) (hereinafter cited as New Mexico Criminal Justice Standards).

110. The problem of unguided discretion is considered by some to be the major problem of criminal justice in the United States. "Although [we do] not overlook that other serious problems afflict the criminal justice system . . . [w]e believe that perhaps the major flaw is the capricious and arbitrary nature of criminal sentencing." Fair and Certain Punishment, *supra* note 104, at 3. Judge Frankel, another critic of unguided discretion, has written:

We do not allow each judge to make up the law for himself on other questions.

We should not allow it with respect to sentencing. . . . The power of judges to sentence criminal defendants is one of the best examples of unstructured discretionary power that can and should be structured.

Frankel, *supra* note 20, at 10 and 113.

111. See text accompanying note 46, *supra*.

112. Judges in New Mexico use different criteria to determine an offender's sentence. Although "certain commonalities were found, there are multiple and significant differences," according to the *New Mexico Master Plan*, *supra* note 71, at 8 (1977).

We are sentencing differently, not out of malice, but out of sheer ignorance, or to put it another way, without guidelines—without the tool that tells each of us what the other is doing.¹¹³

In a state with such a heterogeneous population as New Mexico, there is also the danger that sentences will be based at times on bias and prejudice.¹¹⁴ Unaware that he is doing so, a judge may sentence inconsistently. This potential is increased by the failure of the Act to mandate written reasons in support of the sentence given. Because of the wide range of sentences permissible for each felony classification, and the continued ability of judges to suspend and defer sentences, the sentence imposed on any particular defendant will depend largely on the judge.

The abolition of the Parole Board's authority to release early¹¹⁵ will operate to increase disparity in sentences. The Parole Board was a state-wide authority which could equalize the punishment of offenders. No matter where in the state a crime was committed, if the offender was sent to a state penal institution the Parole Board could regulate the actual length of imprisonment.¹¹⁶ The abolition of the Board's discretion to release on parole signals the end of any uniform state-wide regulation of sentence lengths.

113. Critelli, *Preface* to National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, United States Dept. of Justice, *Sentencing Guidelines: Structuring Judicial Discretion* at xi (1978).

114. In a Washington study disparity in sentencing was found to be the result of the judge's background and unconscious bias, rather than the defendant's particular circumstances or needs. Bayley, *supra* note 80, at 538. Judges have emotions, like everyone else, and at times may make decisions based on them. Gaylin, *supra* note 95, at 40. Some New Mexico judges have indicated concern that sentencing under the 1977 Act may be influenced by racial and cultural bias. *New Mexico Master Plan*, *supra* note 71, at 21. According to a PIRG study, the percentage of inmates who are from ethnic and racial minorities is much higher than their representation in the New Mexico population outside of prison. Whereas Anglos constitute almost 2/3 of the population, they make up only 1/3 of New Mexico's prisoners.

<i>Race/Ethnic Background</i>	<i>Percentage of Population, 1970 Census</i>	<i>Percentage of Prison Population 6/30/75</i>
Anglo surnamed	59.8%	33.2%
Black	1.9%	11.7%
Native American	7.2%	2.4%*
Spanish surnamed**	33.5%	52.7%
Other races	.8%	0.0%

*Indian reservations often fall under federal jurisdiction rather than state.

**There is an error of + or -3 in the Spanish surnamed group based on the way the data was collected.

New Mexico PIRG, *Summary Report*, *supra* note 87, at 9.

115. 1977 N.M. Laws, Ch. 216 § 12(C).

116. Interview with John Ramming, Administrative Assistant to the Secretary of the Criminal Justice Department of the State of New Mexico (Oct. 24, 1978).

Since a person's sentence depends upon the type of crime for which he is convicted, prosecutors help determine sentence lengths by deciding what charges to bring. Prosecutors also influence sentences through plea bargaining, a practice widespread in New Mexico and in the rest of the United States. In a plea bargaining situation the prosecutor agrees to reduce the charge against a potential defendant in return for a plea of guilty.¹¹⁷ Because of the longer possible sentences under the 1977 Act, more defendants may be induced to seek a plea to a lesser offense rather than to chance a long prison term. Since the Act enhances the power of the prosecutor in plea bargaining, it will most likely encourage the practice.¹¹⁸

The prosecutor will set the sentence in cases which are plea-bargained. The judge will not directly determine it because, by law, he cannot participate in the plea bargaining;¹¹⁹ he can only accept or reject the agreement—including the sentence—that is proposed to him by the prosecutor.¹²⁰ This is, of course, the situation under the current law. But the 1977 Act, with its overlapping range of permissible sentences,¹²¹ will render meaningless the prosecutor's current option of agreeing to a lesser charge, rather than proposing a sen-

117. In New Mexico, less than 20% of the felony cases are resolved through trial; as many as 90% of the cases in some districts are resolved through plea bargaining. *New Mexico Master Plan*, *supra* note 71, at 20. The tendency to plea bargain is not unusual: "90% of all convictions are the result of guilty pleas." U.S. President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 9-12 (1967); *See also* Heumann, *A Note on Plea Bargaining and Case Pressure*, 9 L. & Soc'y Rev. 515 (1975); Newman, *Reshape the Deal*, 9 Trial 11 (1973); Peterson, *A Bad Bargain*, 9 Trial 16 (1973).

118. The effect on plea bargaining of legislatively mandated minimum sentences is to grant more power to prosecutors, because of the greater inducement to plead to a lesser offense even when there is a chance of acquittal and even when the accused is innocent. ABA Sentencing Alternatives and Procedures, *supra* note 24, at 150. Legislatively mandated sentences give prosecutors too much power over plea bargaining. Newman, *A Better Way to Sentence Criminals*, 63 ABA J. 1563 (1977). The effect of definite sentencing is to shift discretion to the prosecutor's office. Evans & Gilbert, *supra* note 24; Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. Pa. L. Rev. 550 (1977-78).

119. N.M. R. Crim. P. 21(g) (1978).

120. In *Eller v. State*, 92 N.M. 52, 582 P.2d 824 (1978), the Supreme Court held that a defendant is entitled to withdraw his plea of guilty if the judge rejects the sentence recommended by the prosecutor which was part of the plea bargain agreement. This case interprets N.M. Stat. Ann. § 41-23-21(g)(4) (Supp. 1975) to mean that a judge cannot accept the plea and reject the suggested sentence.

121. The ranges set out in the 1977 Act are:

Degree of Felony	Sentence Range
1st	10-25 yrs.) 5 yr. overlap
2nd	7-15 yrs.) 3 yr. overlap
3rd	2-10 yrs.) 3 yr. overlap
4th	1- 5 yrs.)

Under these ranges, it would also be possible for a man convicted of a third degree felony to receive the same sentence as someone convicted of a first degree felony, namely ten years.

tence. No defendant will plead guilty in exchange for a mere reduction of the charge against him. Some guarantee that his sentence will actually be less if he pleads guilty than if he risks trial is necessary. This will require the prosecutor to include a proposed sentence as part of the plea bargain. Thus, in cases which are plea-bargained, the sentence imposed will depend as much on the prosecutor, and the judge, as on the crime involved.

By allowing the continued *discretionary* use of good time,¹²² the 1977 Act fails to institute sentences which are truly definite. Under the Act even two sentences which were equal when they were imposed by the judge may become disparate as they are served, since their operation can be modified at the discretion of the prison authorities. Thus, unless good time operates automatically, it will contribute to disparate and uncertain punishment. Uncertainty is also increased by the prison authorities' power to revoke good time once awarded.¹²³ In New Mexico, neither indefinite nor definite sentencing provides a prisoner with knowledge of his actual punishment, even at the time of sentencing. Deterrence, predicated on the assumption that before committing his crime the criminal weighs the benefits against the punishment, cannot succeed in a system so fraught with uncertainties.

SUGGESTIONS

A Stated Purpose—Just Retribution

A sentencing act should state the purposes of punishment.¹²⁴ In a system with wide sentencing discretion vested in some government branch or agency, advantages accrue simply from stating the objectives the state hopes to accomplish by punishing. Prosecutors and defense attorneys will know how to shape their arguments as to what sentence is appropriate. The judge, better able to order a sentence consonant with the legislative intent, will also be able to justify it. Pointless disparity may be reduced.

The primary purpose should be to accomplish just retribution. Retribution requires that wrongdoers be punished simply because they have done wrong. It makes no assumptions concerning the illness, rationality, or evil character of the offender. Punishment is justified as an affirmation of the virtue necessary for political associa-

122. See text accompanying note 62 *supra*.

123. N.M. Stat. Ann. § 33-2-34(C) (1978).

124. Evans & Gilbert, *supra* note 24, at 67; Frankel, *supra* note 20, at 107; ABA Sentencing Alternatives and Procedures, *supra* note 24, at 50. See also *Gore v. United States*, 357 U.S. 393 (1958).

tion.¹²⁵ Despite its utilitarian aspects in that public punishment inhibits private revenge, basically retribution is concerned with justice and vindicating society's values. As C. S. Lewis once wrote, "The concept of desert is the only connecting link between punishment and justice. It is only as deserved or undeserved that a punishment can be just or unjust."¹²⁶

Retribution differs from revenge in that the latter arises solely from the victim's desire to inflict pain on the wrongdoer and has nothing to do with the social order. The justification for retributive punishment is also its limitation; it cannot be excessive or cruel without destroying the values it was intended to promote. Since justice and equity are values in our society, any punishment not tempered with them is undesirable. Retribution, thus limited, is just retribution. Such punishment must be proportional to the crime.¹²⁷

Stating that the purpose is to punish justly does not preclude the Act from having other purposes. It means, however, that those purposes must be circumscribed by the requirements of just proportion. Excessive sentences, disproportionate to the crime, could not be justified. A person could not be incarcerated for a long period to prevent him from committing another crime, or to deter others, or because someone speculated that he would thereby be rehabilitated.

The California sentencing act makes retribution the primary purpose of punishment. It states:

(a)(1) 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.¹²⁸

That purpose should satisfy the Criminal Justice Study Committee, which was dissatisfied with the Parole Board's releasing prisoners before they had served their judicially imposed sentences.¹²⁹ It

125. See generally, Hawkins, *Punishment and Moral Responsibility* in *Theories of Punishment* 13 (Grupp ed. 1971).

126. C. S. Lewis, quoted in Bayley, *supra* note 80, at 532, 533, n. 12.

127. Beccaria, *supra* note 79, at 131-33; see also Struggle for Justice, *supra* note 20, at 147.

128. Cal. Penal Code § 1170(a)(1) (West Supp. 1978).

129. See text accompanying note 30 *supra*.

should be emphasized, however, that just retribution must always be *limited* by the nature of the offense it is intended to punish.

Sentencing Guidelines

A sentencing act should also establish guidelines.¹³⁰ These are needed to translate the broad legislative purposes into legally cognizable criteria, enabling judges to sentence more equitably. For example, a sentencing act might list aggravating and mitigating factors to be considered by the judge in arriving at a sentence.¹³¹ It should suggest lesser sentences for persons committing nonviolent or property crimes than for those perpetrating violent crimes against the person, and should distinguish between violence threatened and that committed. Factors could be listed, as in a federal bill, to aid the court in determining whether to order probation, a fine, or imprisonment.¹³² Guidelines would help reduce the disparity in sentencing. Offenders would be sentenced by law and not by the predilections of individual judges.

If the legislature does not want to write guidelines, it could appoint a sentencing commission to do so,¹³³ or it could enact presumptive sentences like California.¹³⁴ Another alternative would be to provide for appellate review to enable the judiciary to develop a common law of sentencing.¹³⁵ This would also necessitate that judges write reasons for the sentences they give.¹³⁶

130. Governor's Council on Criminal Justice Planning, *An Executive Summary of the New Mexico Master Correction Plan 2* (undated); Frankel, *supra* note 20, at 113; Critelli, *supra* note 113.

131. See, Fair and Certain Punishment, *supra* note 104, at 44 & 45. Criteria for determining whether to order imprisonment, a fine, probation or a suspended sentence are set out in Model Penal Code § § 7.01-7.03 (1962).

132. S. 1437, 95th Cong., 1st Sess. § § 2001(b), 2003(a), 2101(a), 2102(a), 2202(a), 2302(a) (1977).

133. S. 181, 95th Cong., 1st Sess. § 3801 (1977), S. 204, 95th Cong., 1st Sess. § 4 (1977). California provides for a sentencing commission to promote uniformity in sentencing by adopting criteria to be considered by judges at sentencing. Cal. Penal Code § 1170.3 (West Supp. 1978). A sentencing commission is discussed in Frankel, *supra* note 20, at 118. The ABA has suggested that each state should set up a committee to develop criteria for the imposition of sentences. ABA Sentencing Alternatives and Procedures, *supra* note 24, at § 7.2.

134. Cal. Penal Code § § 1170(a)(2), (b) (West Supp. 1978).

135. See generally, Frankel, *supra* note 20, at 115.

136. Alaska and California both require written sentence opinions. Alaska Stat. § 12.55.075 (Cum. Supp. 1977), Cal. Penal Code § 1170(c) (West Supp. 1978), as does a federal sentencing bill S. 1437, *supra* note 132, at § 2003(b), and the Model Sentencing Act, note 20, *supra* at § 10. Judge Frankel has written strongly on the subject of requiring sentencing opinions.

"... the absence or refusal of reasons is a hallmark of injustice . . . the swift ukase, without explanation, is the tyrant's way. The despot is not bound by rules. He does not need to justify or account for what he does."

Frankel, *supra* note 20, at 39. Evans & Gilbert, *supra* note 24, at 69; also recommend written opinions.

*Sentencing Opinions and Appellate Review*¹³⁷

A written statement by the judge of reasons for the sentence and appellate review are desirable to ensure that the guidelines are implemented. Through analogy and precedent, objective criteria can be developed that would help account for differences in offenders and still allow the consideration of important factual circumstances which the legislature could not possibly foresee. These provisions would reduce disparity in sentences, while allowing for individual differences among offenders.

*Mandatory Sentence Hearings and Pre-sentence Reports*¹³⁸

In order for the judge to be able to sentence appropriately, he must be fully informed about the circumstances of the defendant and those surrounding the commission of his crime. Without this information, guidelines are useless. Hence sentence hearings and the use of pre-sentence reports should be mandated in any sentencing act where the judge has the discretion to set sentences. Further, care should be taken that the information given the judge is accurate and up-to-date.¹³⁹ The enhanced significance of the sentencing hearing necessitates strict standards governing the quality of information on which the sentence is based.¹⁴⁰

Redefinition of "Habitual Offender"

The habitual offender provision should apply primarily to serious repeat offenders.¹⁴¹ If habitual offenders are classified as all persons

137. Among authors and organizations recommending appellate review of sentencing are the following: ABA Sentencing Alternatives and Procedures, *supra* note 24, at 81; Frankel, *supra* note 20, at 75; P. O'Donnell, M. Churgin & D. Curtis, *Toward A Just and Effective Sentencing System* 60 (1977). A federal bill, S. 1437, *supra* note 132, at § § 2007 & 3725, provides for appellate review, but the Model Sentencing Act does not. See Model Sentencing Act, *supra* note 20, at § 11, Comment.

Sixteen states provide sentence review of some kind. They are: Alaska, Arizona, California, Connecticut, Florida, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Montana, Nebraska, New York, Oregon, and Tennessee. See Comment, *Disparity and Discretion in Sentencing: A Proposal for Uniformity* 25 U.C.L.A. L. Rev. 323, 324 n. 6 (1977). See generally ABA Appellate Review of Sentences (Approved Draft, 1968).

138. Sentence hearings are mandated in the Model Sentencing Act, *supra* note 20, at § 10. Pre-sentence investigations are required before sentencing felons in the Model Sentencing Act at § 2, in ALI Model Penal Code, *supra* note 131, at § 7.07, and have been proposed in S. 1437, *supra* note 132, at § 2002(a).

139. See, note 59, *supra*.

140. See, *New Mexico Master Plan*, *supra* note 71, at 21. (Technical Report No. 4).

141. The New Mexico Governor's Council for Criminal Justice Planning suggests that a convict should be considered an habitual offender only after having committed two prior felonies and that the length of time elapsed since the last felony should be considered, as well as the nature of the prior felonies. New Mexico Criminal Justice Standards, note 109, *supra*, at 322.

with one prior felony conviction and no consideration is given to the nature and circumstances of those earlier offenses and the time elapsed since their commission, then serious repeat offenders who may be dangerous criminals will be lumped together with persons who have made sincere efforts to become law-abiding. A person may transgress the law without thereby signaling that he has a propensity for crime. To punish as habitual offenders those who are not such is a useless waste of money and human resources.

A Narrower Weapon Enhancement Provision

The weapon enhancement should be limited to cases in which violence is actually perpetrated, and it should apply only to firearms, by far the most dangerous weapons used in our society. Specific sanctions against their criminal use would be more effective in deterring persons from using them than a sanction applied to anything which could be used as a deadly weapon. A person intent on robbing a store is going to take something with him to coerce the owner. If for purposes of the law it makes no difference if he takes a gun or a coke bottle,¹⁴² he might as well take in the gun, which is certainly more threatening and more dangerous. Since guns are more dangerous than other weapons, the weapon enhancement should be aimed specifically at deterring their use.

Good Time Should Vest

Good time should be administered by an objective tribunal, separate from the prison authorities and, once awarded, good time should vest.¹⁴³ This requirement should be mandated by statute.

Shorter Mandatory Parole

The mandatory two-year parole for non-capital felons should be abolished. While the idea of a mandatory period of parole following the completion of a term in prison is not in itself objectionable, two years is too long for most terms of imprisonment. For example, if a crime merits only one year of imprisonment, a mandatory two years of parole added to that is excessive and disproportionate. Why

The Model Sentencing Act suggests that the long term prison population should consist "only of rackateers and uncontrollable, currently untreatable persons." Model Sentencing Act, *supra* note 20, at 1. The California Sentencing Act differentiates between the types of prior felonies committed for purposes of the habitual offender enhancement provision. It also provides that under certain conditions, felonies over ten years old shall not count toward any enhancement. Cal. Penal Code § 667.5(a) (West Supp. 1978).

142. See, the definition of "deadly weapon" in the text following note 57, *supra*.

143. Fogel, *supra* note 20, at 255.

should a minor offender, imprisoned for only one year be subjected to the same constraints on release and for the same period of time as a major offender who has been in prison for ten years? If parole is to be mandatory, its length should be a fraction of the prison term, and in no event exceed two years.

Shorter Sentences

A sentencing act should reduce sentences.¹⁴⁴ In New Mexico, the median maximum sentence is already longer than in over fifty percent of the states,¹⁴⁵ and the United States as a whole has longer sentences than most other Western countries.¹⁴⁶ Judges in New Mexico also send offenders to prison at a high rate.

New Mexico has the highest rate of commitments to state facilities per population of any state west of the Mississippi River even though New Mexico ranks from low to average in comparison with other western states regarding crime rates . . .¹⁴⁷

Shorter sentences will achieve the deterrent purpose desired by the proponents of the 1977 Act more effectively than longer ones because shorter sentences will have a greater possibility of being imposed.¹⁴⁸ Further, shorter sentences would be less burdensome to New Mexico taxpayers. If sentences were shortened, the huge expenditures for an expanded prison system would not be necessary.

144. Very few sentences should exceed three years. Goodell, *Preface to Doing Justice*, *supra* note 82, at xvii. Fogel suggests basic sentences as follows: capital felony—life imprisonment; first degree felony—eight years; second degree felony—five years; third degree felony—three years; fourth degree felony—two years. Fogel, *supra* note 20, at 254-55.

Writing of reform in Denmark, Dr. George K. Sturup has noted: "The combination of *shortening the time served*, establishing many small, open institutions (about 100 inmates in each), and good social relations with the staff, has resulted in a smaller risk for contact with a criminal subculture and in better possibilities for establishing and maintaining valuable social contacts for inmates. Sturup, *supra* note 95, at 1057. (Emphasis added).

145. See United States, National Criminal Justice Information and Statistics Survey, L.E.A.A., U.S. Dept. of Justice, Census of Prisoners in State Correctional Facilities 1973 (1976).

146.

"Usually sentences are much longer in the United States than in most of the other countries represented at the United Nations Conference (on the Prevention of Crime and the Treatment of Offenders) . . . Sentences abroad average considerably less than in this country for the same types of offenses. Few men are sent to prison for more than 5 years in any Western European country. Only in cases of murder or extreme violence do the courts pronounce a sentence of more than five years."

Rogers, *The Geneva Conference on Crime: Its Significance for American Penology*, Fed. Prob., Dec. 1955, at 40-41, quoted in Model Sentencing Act, *supra* note 20, at § 9. See Mitford, *supra* note 20, at 321, and Fair and Certain Punishment, *supra* note 104, at 6.

147. *New Mexico Master Plan*, *supra* note 69, at 14.

148. See, *supra* note 103, and text accompanying.

Shorter sentences, proportional to the crime, would also further the end of just retribution. If not shortened, sentences should not, in any event, be lengthened. A computation of average time actually served now under the indefinite system should be used to determine the average sentence lengths under any new act.¹⁴⁹

Alternatives to Incarceration

The Act should suggest alternatives to incarceration.¹⁵⁰ Most New Mexico offenders are not the most dangerous type of criminals. According to the New Mexico Master Plan for Adult and Juvenile Corrections,

...in comparison to nationwide averages, New Mexico's inmate population is *more* likely to have committed property, fraud, and drug offenses, and *less* likely to have been sentenced for murder, manslaughter, and robbery.¹⁵¹

Despite the less serious nature of their crimes, New Mexicans are sentenced to prison at a high rate. "From a comparative perspective, offenders in New Mexico are sentenced to incarceration in state institutions at a higher rate and for less serious offenses than in other states."¹⁵² Possibly one reason for the relatively high prison commitment rate in New Mexico is the insufficiency of alternative programs.

New Mexico should be willing to experiment with alternative pro-

149. The average sentence lengths served under current indefinite sentencing are found in note 67, *supra*.

150.

If this country is resolved to do something constructive about the crime problem, the immediate thing it must do is call a halt to the building of new prisons, jails, and training schools, at least for a time, while we plan and develop alternatives. We say this for two principal reasons. First, *so long as we build, we will have neither the pressures nor the will to develop more productive answers*. The correctional institution is the 'out of sight, out of mind' response to the problem of crime. It gives us the impression that we have been strong and forceful in dealing with the criminal and thus with crime, while the fact is that we have merely swept the criminal and the problem under the rug. No study that I have ever seen, and there are many, provides any assurance that the prison reduces crime, while there is ample evidence that the fact of imprisonment is a heavy contributor to postrelease criminal activity. The prison provides only the illusion, not the reality, of protection against the criminal.

W. Nagel, *The New Red Barn* 148-49 (1973) (emphasis added).

In New Mexico, the Governor's Council on Criminal Justice Planning has suggested minimizing the use of prisons as punishment. See, New Mexico Criminal Justice Standards, *supra* note 109, at 293. Suggested alternatives to incarceration are found in New Mexico PIRG, *Summary Report*, *supra* note 87, at 15-21.

151. *New Mexico Master Plan*, *supra* note 69, at 12.

152. *Id.* at 14.

grams. One of the advantages of the federal system is that individual states are free to create solutions different from other states and the federal government. Moreover, New Mexico is particularly suited to experimenting with alternatives to incarceration because of the youth and educational potential of the average offender. The New Mexico Master Plan concludes that "the State of New Mexico has an unusually high potential for successful rehabilitative and community-based programming."¹⁵³

Alternatives are cheaper than incarceration and may better achieve the purposes of the 1977 Act.¹⁵⁴ Through the use of alternatives, overcrowding in the penitentiary would be reduced because fewer offenders would be sent there. Deterrence would be possible, since the certainty of punishment would be increased. The state penitentiary, reserved for only hardened serious offenders, would not harbor persons convicted of minor crimes who thus would not be subjected to its crimogenic influences.¹⁵⁵ Rehabilitation could be instituted in alternative programs made available for persons receiving deferred or suspended sentences. Education and vocational programs, supervised by the Parole Board,¹⁵⁶ could be devised to help ex-convicts readjust to life on the "outside" while serving parole.

CONCLUSIONS

Instead of being the hoped-for reform which would reduce crime, the 1977 Criminal Sentencing Act merely redistributes sentencing discretion from the Parole Board to the judiciary. The result probably will be an increase in disparity since, with the demise of the Parole Board, there will no longer be one state-wide authority with any control over sentence lengths. If sentences do increase, as the Act's proponents hope, the Act will require large expenditures to construct and maintain new prison facilities. Such expenditures are not justifiable, because there is not sufficient evidence that harsh sentences, randomly imposed, deter potential criminals. The sentences will be random because they will be chosen from a wide range of possible sentences and inadequate guidelines exist to enable a

153. *Id.* at 33.

154. See note 74, *supra*, and Nagel, *supra* note 150.

155. See note 88, *supra*.

156. The Parole Board should aid in transition to society. See, Fair and Certain Punishment, *supra* note 104, at 22. Senator Kennedy has made a similar suggestion. "The parole board might . . . play a new innovative role in a modified correctional system . . . the board might marshal its energies in the direction of voluntary rehabilitation programs . . . (and) the board could turn its undivided attention to the successful implementation of alternatives to imprisonment." Sen. Edward Kennedy, *supra* note 95, at 23.

determination of which sentence is appropriate. The Act only provides for punishment by incarceration, but cheaper alternatives could be devised with just as much or more likelihood of reducing crime.

There is even a slight possibility that the 1977 Act will not increase a prisoner's sentence. If judges begin routinely to suspend long sentences, to avoid prison overcrowding, because they think them too harsh, or for any other reason, the legislative intent will be thwarted, and the Act will accomplish nothing.

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