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REAL OFFENSE SENTENCING: THE MODEL SENTENCING AND CORRECTIONS ACT

MICHAEL H. TONRY*

The Uniform Law Commissioners recently adopted a Model Sentencing and Corrections Act.¹ It provides for the creation of a sentencing commission that would promulgate guidelines for sentencing. In the ordinary case, the judge would be expected to impose the sentence indicated by the applicable guideline. Defendants would be entitled to appeal the sentence imposed. To forestall or frustrate prosecutorial manipulation of the guidelines by means of charge dismissals and plea bargains, the Model Act separates sanctions from the substantive criminal law by directing the probation officer, the judge, and any appellate court to base sentencing considerations not on the offense of conviction but on the defendant's "actual offense behavior." In this respect, and in several others, the Model Sentencing Act is a perplexing document. This article explores some of its major perplexities.

Sentencing reform in America is now five years old.² Denver³

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¹ NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, MODEL SENTENCING AND CORRECTIONS ACT (Approved Draft 1978), located in 10 UNIFORM LAWS ANN., (master ed., West 1974) (Supp. 1980) [hereinafter cited without cross reference as MODEL ACT]. This essay is primarily concerned with Article 3 on sentencing. References to the Model Act should be understood to refer only to Article 3.

For insiders' accounts of the Model Act in general, and Article 3 in particular, see Perlman & Potuto, *The Uniform Law Commissioners' Model Sentencing and Corrections Act: An Overview*, 58 NEB. L. REV. 925 (1979) [hereinafter cited as Perlman & Potuto]; Perlman & Stebbins, *Implementing an Equitable Sentencing System: The Uniform Law Commissioners' Model Sentencing and Corrections Act*, 65 VA. L. REV. 1175 (1979) [hereinafter cited as Perlman & Stebbins].

² Several influential books appeared some years earlier but the first major formal changes date from 1976. The major books included AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE (1971); M. FRANKEL, CRIMINAL SENTENCES (1973); N. MORRIS, THE FUTURE OF IMPRISONMENT (1974); TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT (1976); A. VON HIRSCH, DOING JUSTICE (1976).

³ See L. WILKINS, J. KRESS, D. GOTTFREDSON, J. CALPIN, and A. GELMAN, SENTENCING GUIDELINES: STRUCTURING JUDICIAL DISCRETION (National Institute of Law Enforcement

adopted the first descriptive sentencing guidelines, and Maine⁴ adopted the first determinate sentencing law in 1976. Since then, upwards of twenty states have enacted major sentencing "reform" laws.⁵ Several states and many local jurisdictions have developed sentencing guidelines.⁶ In crude oversimplification, the new regimes can be characterized as "descriptive" or "prescriptive." The former, typified by the Denver prototype, are empirically-based sentencing guidelines. Their aim is to inform, and they have no legal force. They purport more or less to describe past sentencing patterns for various categories of offenders and are based on statistical efforts to explain variation in past sentences. Their premise is that judges will use the information to test tentative sentencing decisions, reconsidering and sometimes changing those that differ from the guidelines, except when special circumstances appear to justify an extraordinary sentence. Prescriptive sentencing standards, in contrast, do have legal force; deviation by the judge usually gives rise to a right of sentence appeal. Prescriptive sentencing schemes can encompass detailed statutory sentencing standards, loose statutory sentencing standards, or presumptively appropriate sentencing

and Criminal Justice 1978) [hereinafter cited as WILKINS, KRESS]. For an assessment of the development and evaluation of the impact of the Denver guidelines, see W. RICH, L. SUTTON, T. CLEAR, and M. SAKS, *SENTENCING GUIDELINES: THEIR OPERATION AND IMPACT ON THE COURTS* (National Center for State Courts 1980).

⁴ ME. REV. STAT. ANN., tit. 17A, chs. 47-54 (1979 Pamphlet). For a description and analysis see Zarr, *Sentencing*, 28 ME. L. REV. 117 (1976). A federally-funded evaluation of the impact of the Maine law was completed in 1978. J. KRAMER, F. HUSSEY, S. LAGOY, D. KATKIN & C. MCLAUGHLIN, *ASSESSING THE IMPACT OF DETERMINATE SENTENCING AND PAROLE ABOLITION IN MAINE*. The report has not been published but copies can be borrowed from National Criminal Justice Reference Service.

⁵ The sentencing reform schemes include statutory "determinate" sentencing (*e.g.*, Illinois, Indiana, California, Maine, North Carolina), parole guidelines (*e.g.*, Florida, Oregon, New York, Minnesota, Washington), creation of a sentencing commission to develop sentencing guidelines (*e.g.*, Minnesota, Pennsylvania), and mandatory minimum sentences (*e.g.*, Massachusetts, Michigan). Besides the states mentioned, major sentencing legislation has been passed in Arizona, Colorado, New Jersey, and New Mexico and probably other places as well. Although keeping up-to-date on sentencing reform developments is a full-time occupation, an attempt is being made with a federally-funded project at American University Law Institute. See, CRIMINAL COURTS TECHNICAL ASSISTANCE PROJECT, *OVERVIEW OF STATE AND LOCAL SENTENCING GUIDELINES AND SENTENCING RESEARCH ACTIVITY* (American University Law Institute, May, 1980) [hereinafter cited as OVERVIEW].

⁶ OVERVIEW, note 5 *supra*, indicates that as of May 1980 the following states were developing sentencing guidelines or were about to start: Alaska, Connecticut, Florida, Georgia, Maryland, Massachusetts, Michigan, Minnesota, Montana, New Jersey, North Dakota, Oregon, Pennsylvania, Rhode Island, Utah, Washington, Wisconsin. Among the local jurisdictions are: Maricopa County (Phoenix), Arizona; Denver, Colorado; Cook County (Chicago), Illinois; Topeka, Kansas; Lucas County (Toledo), Ohio; Essex County (Newark), New Jersey; Philadelphia, Pennsylvania; Clayton County (Dayton), Ohio; Hamilton County (Cincinnati), Ohio; Cuyahoga County (Cleveland), Ohio. For detailed descriptions of the earliest guidelines systems, see WILKINS, KRESS, *supra* note 3, *passim* (Denver); J. KRESS, *PRESCRIPTION FOR JUSTICE* (1980) (Chicago, Newark, Phoenix).

guidelines promulgated by a sentencing commission. The Model Sentencing Act is of the last sort.

The pace of change has been dizzying. Some states have experienced two or three generations of major sentencing reform innovation within a few years.⁷ Much of the debate over sentencing law changes has been polemical and irresponsible.⁸ The responsible debates over proposed reforms have dealt mostly with major institutional and structural issues—whether parole boards are better situated or otherwise more appropriate than judges to determine the lengths of prison sentences; whether sentencing policy should be set by the legislature, by a sentencing commission, by a judicial body, or by individual judges—and have been largely suppositious. None of the major reforms has been in effect for very long and policy-makers can only speculate as to how they will work in practice.⁹

In retrospect many of the early sentencing reform schemes were poorly conceived.¹⁰ While attempting to prevent unwarranted sentenc-

⁷ Minnesota established parole guidelines only to abolish parole in favor of a presumptive sentencing guidelines system. 1978 Minn. Laws, ch. 723, *et seq.*; MINN. STAT., Ch. 244, *et seq.* (1978). Each of the early sentencing guidelines projects—in Denver, Chicago, Phoenix, Philadelphia, and Newark—took place in states that later implemented major state-wide sentencing law changes.

⁸ *See, e.g.*, for accounts of legislative ferment in California, A. LIPSON & M. PETERSON, CALIFORNIA JUSTICE UNDER DETERMINATE SENTENCING: A REVIEW AND AGENDA FOR RESEARCH (Rand Corp. 1980). The Pennsylvania legislature recently rejected as too lenient the proposed guidelines for sentencing developed by the Pennsylvania Commission on Sentencing.

⁹ Besides the early impact evaluations described in notes 3-4 *supra*, the major impact evaluations have concerned mandatory minimum sentencing laws. *See* JOINT COMMITTEE ON NEW YORK DRUG LAW EVALUATION, THE NATION'S TOUGHEST DRUG LAW: EVALUATING THE NEW YORK EXPERIENCE (1977); Beha, "And Nobody Can Get You Out"—*The Impact of a Mandatory Prison Sentence for the Illegal Carrying of a Firearm on the Use of Firearms and on the Administration of Criminal Justice in Boston*, 57 B.U.L. REV. 96 (Pt. I) and 289 (Pt. II) (1977); Heumann & Loftin, *Mandatory Sentencing and the Abolition of Plea Bargaining: The Michigan Felony Firearm Statute*, 13 LAW & SOC'Y REV. 393 (1979). Several ambitious federally-funded impact evaluations are nearing completion and should be published some time in 1982. A Stanford University group directed by Jonathan Casper is studying the California experience, as is another group directed by Sheldon Messinger at the University of California, Berkeley, and Richard F. Sparks and Andrew von Hirsch of Rutgers University. The Berkeley-Rutgers group is also addressing the impact of sentencing law changes in other states, including Oregon and Indiana.

¹⁰ Maine, for example, abolished parole without establishing sentencing criteria for judges. The result was to increase disparity in sentencing. California abolished parole and provided detailed statutory sentencing standards; the result has been to increase the sentencing power of the prosecutor greatly. Illinois established day-for-day "good time" (time off for good behavior) as a device for making sentences seem longer than they really are. Thus a nominal four year sentence is, given good behavior in prison, really a two year sentence. However, Illinois good time does not vest and prisoners are vulnerable to having their prison sentences greatly increased as a result of a guard's decision to penalize alleged misconduct by withdrawal of accrued good time.

ing disparities, to lessen bias and arbitrariness in sentencing and paroling decisions and to establish published decision standards that would make officials accountable, many of the early schemes assumed a simplistic model of how the criminal process works.

California's Uniform Determinate Sentencing Act,¹¹ for example, was one of the earliest prescriptive sentencing laws and remains one of the most complex. The Act establishes a detailed sentencing tariff¹² that specifies normal, mitigated, and aggravated prison sentences for defendants convicted of particular felonies and prescribes the exact amounts by which sentences are to be increased on account of prior criminal record, use of a dangerous weapon, infliction of grievous bodily injury, and similar offense and offender circumstances.¹³ Two of the systemic assumptions behind this detail are that judges decide sentences and that judges will conscientiously apply the sentencing tariff.

Neither assumption is wholly unwarranted. But neither of them is wholly warranted either. The difficulty is not that judges wantonly and whimsically disregard the will of the legislature but that judges do not work in isolation and most cannot imperiously disregard the interests and needs of other participants in the process.¹⁴ The ubiquitous prac-

¹¹ 1976 Cal. Stats. ch. 1139 (as amended).

¹² "Tariff" here and elsewhere refers to the implicit sentencing standards governing a court's sentencing decisions. See D.A. THOMAS, *PRINCIPLES OF SENTENCING* (2d ed. 1979) for a book-length discussion of the English sentencing tariff.

¹³ For every offense, the Act specifies three prison terms (for example, 2, 3, or 5 years for robbery, CAL. PENAL CODE § 213 (1970 & Supp. 1981) (West)). The middle number is the presumptive *base* sentence although the judge may, in accordance with criteria established by the California Judicial Council, impose the higher or lower terms to reflect aggravating or mitigating circumstances. *Id.* § 1170 (Supp. 1981). The Act also provides that the judge "shall" add additional years of imprisonment to the base sentence if the defendant has previously served prison terms [if the present offense is a designated violent felony, three additional years imprisonment for *each* prior prison term arising from a designated violent felony conviction; for any felony for which a prison sentence is imposed, one additional year for each prior prison term]; or if the defendant was armed with a firearm, or personally used a deadly or dangerous weapon, or took, damaged, or destroyed property in value exceeding \$25,000 [one additional year in each case] or personally used a firearm or took, damaged, or destroyed property in value exceeding \$100,000 [2 additional years in each case] or, with intent to do so, inflicted great bodily injury [3 additional years]. *Id.* §§ 667.5, 12022, 12022.5, 12022.6, 12022.7. Critically, the enhancements may not be imposed unless they are "charged and admitted or found true." *Id.* § 667.5(d); *see also* § 1170.1(e). What all of this means is that the judge in most robbery cases can vary the sentence down by one year or up by two while the prosecutor in all cases can fine tune the prison sentence by electing which charges to file or dismiss and also by deciding what enhancements and prior prison sentences to charge and prove.

¹⁴ The prevailing view among social scientists has been, for at least a decade, that the criminal court is a complex organization which can best be understood in terms of bureaucratic and organizational behaviors. The court is both an organization with goals, conventions, and norms, and an aggregation of individuals who are members of bureaucracies (the policeman, the prosecutor, the judge, the public defender). Patterns of interaction in any court depend on the quality of relations among individuals, the stability of personnel, and the

tice of offering defendants inducements to plead guilty satisfies the diverse needs of defendants, prosecutors, defense counsel, and judges. If the court's work is to be accomplished, prosecutors, defense counsel, and judges must get along, and often that means going along. Conventions must generally be observed, important interests must be acknowledged, and expectations must be satisfied, otherwise the necessary patterns of cooperation break down. Sentencing decisions embody not only the judge's views, needs, and interests, but also those of the prosecutor, the defense counsel, and the defendant.

Most defendants plead guilty,¹⁵ usually on the understanding that penal risk will be lessened. Sometimes the prosecutor agrees to dismiss charges or to recommend a particular sentence to the judge. Other times counsel negotiate the specific sentence the defendant will receive. As a constitutional matter the judge must either accede or else permit the defendant to withdraw his plea.¹⁶

Not one of the major new sentencing systems faces up to the squalid reality that most guilty pleas are induced by promises of leniency. Yet there is little reason to doubt that concessions remain necessary if the requisite number of defendants are to plead guilty, or that plea bargaining will persist, or that ways will be found to circumvent inconvenient, "unrealistic," and draconian sentencing standards. There are any number of ways, with or without judicial cooperation, to induce guilty pleas under even the most detailed sentencing tariff. If the appropriate sentence depends on the offense of conviction, cooperation can be rewarded by reducing or dismissing charges; the 30-month armed robber can be transmogrified into a 20-month robber or a 10-month thief. Sentence bargains that patently defy the tariff would require overt judicial acquiescence, which might make judges uncomfortable, but there are a number of subtler ways that judges and lawyers could carry out sentence bargains without appearing to defy the tariff.¹⁷

policies (and oversight) of the separate bureaucracies. J. EISENSTEIN & H. JACOB, *FELONY JUSTICE* (1977) (Baltimore, Chicago, and Detroit), is probably the leading work, but the literature is large and growing. For recent book-length works *see, e.g.*, M. FEELEY, *THE PROCESS IS THE PUNISHMENT* (1979) (New Haven, Connecticut); M. LEVIN, *URBAN POLITICS AND THE CRIMINAL COURTS* (1977) (Minneapolis and Pittsburgh); L. MATHER, *PLEA BARGAINING OR TRIAL?* (1979) (Los Angeles); P. UTZ, *SETTLING THE FACTS* (1978) (San Diego and Alameda Counties, California).

¹⁵ *See* NATIONAL CRIMINAL JUSTICE INFORMATION AND STATISTICS SERVICE, *SOURCEBOOK OF CRIMINAL JUSTICE—1978*, Tables 5-19 (guilty plea rates as a percentage of conviction vary from place to place but are typically in the 85% to 95% range) & 5-30 (85% of federal convictions in 1977 resulted from guilty pleas).

¹⁶ *See* *Santobello v. New York*, 404 U.S. 257 (1971).

¹⁷ Even in a detailed prescriptive sentencing guidelines system in which judges were directed to impose the guidelines sentence in most cases, judges and lawyers could effect sentence bargains in at least three ways. Counsel could simply, with judicial acquiescence, settle

The prosecutor's enhanced influence under determinate sentencing has not gone unnoticed.¹⁸ Several proposals have been made in order to prevent the prosecutorial manipulation of narrow sentencing guidelines or laws. The simplest proposal would legitimate overt "discounts" to defendants who plead guilty.¹⁹ The most complex and imaginative proposal calls for establishment of "charge reduction guidelines" for the judicial decision whether to approve charge dismissals as part of a plea bargain.²⁰ However, the least satisfactory proposal, "real offense sentencing," is at the heart of the Model Act.²¹ According to the sentencing

on a below-guidelines sentence. Neither party would have reason or standing to object to the extra-guidelines sentence and the judge's non-compliance with the guidelines would pass legally unacknowledged. If outright judicial nonfeasance lacks subtlety, the same result could be achieved if the judge cited the defendant's guilty plea as the "justification" for a lenient departure from the guideline. If that candid admission of the effect of a guilty plea would make the judge uncomfortable, he could disingenuously assert a different rationale (the defendant's contrition, his good character, etc.) for the lenient sentence. The prosecution would not appeal the lenient sentence and the appropriateness or applicability of the judge's reasons would never be tested.

¹⁸ See Schulhofer, *Due Process of Sentencing*, 128 U. PA. L. REV. 733, 751 (1980): "[T]he principal effect of a system of narrow sentencing guidelines would be to transfer discretionary sentencing power in guilty plea cases from federal district judges to assistant United States attorneys." See also Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550 (1978).

¹⁹ See Note, *Restructuring the Plea Bargain*, 82 YALE L.J. 286 (1972).

²⁰ Both S. 1722, 96th Cong., 1st Sess. (1979) and H.R. 6233, 96th Cong., 1st Sess. (1979) propose creation of "charge reduction" guidelines, as part of a sentencing guidelines system, to set standards for the judge's decision whether to approve a charge reduction agreement. See CRIMINAL CODE REFORM ACT OF 1979, S. REP. No. 553, 96th Cong., 2d. Sess. 1235-36 (1979). The charge reduction device is based on S. SCHULHOFER, PROSECUTORIAL DISCRETION AND FEDERAL SENTENCING REFORM (1979) and is discussed at length in Schulhofer, *supra* note 18. Charge reduction guidelines are subject to many of the problems of "real offense" sentencing. They gloss over the complexities of criminal court organization. They can be circumvented by means of the prosecutor's power to elect what charges to file and what to dismiss. Schulhofer's proposal founders on what he sees as a need to provide guilty plea incentives to defendants in the form of substantial guilty plea "discounts"—reduction in the otherwise applicable sentence. Overt guilty plea discounts may be unconstitutional. See *Corbitt v. New Jersey*, 439 U.S. 212 (1978). They are in several respects unsound as a matter of policy. In any event, Schulhofer effectively would abolish plea bargaining; his proposal converts charge reductions into guilty plea discounts, in other words into court-monitored sentence bargaining. Abolition of plea bargaining may or may not be possible but is probably better attempted directly. Experience in other countries and recently in Alaska suggests that abolition of plea bargaining may be less millenarian than is widely believed. See, on France and West Germany, Weigend, *Continental Cures for American Ailments: European Criminal Procedure as a Model for Law Reform*, in 2 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 381-428 (N. Morris & M. Tonry eds. 1980). On Alaska, see M. RUBINSTEIN, S. CLARKE, T. WHITE, ALASKA BANS PLEA BARGAINING [hereinafter cited as ALASKA].

²¹ MODEL ACT at 114 (comment to § 3-104(e)), 126 (comment to § 3-109(1)), 144 (comment to § 3-115(b)(1)), 155 (comment to § 3-204(a)(1)), 157-60 (§ 3-206 and explanatory comments). Partial "real offense" systems have been proposed in which judges would sometimes look behind offenses of conviction to actual harms caused and losses suffered. The first sentencing guidelines project, in Denver, recognized that charge bargains would distort sentencing under sentencing guidelines. "The judges on our Steering and Policy Committee . . .

guidelines, the judge, the presentence report, and any appellate judge would ignore the offense of conviction: "In determining the appropriate guideline to follow the court shall consider the nature and characteristics of the criminal conduct involved *without regard* to the offense charged."²² The goal is to liberate the judge from the consequences of the prosecutor's charging and bargaining decisions.

Objections to real offense sentencing range from the constitutional to the principled to the practical. Section I of this article introduces the Model Act's major sentencing proposals and suggests their deficiencies by chronicling the progress of an armed robbery suspect through the criminal justice system before and after implementation of the Model Act. Section II describes the proposed system of real offense sentencing in considerable detail. Suffice it to say that this writer is not enthusiastic about a proposal which requires that guilty pleas, trial verdicts, the law of evidence, the criminal burden of proof, and the substantive criminal law be ignored, with sentencing being based instead on the court's conclusions about what "really happened" without regard to the offense charged.²³

Section III considers two additional major features of the Model Act. First the Model Act purports, but fails, to prescribe a retributive "just deserts" sentencing system that aims to treat similarly situated offenders similarly, to give high priority to pursuit of equality in punishment, and to proportion sanctions to defendants' moral culpability. Yet many provisions are avowedly incapacitative and deterrent and are inherently inconsistent with a retributive punishment program. Instead, the Act is moderately utilitarian in its aims and provisions, and clarity and coherence would be gained if it did not claim to be otherwise. A second problem is that the Act's provisions provide no reasonable assurance that they will achieve the Act's aim of treating defendants fairly and consistently. Proposed sentencing guidelines and statutory aggravating and mitigating circumstances, taken together, are highly vulnera-

felt that the sentencing decision required more information concerning the underlying physical harm and/or property loss suffered by the victim than the mere statutory label of a plea-bargained conviction would provide them." WILKINS, KRESS, *supra* note 3, at 8. The solution selected was partially to deprive the defendant of the benefit of his bargain by use of a "harm/loss" modifier which could be used in some cases to increase the rated severity of the defendant's offense on the matrix that constitutes the sentencing guidelines. *Id.*, Appendix G., at 63-66. Real offense provisions in descriptive guidelines like Denver's may present different issues than in a prescriptive scheme like the Model Act. In the former case, the aim is to provide a somewhat truer picture of past practice: Denver's judges *do* look behind the "statutory label" and guidelines that fail to do so would obscure past practice. In a prescriptive system, the issue is "ought" not "is" and it is far from clear that real offense sentencing would be practiced in utopia.

²² MODEL ACT § 3-206(d) (emphasis added).

²³ *Id.* § 3-207(d).

ble to manipulation by counsel and are unlikely to provide significant checks on sentencing decisions. Further, unlike most sentencing proposals which prefer concurrent to consecutive sentences, the Model Act reverses the pattern and creates a presumption in favor of consecutive sentences, thereby giving the prosecutor, through charging decisions, another manipulative tool.²⁴ Also, the Model Act permits prosecutorial appeal of sentences and permits the appellate court to *increase* the sentence of a defendant who appeals.²⁵ The former defies double jeopardy policies according to the Burger court, although apparently not Article V of the Bill of Rights.²⁶ The latter would inevitably have a chilling effect on appeals. Finally, in this Act, statutory good time, while generous, only partly vests. Correctional authorities would possess substantial effective control over release dates²⁷—an irony in an Act that would abolish parole release because of its inconsistencies.²⁸

Section IV suggests other plausible ways that sentencing reform might take the prosecutor into account and considers whether systematic real offense sentencing is more objectionable than our present system in which something like real offense sentencing is commonplace, though often surreptitious. The last point warrants repetition. Present practice in most jurisdictions follows a modified real offense system.²⁹ Under *Williams v. New York* and its lineals,³⁰ courts are free to consider whatever evidence they choose in deciding what sentence to impose. The gun that the prosecutor swallows when he accepts a plea of guilty to robbery for an armed robbery charge can reappear in the sentencing hearing. Even a sentence bargain may not protect the defendant from real offense sentencing. Parole boards often ignore the nominal offense of conviction and look behind it to "actual offense behavior."³¹ If the

²⁴ *Id.* § 3-107.

²⁵ *Id.* § 3-208.

²⁶ *United States v. DiFrancesco*, 101 S. Ct. 426 (1980).

²⁷ The Model Act would establish day-for-day good time; thus a 10 year sentence would on good behavior expire in 5 years. MODEL ACT § 3-501. However, up to three quarters of accumulated good time may in some cases be revoked. Hence, at the end of the fifth year of a 10 year sentence, multiple disciplinary infractions could be sanctioned by withdrawal of up to 3 years, nine months good time, and a single infraction up to two years, thereby possibly lengthening the effective prison term from 5 years to 8 years, 9 months. MODEL ACT § 4-502(c).

²⁸ If good time is generous and does not vest, prison authorities may effectively reconstitute the worst aspects of parole release—low visibility, ad hoc release decisions, prisoner anxiety, and the absence of published criteria and public accountability—without replicating the best—evening out sentence disparities and giving prisoners early notice of when they can expect to be released. *See* note 31 *infra*.

²⁹ *See, e.g.*, *WILKINS, KRESS, supra* note 3, at 8.

³⁰ *Williams v. New York*, 337 U.S. 241 (1949); *e.g.*, *United States v. Grayson*, 438 U.S. 41 (1978).

³¹ *See, e.g.*, U.S. Parole Commission Rules, 28 C.F.R. § 2.20 (1980).

Model Act's real offense proposals are objectionable, then are not present practices just as bad? How can the prevalence of real offense sentencing be explained and justified? These questions are also explored in section IV.

I. THE MODEL ACT'S PROPOSALS FOR REFORM OF SENTENCING

The draftsmen of the Model Act deserve credit for their efforts to give order to complexity. The Act contains provisions that are intended to structure, counterbalance, or abolish the discretions of prosecutors, judges, and parole and correctional administrators.

The core proposal is that a part-time sentencing commission be established to promulgate presumptive sentencing guidelines. The Model Act does not specify the form these guidelines should take. However, to illustrate for heuristic purposes the kind of guidelines which the Act appears to envision, Table 1 sets out the guidelines matrix developed by the Minnesota Sentencing Guidelines Commission. All felonies are di-

TABLE 1
MINNESOTA SENTENCING MATRIX: SENTENCING BY
SEVERITY OF OFFENSE AND CRIMINAL HISTORY

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

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

* one year and one day

vided into ten categories; these are shown on the vertical axis. Defendants are divided into seven groups on the basis of their prior criminal records and these are arrayed on the horizontal axis. To find the applicable guideline sentence, one determines the severity level of the conviction offense and the defendant's prior record grouping by consulting the cell located at the intersection of the appropriate row and column. This cell indicates the number of months to be served by that particular defendant.

Under the Model Act, judges can deviate from guidelines when they state their reasons for their departure, but the sentence would be subject to appellate review initiated by either party. The Act proposes no direct controls on plea bargaining but would try to alleviate its effects by basing sentences on actual offense behavior and *not* on the offense of conviction. Parole release would be abolished³²—no more effective prophylaxis comes to mind for minimizing inconsistencies in parole release decisions. Good behavior in prison would earn one day's good time credit for each day served and, thus, could halve nominal prison terms.

Notwithstanding the Model Act's admirably ambitious scope, real offense sentencing is its central idea, and real offense sentencing, regrettably, is not a good idea. Consider the case of Miles Standish before and after enactment of the Model Sentencing Act.

Miles Standish is a 22-year-old black man who has been arrested in Erewhon, a pseudonymous Eastern state, on armed robbery charges. He admits having been in a gasoline station in which an attendant was shot but denies that he intended to steal anything or to shoot the attendant. He claims that the white attendant insulted him by use of a racial slur, picked a fight, and pulled a gun; and that while he was struggling to defend himself, the gun discharged, hitting the attendant. Standish fled, and denies taking any money.

The attendant says that Standish entered the station with the gun, ordered the attendant to hand over the contents of the cash register, shot the resisting attendant, and fled taking the gun and \$100.

³² Several states have "abolished" parole to a greater or lesser extent. Maine, Minnesota, Illinois, Indiana, and California are examples. Most have retained a period of parole supervision as a standard consequence of a prison sentence. Powerful arguments can be made for abolition of parole, but those made by the Model Act's draftsmen are among the least persuasive. The reasons mentioned are that continuing uncertainties about release dates debilitate prisoners and that parole "intensifies disparity." MODEL ACT, prefatory note, at 93. In better run parole systems—like that of the U.S. Parole Commission—neither criticism applies. Release dates are set in the early months of imprisonment, and, because of the parole guidelines, disparities are diminished, not increased. For more thoughtful assessments of the case for abolition of parole, see A. VON HIRSCH & K. HANRAHAN, *THE QUESTION OF PAROLE* (1979); Morris, *Towards Principled Sentencing*, 37 MD. L. REV. 267 (1977).

Ownership of the gun cannot be traced. When found during the course of a warrantless search of Standish's apartment, it bore only Standish's fingerprints.

Standish's defenses are, first, that he is factually innocent, that he committed no robbery. And, second, that if there were a robbery, it was of the simple, not the armed, variety.

Consider what would happen to Standish under present Erewonian law.³³ Standish is indicted for armed robbery. At arraignment he pleads not guilty. His lawyer files a motion to suppress evidentiary use of the gun. The search was patently unconstitutional and the motion is granted.

The prosecutor offers to dismiss the armed robbery charge if the defendant will plead guilty to the lesser-included robbery charge. The defendant, on the advice of counsel, rejects the proposed bargain; counsel's reasoning is that the state cannot prove armed robbery without the fingerprint evidence and that Standish will not be convicted at trial of anything more serious than robbery. He tells Standish, "hold out for an offer to plead guilty to theft; otherwise the prosecutor is not giving you anything."

The prosecutor will offer no better bargain. At a trial before a jury, Standish is convicted of theft. He receives a prison sentence of two years, suspended. (Somewhat improperly, we question the jurors and learn that they could not decide beyond a reasonable doubt who was telling the truth about the gun, hence no armed robbery conviction. They thought that Standish probably did intend to commit the robbery but that the attendant did insult him with racial slurs, thus a "compromise" theft conviction.)

Now consider what would happen to Standish if Erewon had adopted the Model Sentencing and Corrections Act. The early parts of the story do not change: armed robbery indictment, not guilty plea, successful motion to suppress, the prosecutor's offer to accept a guilty plea to robbery. Then things change a little. Standish's counsel opposes the charge bargain but for a very different reason. He tells Standish, "under the Model Act, if you are convicted, the judge will sentence you for armed robbery. Under the sentencing guidelines, with your record you will receive a prison sentence of 48 months. Hold out for a sentence bargain to something shorter." The prosecutor will offer no better bargain. There is a jury trial and Standish is once again convicted of theft (for the same reasons). At this point, things change mightily.

³³ For heuristic purposes, the process has been truncated. For example, motions to suppress would normally be presented at a preliminary hearing before grand jury proceedings. Here the sequence is reversed.

As a matter of course, the judge will direct a "presentence service officer" to prepare a presentence report on, among other things, "the characteristics and circumstances of the offense,"³⁴ looking "behind the offense charged or the offense for which the defendant was ultimately convicted"³⁵ to the actual offense behavior. At a sentencing hearing, the court will consider the evidence admitted at trial or at the hearing (including the suppressed fingerprint evidence), the presentence report, and the sentencing guidelines. The guidelines are based on "offense behavior rather than the offense for which the defendant was ultimately convicted."³⁶ The court, in considering evidence and the guidelines, "shall consider the nature and the characteristics of the criminal conduct involved without regard to the offense charged."³⁷ The court will make its decision on the basis of "substantial evidence in the record of the sentencing hearing and the presentence report."³⁸ Standish will be sentenced as if he had been convicted of armed robbery and receive a 48 month prison sentence.

For Standish, the Model Act would deprive him of the protections of constitutional criminal procedure and the law of evidence (the suppressed fingerprint evidence), the substantive criminal law (armed robbery versus robbery versus theft), and proof beyond a reasonable doubt ("substantial evidence"). The comments to the Model Act neither attempt to justify so drastic an alteration of American law nor do they discuss the likely systemic impact of such a change.

II. CONTROL OF THE PROSECUTOR BY INDIRECTION—REAL OFFENSE SENTENCING

The prosecutor looms large in sentencing. Under finely tuned prescriptive sentencing systems like those of California³⁹ or Minnesota,⁴⁰ he may loom larger still. Plea bargains for specific sentences or prosecutorial agreements to recommend or not oppose a specific sentence may be amenable to control by sentencing guidelines, if we assume that judges will not condone overt sentence bargains that circumvent

³⁴ MODEL ACT §§ 3-203, 3-204(a)(1).

³⁵ *Id.*, comment to § 3-204(a)(1) at 155. The Comment continues: "The application of sentencing guidelines is based on the underlying criminal activity of the defendant and not on the formal charge or conviction."

³⁶ *Id.*, comment to § 3-115(b), at 144.

³⁷ *Id.* § 3-206(d).

³⁸ *Id.* § 3-207(d).

³⁹ See note 13 *supra*.

⁴⁰ Judges are expected to impose a sentence within the range provided in the applicable cell of the guidelines grid (see Table 1) except when "substantial and compelling" reasons exist to justify a different sentence. MINNESOTA SENTENCING GUIDELINES COMMISSION, REPORT TO THE LEGISLATURE (1980).

applicable guidelines. Charge bargaining however would become more important. If guidelines prescribe specific offenses, the power to initiate or dismiss charges is the power to determine sentence. The problem cannot be burked and the Model Act, to its credit, does not do so.

A. THE MODEL ACT'S REAL OFFENSE PROVISIONS

The Model Act contains a thorough application of its real offense approach to the control of plea bargaining. Section 3-115, the provision governing development of sentencing guidelines, directs the commission to consider "the nature and characteristics of the offense." The comment explains: "The language 'nature and characteristics of the offense' . . . authorizes the commission to utilize and the sentencing court to consider offense behavior rather than the offense for which the defendant was ultimately convicted. The major purpose of the provision is to reduce disparity resulting from the effect of plea bargaining."⁴¹ Because neither the trial nor a guilty plea would determine the factual foundation of a sentence, the sentencing hearing would become critically important. Accordingly, sections 3-203 and 3-204(a) would require preparation of a presentence report setting forth, among other things, "the characteristics and circumstances of the offense."⁴² Finally, section 3-206(d) requires the sentencing judge to consider the "nature and circumstances of the criminal conduct involved *without regard to the offense charged*." Although the critical facts would be determined at the sentencing hearing, the defendant would have no *right* to subpoena, call, or cross-examine witnesses.⁴³ Under section 3-207(d), the sentence "must

⁴¹ MODEL ACT, comment to § 3-115(b).

⁴² The applicable comment to § 3-204(a) (MODEL ACT at 155) explains: "The language requires [the presentence service officers] to go behind the offense charged or the offense for which the defendant was ultimately convicted." Oddly, § 3-115 on development of sentencing guidelines refers to the real offense in terms of "the nature and characteristics of the offense"; while § 3-204 on the presentence report refers to "the characteristics of the offense"; and § 3-206 on the judge's sentencing decision refers to "the nature and characteristics of the criminal conduct." Most well-drafted statutes would use a single phrase to refer to so fundamental a concept as the "real offense" in order to anticipate and avoid appeals based on wholly semantic differences. The inconsistency appears to be inadvertent. The comments to each section explain the plea bargain control strategy behind real offense sentencing.

I can divine no intended difference between the "offense" of § 3-115 and the "criminal conduct" of § 3-206. The phrase "criminal conduct" might denote conduct proven beyond a reasonable doubt in contrast to "alleged criminal conduct," but that distinction seems unlikely here.

The words "characteristics and circumstances" in § 3-204(a)(1) (as opposed to "nature and circumstances" in the other two sections) could, out of context, be construed to refer to the elements of the offense *and* to relevant aggravating and mitigating circumstances. However §§ 3-204(a)(2) and (4) require the presentence report separately to set forth information relating to aggravating and mitigating circumstances.

⁴³ MODEL ACT § 3-206(b). The court "may," but would not be obliged to, permit the defendant to subpoena, call, or cross-examine witnesses.

be based on substantial evidence in the record of the sentencing hearing and the presentence report."⁴⁴ Thus the Model Act makes clear in these respects, and in others,⁴⁵ that sentencing is to be constrained by neither offenses charged nor offenses of conviction.⁴⁶

⁴⁴ However, defendants may not be sentenced to enhanced terms for "especially aggravated offenses" or as "persistent offenders" except on the basis of facts proven beyond a reasonable doubt. *Id.* § 3-207(e)(2).

The provisions for enhanced terms are apparently intended to reduce maximum authorized sentences for most offenses by reserving long prison terms for cases of special severity. *See* comment to § 3-105, at 116. If long sentences were reserved for defined categories of offenders, maximums substantially lower than those now authorized in most jurisdictions would apply to most offenses. Extremely long prison sentences would be reserved for "especially aggravated offenses" or "persistent offenders." The *Study Draft* of the National Commission on Reform of Federal Criminal Laws proposed such a system. *See* text accompanying notes 133-34 *infra*. The aim is to build a two story sentencing structure. The first floor has a low ceiling and the second story is for persistent offenders, etc. Somewhat surprisingly, the Model Act does not propose a set of statutory sentence maximums (MODEL ACT at 107). Thus the first story well could have very high ceilings and the second story tower into the clouds. *See* §§ 3-104-06 and supporting comments. For an especially well-informed discussion of this two-story strategy for reducing the lengths of prison sentences, *see* AMERICAN BAR ASSOCIATION STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, SENTENCING ALTERNATIVES AND PROCEDURES (2d. ed. tent. draft 1979) [hereinafter cited as SENTENCING ALTERNATIVES].

⁴⁵ MODEL ACT § 3-102(6) establishes as a "principle of sentencing" that predictions of future criminality should play no role in sentencing "unless based on prior criminal conduct or acts designated as a crime under the law" (emphasis added). The relevant comment, *id.* at 102, explains that the "acts designated" language is intended to capture juvenile acts that would have led to a conviction for a crime had the offender been an adult. It's unclear from either § 3-102(6) or the comment whether an adjudication would be required or whether this is a "real" prior juvenile offense standard. In any event, the § 3-102(6) language is not by its terms restricted to juvenile records. Unless the comments were codified, courts would have opportunity to construe the section in broad "real offense" terms.

Section 3-109 on aggravating factors in sentencing includes "a recent history of convictions or criminal behavior." The comments, *id.* at 126-27, explain that "criminal behavior" encompasses criminal conduct of juveniles that resulted in an adjudication (note that this is less ambiguous than the 3-102(6) standard), and "allegations of criminal conduct or the underlying criminal behavior of convictions that were set aside as unconstitutionally invalid." The words "criminal behavior" in § 3-109 presumably refer (if they are used as defined in the comment) to the "real offense" underlying the unconstitutionally invalid conviction.

No reason is given in the comments for use of the different terms "acts designated as a crime under the law" in § 3-102(6) and "criminal behavior" in § 3-109.

Finally, § 3-104(e) permits imposition of enhanced fines on the basis of "transactions which are part of a scheme of criminal activity but not formally charged" (comment at p. 114).

Only § 3-105 defining "persistent offenders" for purposes of enhanced sentencing vulnerability takes a restrictive view of prior records and is limited to prior convictions and excludes convictions that have been set aside on appeal.

⁴⁶ § 3-206 and the comments to §§ 3-115, 3-204, and 3-206 expressly permit sentencing to disregard the offense charged. Powerful arguments could be developed that even so unprincipled a concept as real offense sentencing should be constrained by offenses charged. The Model Act clearly would permit sentencing of a defendant for a "real offense" with which he was not charged. For an example, consider a defendant who committed an armed robbery in which a victim was accidentally killed. Charged with armed robbery, the defendant pleads

B. WHAT'S WRONG WITH REAL OFFENSE SENTENCING?

The fundamental flaws of real offense sentencing are easily stated. The most basic are that it is incompatible with the basic values of our legal system and that it will not work. Those are the first two points discussed below. Other flaws range from objections based on concern for fairness and due process to practical objections based on likely inefficiencies.

1. *Real offense sentencing is antithetical to basic notions of individual worth and liberty.*

In part, no doubt, because of our historical and philosophical commitment to liberty, our system of criminal law justifies the imposition of criminal sanctions only on people whose acts or omissions *in fact* violate the criminal law and who have admitted their unlawful acts or have been convicted at trial on the basis of proof beyond a reasonable doubt.⁴⁷ Real offense sentencing undermines the importance of the substantive criminal law, nullifies the law of evidence, and is irreconcilable with the notion that punishment can be imposed only in respect to offenses admitted or proven.⁴⁸ *For purposes of analysis, this section is premised on the conceit that counsel and judges would not systematically circumvent sentencing guidelines.* I employ the conceit, which I regard as highly unlikely, so

guilty to robbery. The Model Act would not only permit the sentencing judge to look behind the robbery conviction to the "real offense" of armed robbery with which he was charged but even further to the "real offenses" of felony-murder or manslaughter. However, § 3-206(d) limits the maximum sentence to the statutory maximum authorized for the offense of conviction. That decision is explained in the comments, MODEL ACT at 159, in the following extraordinary understatement: "Serious constitutional objections would be raised if the court were authorized to impose a sentence in excess of that authorized by statute for the offense charged."

⁴⁷ The prevalent trend in the philosophy of the criminal law is to expose the moral basis of our constitutional preference for autonomy and to attempt to expose and where necessary rebuild the moral foundations of the criminal law. See G. FLETCHER, *RETHINKING CRIMINAL LAW* (1978); D. RICHARDS, *THE MORAL CRITICISM OF LAW* (1977); Richards, *Human Rights and the Moral Foundations of the Substantive Criminal Law*, 13 GA. L. REV. 1395 (1979). Real offense sentencing and guilty plea discounts are a move in the opposite direction.

⁴⁸ The textual point is cognizant of the procedural and evidentiary latitude given judges by *Williams v. New York*, 337 U.S. 241 (1949), to consider a wide range of information when making sentencing decisions. "The due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure." *Id.* at 251. *Williams* was concerned with the secondary question of the evidence admissible, and the governing probative standards, in deciding what sentence to impose in respect of an admitted or proven offense. The textual point is more basic—real offense sentencing is premised on a primary characterization of the criminal offense. The offense admitted by the defendant, or which was proven to a judge or jury's satisfaction beyond a reasonable doubt, is not a limiting factor in sentencing (unless the maximum sentence authorized by statute is less than that which would result under the real offense scheme). The offense proven beyond a reasonable doubt would often be a nullity. The real offense, based on a substantial evidence probative standard, would determine sentence.

that the Model Act may be considered in the best possible light, with all parties complying with it in complete good faith, however inconvenient that compliance may be and however uneasy the parties may be with the guidelines' sentences.

a. The substantive law. Criminal law is the most complex and subtle of the common law subjects.⁴⁹ The stakes—deprivation of liberty and property—are high, and the courts and legislatures specify the elements of offenses and defenses with exacting detail. The felony-murder rule, for example, varies among jurisdictions on the bases of such refinements as the underlying offense; the foreseeability of death; the nature of the killer's involvement in the predicate felony (whether he was the mastermind, a willing accomplice, driver of the getaway car, etc.); the identity of the victim; whether the killer was a felon, a victim, a bystander, or a peace officer; whether the death was intended, knowledgeable, reckless, or negligent; whether the death was "in furtherance" of the original criminal purpose; and whether it occurred before, during, or after the underlying offense. The defense of self-defense varies with the nature of the threat; whether a mistaken belief in a threat was reasonable or unreasonable; whether a person must retreat and thereby avoid the incident; whether the retreat rule is different on property one owns or occupies; the amount of force used in self defense; whether the original assailant has renounced his nefarious purpose and may himself justify assaultive acts on the basis of self-defense; and so on. Countless hours have been expended over centuries in wrestling with the byzantine intricacies of the substantive criminal law. Conviction and the resulting public labelling, denunciation, and possible deprivation of liberty, are too important to tolerate avoidable ambiguities. The requirement of a high burden of proof in criminal cases, with either an admission of guilt or proof beyond a reasonable doubt being necessary for conviction, is one acknowledgement of the importance of the interests and values implicated by the substantive criminal law.

Real offense sentencing side-steps the substantive law as if its refinements are so much superfluous metaphysic, rather than the exactly developed fine print of the social contract. Under the Model Act the

⁴⁹ Presumably teachers of property, torts, and contracts would give this sentence a different subject. They would be wrong. Property law is the quintessential body of law in which it is less important that rules be right than that they be settled. Much property law is carved in stone. Torts and contracts are etched in jello. Concerned with distribution of loss and money damages, not liberty, both have undergone rapid change in this century. The issues and arguments in criminal law are more enduring. Little of the argument in, for example, G. FLETCHER, *RETHINKING CRIMINAL LAW* (1978), would be unfamiliar to the nineteenth century English Criminal Law Commissioners. *See, e.g., HIS MAJESTY'S COMMISSIONERS ON CRIMINAL LAW, FIRST REPORT* (1834).

offense of conviction is but an inconvenience that can—if the statutory maximum sentence is lower than the appropriate real offense guideline sentence⁵⁰—occasionally frustrate the sentencing process. The comments to the American Bar Associations's *Sentencing Alternatives and Procedures* characterize real offense sentencing as "a practice that risks infringing the appearance of justice and downgrading the significance of the trial."

b. The burden of proof. During the first week of law school every law student learns that, in Blackstone's words, "it is better that ten guilty persons escape than one innocent suffer,"⁵¹ that those words are no less salient now than in the eighteenth century, and, accordingly, that the burdens of proof in the civil and criminal courts are different. Lawsuits in the civil courts are usually subject to probative standards of "more probable than not" or "balance of probabilities" or "preponderance of the evidence," while an accused wrongdoer becomes a convicted criminal only if he freely admits guilt or is proven guilty "beyond a reasonable doubt." The Model Act's provisions would in all cases replace proof "beyond a reasonable doubt" with proof based on "substantial evidence." It should go without saying that substantial evidence often will not support a conclusion "beyond a reasonable doubt."

Formally, real offense considerations under the Model Act would be raised after conviction, whether by plea or verdict, and the burden of proof would not be affected. The reality is different. Upwards of 90 percent of convictions in most jurisdictions result from pleas of guilty to particular charged offenses.⁵² The remaining convictions result from verdicts rendered following bench and jury trials. In either case, the Model Act would authorize the court to sentence the defendant as if he had been convicted of a more serious offense. And, under section 3-207(d), the court's decision would be based not on proof beyond a reasonable doubt, but on "substantial evidence in the record."⁵³

The Model Act overlooks fundamental distinctions among cases. Different considerations are presented by defendants who plead guilty,

⁵⁰ Defendants of course must be released when the maximum sentence expires. Guidelines that specify a sentence longer than an applicable maximum are patently irrelevant.

⁵¹ W. BLACKSTONE, IV COMMENTARIES ON THE LAWS OF ENGLAND 27 (1765-69).

⁵² See note 15 *supra*.

⁵³ Under other provisions of the Model Act, the quality of the record may be substandard. Defendants could cross-examine, call, and subpoena witnesses only with the court's consent, MODEL ACT, § 3-206(b). The presentence report would provide the factual base in most cases. Although the "presentence service officer" could, with the court's permission, be examined, much of the contents of his report and his testimony would constitute inadmissible hearsay were the rules of evidence applicable. They are not. See note 57 and accompanying text *infra*.

defendants convicted at trial on all counts, and defendants who are convicted at trial of some offenses and acquitted of others. In all cases, distinctions should be drawn between defendants convicted of the highest offense charged and those who plead guilty to lesser charges or are convicted of them.

The defendant who pleads guilty to the highest charge concedes his guilt. Neither he nor the defendant convicted at trial of the highest offense charged can complain that the facts supporting conviction were insufficiently proved.⁵⁴ Both can complain if they are sentenced as if they had been convicted of a yet more serious offense with which they were not charged—a result the Model Act prescribes. Section 3-206(d) directs the judge to disregard the offense charged, thereby addressing the distortions that result from prosecutors' charging decisions, but only by sentencing the defendant for committing an offense against which he had no opportunity to defend.

The most rudimentary due process requires notice of accusations and an opportunity to respond.⁵⁵ At its most extreme reach, the Model Act would allow a judge to justify a sentence on the basis of uncharged criminal conduct unrelated to the offense charged. The inventory of the rape defendant's personal possessions when arrested may reveal marked bills traceable to a robbery. It is hard to imagine that a sentence would pass constitutional muster if the judge announced that a lengthy prison term for a rape defendant is justified by an uncharged "real offense" of armed robbery. The line is a fine one—if there is such a line—between this example and a case in which the defendant charged and convicted of robbery is sentenced for the real offense of armed robbery. In either case, the "real offense" may never have been discussed nor the factual basis for it explored at trial or during plea negotiations. Perhaps the defendant would not have pled guilty to the higher offense if he had been charged with it, or would have presented evidence and legal argument contesting its appropriateness. When, therefore, he is sentenced as if he had been charged with the higher offense, he could fairly say that he had not been proven guilty: the *only* salient evidentiary finding would be based on substantial evidence. For him, proof beyond a reasonable doubt simply would not apply.⁵⁶

The problem is similarly stark for the defendant who pleads guilty

⁵⁴ With the exception of defendants who enter Alford pleas in which they deny guilt but plead guilty. See *North Carolina v. Alford*, 400 U.S. 25 (1970).

⁵⁵ See *Goldberg v. Kelly*, 397 U.S. 254 (1970). The important post-sentencing cases establishing minimum procedural requirements when "grievous loss" may be imposed are *Vitek v. Jones*, 100 S. Ct. 1254 (1980) (transfer from prison to mental institution); *Wolff v. McDonnell*, 418 U.S. 539 (1974) (prison disciplinary procedures); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (probation revocation); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (parole revocation).

⁵⁶ It is unclear why any defendant would plead guilty if he obtains no sentencing benefits

to a lesser charge in consideration of charge dismissals.⁵⁷ Not only would the Model Act permit punishment for acts not proven, it would unfairly deprive the defendant of the benefit of his bargain. The defendant's guilty plea and waiver of trial rights are the price paid for immunity from punishment for the more serious dismissed charge. A principled legal system should be uneasy about institutionalized deceit. As, however, this is precisely the result which the Model Act's provisions are designed to reach, nothing more will be said here about it. The Model Act's proponents could presumably argue that rational defendants would cease pleading guilty on the inducement of charge dismissals and no unfairness would occur.

Sentencing a defendant for committing an offense of which he was acquitted presents considerable ethical problems.⁵⁸ Suppose that a rape prosecution resulted in jury conviction for assault. From the rape acquittal, the law infers only that there was reasonable doubt of the defendant's guilt. A judge's decision that there is substantial evidence to support a sentence premised on rape is completely reconcilable with the jury's reasonable doubt, but no principled system of criminal law could responsibly permit sentencing on such a basis. The symbolism and high drama of the criminal court would be displaced by the artifice and illusion of a shell game.

If the Model Act does not expressly abrogate the criminal law burden of proof, it seriously undermines it. Judges are free under existing law to range widely in consideration of sentences, but that is hardly germane. Judges impose sentence in respect of a specified offense of conviction. Under the Model Act, judges would, in effect, simultaneously determine the offense of conviction and the sentence, and would do so on the basis of substantial evidence received free of the rules of evidence.

c. The law of evidence. This point requires little elaboration. Most of the argument was adumbrated in the preceding two subsections. The law of evidence consists of a body of elaborate rules governing the ad-

directly or indirectly. The Model Act ignores the problem of providing inducements to guilty pleas. This problem is discussed in the text accompanying notes 63-64 *infra*.

⁵⁷ The U.S. Parole Commission routinely disregards the effects of charge reduction guilty pleas by basing the presumptive date for early release on the actual offense behavior. Factual disputes are resolved on the basis of a "preponderance of the evidence." U.S. Parole Commission Rules, 28 C.F.R. § 2.19(c) (1980).

⁵⁸ Schulhofer, *supra* note 18, at 766. Schulhofer discusses this point and the leading cases at 765-68. The New York State Parole Board did, for a time, treat a partial acquittal as if it were a dismissed charge. That policy was later modified. *Id.* at 766-67 n.141. The U.S. Parole Commission's Rules provide: "[T]he Commission shall not consider in any determination, charges upon which a prisoner was found not guilty after trial unless reliable information is presented that was not introduced into evidence at such trial (e.g., a subsequent admission or other clear indication of guilt)." 28 C.F.R. § 2.19(c) (1980).

missibility of evidence. Some of those rules (e.g. that wives cannot testify against their husbands under any circumstance) have outlived their original justifications, but most are concerned with the reliability of evidence and the quality of the inferences it supports. "Real offense" sentencing would effectively repeal the law of evidence in criminal cases.

It has long been clear that the law of evidence does not apply at a sentencing hearing.⁵⁹ Under the Model Act, the critical factual determination would be made at the sentencing hearing. For that vast majority of defendants who plead guilty, the law of evidence now plays some role in plea bargaining. Under real offense sentencing it would simply be meaningless. Under present law, calculations of the impact of evidentiary rules on the admissibility of important evidence are sometimes part of counsels' calculus as they plea bargain. Under real offense sentencing, admissibility at trial is irrelevant because a guilty plea to any charge will expose the defendant to sentencing for the real offense, without regard to the trial record.

Admittedly, the law of evidence is only marginally relevant in most guilty plea cases. However, in cases that go to trial, application of the rules of evidence may be the basis for conviction of one offense rather than another. Thus the law of evidence can, and often does, play a crucial role in the determination of guilt at trial. Yet, once the trial is over, the judge under the Model Act could ignore the trial record and, relying on the presentence report, sentence the defendant as if he had been convicted of the very offense of which he was acquitted.

The criminal law's formal insistence that individuals be vulnerable to punishment for crime only on the basis of proof beyond a reasonable doubt, supported by reliable evidence that they have committed a closely defined substantive offense, underscores the primacy of individual liberty and its corollary—limited state power—in our constitutional scheme. None of those values are enhanced or acknowledged by the Model Act's sentencing provisions.

2. Real offense sentencing is unlikely to reduce the impact of plea bargaining on the sentencing process

The preceding subsection was premised on the conceit that lawyers and judges would not circumvent the Model Act. Circumvention, however, is likely to be the reality.

The real offense provisions are intended "to reduce the impact of plea bargaining on the sentencing process."⁶⁰ "If guidelines are based

⁵⁹ See *Williams v. New York*, 337 U.S. 241 (1949), which was recently reinvigorated by *United States v. Grayson*, 438 U.S. 41 (1978).

⁶⁰ MODEL ACT, comment to § 3-206(d). Somewhat surprisingly, a lengthy exposition of

on the offense charged [offense of conviction?], the prosecuting attorney is given substantial leverage in dictating the sentence."⁶¹ The only caveat is that the offense of conviction would establish a statutory maximum allowable sentence, whatever the guidelines provide. Thus, if the guideline sentence is five years and the statutory maximum is two years, the two-year maximum perforce would govern.

Real offense sentencing under the Model Act is unlikely to prevent manipulation of guidelines by counsel for at least four reasons. First, if the Model Act were in effect and followed, there would be no incentive for defendants to plead guilty; the guilty plea would neither earn a sentencing concession nor reduce uncertainty. Second, prosecutors and defense counsel could circumvent the guidelines by developing new plea bargaining patterns; the medium of exchange would be the offense class and its accompanying statutory maximum sentences. Third, plea bargaining is in part the product of the personal and institutional needs of defendants and defense counsel, and prosecutors and judges. If an assortment of institutional needs requires the prosecutor to find ways to reward guilty pleas, the court's other functionaries are likely to be willing collaborators.⁶² Fourth, within its four corners, the Model Act gives the prosecutor potent manipulative powers. He can elect whether to invoke special provisions for extended terms for "persistent offenders" and "especially aggravated offenses"; he can influence whether consecutive sentences are imposed through his charging and dismissal decisions; he can elect whether to allege the presence of aggravating circumstances; he can, as noted earlier, control the maximum allowable sentence by means of his charging and charge dismissal powers.

a. Incentives to plead guilty. The conventional view is that the efficient operation of the courts requires that a majority of defendants plead guilty.⁶³ Guilty pleas are induced by the prospect or certainty of

the *Model Act* by its principal draftsmen makes no reference to the real offense sentencing provisions. See Perlman & Stebbins, note 1 *supra*.

⁶¹ MODEL ACT, comment to § 3-206(d).

⁶² See text accompanying notes 64-78.

⁶³ See, e.g., Chief Justice Burger's opinion for the Court in *Santobello v. New York*, 404 U.S. 257, 260 (1971): "[Plea bargaining] is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities." See generally A. BLUMBERG, *CRIMINAL JUSTICE* (1967); Alschuler, *The Prosecutor's Role In Plea Bargaining*, 36 U. CHI. L. REV. 51 (1968). The contrary view, that plea bargaining results not from case pressures but from the mutual interest of defendants, lawyers, and judges in handling straightforward cases economically and efficiently, has been developed at length in M. HEUMANN, *PLEA BARGAINING* (1978). See also M. FEELEY, *supra* note 14, ch. 8; Feeley, *Two Models of the Criminal Justice System: An Organizational Perspective*, 7 LAW & SOC'Y REV. 407, 415 (1973); Skolnick, *Social Control in the Adversary System*, 11 J. CONFLICT RESOLUTION 52 (1967).

less severe sentences than would otherwise obtain. Defendants who are rational calculators would, in general, waive trial rights and plead guilty only if the guilty plea would yield a probable punishment less than the probable punishment following conviction at trial times the probability of conviction. If counsel could not manipulate sentencing guidelines to provide sentencing concessions, under the Model Act defendants would have no incentive to plead guilty. This would be especially true with narrow guidelines, like the Minnesota guidelines in Table 1, which would make sentences highly predictable. Under present practice in most jurisdictions, the alternative to a plea bargain is to risk sentencing by a judge, subject to no meaningful standards and with great statutory latitude. Sentencing by the court thus entails the risk of an extremely severe sentence, relative to sentences received by other defendants convicted of that offense. The choice under present law may be between a sentence bargain to a two-year sentence; or a guilty plea to a charge carrying a five-year maximum, if the defendant pleads guilty with a charge bargain; or the risk of any sentence up to 25 years if he is convicted at trial or submits an unbargained guilty plea.

Under the uncircumvented Model Act, without plea bargaining or manipulation, conviction on plea or after trial should produce the same, reliable known sentence. There would be no incentive to plead guilty and every incentive to plead not guilty in the hope that the vagaries of trial would produce an acquittal or at least defer an inevitable prison sentence.

If many more defendants took their chances at trial, judges and lawyers would have to work harder, facilities would be overburdened, and the operation of the criminal courts would be made more expensive. Some method would be found to re-establish a tolerable equilibrium. The likeliest method would be to circumvent the guidelines.⁶⁴

b. Circumvention of guidelines. No court could easily handle a quantum increase in the number of trials. Some way would have to be found to reward guilty pleas. Prosecutors are under pressure to keep the cases flowing, to hold the backlog down, and to minimize the number of trials. Defense counsel need to be able to demonstrate to their clients that they are earning their fees. At the same time the majority of defense counsel whose practices depend on high volume cannot afford to

⁶⁴ Schulhofer, *supra* note 18, recognized that efforts to circumvent guidelines will be inevitable unless defendants are offered a guilty plea inducement. His solution is to offer regulated open guilty plea "discounts." He poses the further question whether, with sentencing uncertainties diminished, defendants might increase their requests for jury trials. He discusses the implications of adding jury trial waiver "discounts" to the system of guilty plea discounts. *Id.* at 796-98.

try many cases.⁶⁵ Thus, there would be every motive for counsel to negotiate a plea arrangement that would frustrate the applicable guidelines. The simplest stratagem would be for the judge to accept a plea to a charge bearing a maximum authorized sentence *less* than the sentence specified by real offense guidelines. If the guideline sentence for robbery, under specified circumstances, is, say, four years, it could be avoided if the defendant pled guilty to a lower-severity felony, say theft, that has a lesser statutory maximum sentence, say three years, or to a misdemeanor, say petty larceny or simple assault, bearing a one year statutory maximum sentence.

Or, if manipulation by juggling charges is too overt, prosecutors and defense counsel could easily find other methods. Charge bargaining could move back to an earlier stage in the process. In the nineteenth century, bargaining sometimes took place in the station house.⁶⁶ If that is too bold or complicated, bargaining could move to the preliminary hearing stage, before grand jury consideration, and the prosecutor could seek an indictment only to the lesser offense to which the defendant has agreed to plead guilty. Or the prosecutor could simply *nolle* all but the agreed charges of conviction.

Most of these methods require at least the acquiescence of judges. Of course, if the judge would cooperate, counsel could sentence-bargain despite the guidelines, or reach a firm agreement that the defendant would receive a relatively lenient sentence because of "mitigating" circumstances. There are three ways judges and prosecutors can effect sentence bargains under sentencing guidelines. Counsel can simply, with judicial acquiescence, settle on a below-guidelines sentence. Neither party would have reason or standing to object to the extra-guidelines sentence and the judge's non-compliance with the guidelines would pass unacknowledged. If outright judicial nonfeasance lacks subtlety, the

⁶⁵ The evaluation of Alaska's abolition of plea bargaining concluded that, by and large, prosecutors adhered to the Attorney General's directive, with different consequences for defendants represented by union-provided prepaid legal service plea lawyers and the bulk of defendants who were represented by public defenders, court-appointed and private counsel. The "pre-paid" attorneys earned a guaranteed market level hourly rate and thus "were encouraged to devote extra time to matters which might otherwise have received more cursory treatment." Other counsel, unable as before to obtain negotiated settlements, experienced greater economic pressure than theretofore and felt some tension between their personal financial concerns and full adversary representation of clients. ALASKA, *supra* note 20, at 37-43, 240-410.

⁶⁶ Haller, *Plea Bargaining: The Nineteenth Century Context*, 13 LAW & SOC'Y REV. 273 (1979). Somewhat similarly, a Rand Corporation analysis of the impact of California's determinate sentencing law found that "there was an appreciable increase . . . in the percent of convictions based on guilty pleas at the time of arraignment." In other words, bargaining had apparently shifted forward in the process to a point where the charges in the information were not yet settled. A. LIPSON & M. PETERSON, CALIFORNIA JUSTICE UNDER DETERMINATE SENTENCING: A REVIEW AND AGENDA FOR RESEARCH 16 (1980).

same result could be achieved if the judge cited the defendant's guilty plea as the "justification" for a lenient departure from the guideline. If candid admission of the effect of a guilty plea makes the judge uncomfortable, he can disingenuously assert a different rationale (the defendant's contrition, his good character, etc.) for the lenient sentence. The prosecution would not appeal the lenient sentence and the appropriateness or applicability of the judge's reasons would never be tested. How likely is the judge to cooperate with one or another of these artifices? Very likely, indeed.

c. The court work group. Patterns of relations among court functionaries vary widely from place to place and from time to time. Few useful generalizations can be made. What is clear, however, is that sentencing decisions result from a complex interplay of personal relations, institutional needs, and behavioral norms that constitute the subculture of a given court.⁶⁷

Courtroom cultures vary. In some places, the judge is the dominant figure,⁶⁸ in other places, the prosecutor.⁶⁹ Occasionally a well-supported Public Defender's office possesses unusual influence.⁷⁰ Well-settled norms exist in some courts about the handling of cases; working relations are stable and colored by personal and social relations. When relations are stable, expectations seem often to be settled, and persistent non-compliance with expectations is sanctioned.⁷¹ Less stable relations

⁶⁷ *See, e.g.*, works cited in note 14 *supra*. This approach to understanding courts was launched by the appearance in 1967 of A. BLUMBERG, *CRIMINAL JUSTICE*.

⁶⁸ *See, e.g.*, the accounts of Minneapolis and Pittsburgh courts in M. LEVIN, *supra* note 14.

⁶⁹ *See, e.g.*, the analysis of the operation of San Diego courts in P. UTZ, *supra* note 14.

⁷⁰ *See, e.g.*, the analysis of the operation of Alameda County (Oakland), California courts, *id.*

⁷¹ Consider, for example, the following description of the norms of Chicago felony courts, where work groups were fairly stable:

In most courtrooms, informal norms developed. Judges accommodated the work schedules of prosecutors and defense counsel. For instance, attorneys trying cases in a courtroom automatically obtained a continuance in other courtrooms where they had a matter scheduled. Both judges and prosecutors often tried to help retained regulars collect their fees. Prosecutors took care to keep judges informed about what cases were likely to go to trial and sought to build and preserve a reputation for reliability and reasonableness. Defense attorneys had perhaps the most developed set of courtroom norms, which included the following strictures:

1. Never make the state's attorney answer unnecessary motions.
2. Don't mess up someone else's schedule, especially by leading him to think you are ready to proceed when you are not.
3. Disclose the nature of your case informally in chambers or hallways.
4. Don't trap the state in a bind over the 120-day rule.
5. Accommodate the prosecution wherever possible.
6. Avoid trials for cases that cannot be won. (Trying cases when there is a chance of winning was not considered a violation of the norm.)

Although one or another of these norms could occasionally be violated with impunity, consistent violation met with sanctions from the courtroom workgroup. Violators found themselves waiting half a day for a continuance, while other attorneys were taken care of

produce less settled norms and greater room for idiosyncrasy. The relations among judges, prosecutors, and defense lawyers are symbiotic. While the nature of the symbiosis differs, it must be taken into account when thinking about changes in the court's patterns of cooperation.

The judge and counsel are often collaborators, not antagonists, and they share common goals: minimize the number of trials, keep the cases flowing and the backlog down, accommodate institutional and personal needs, achieve reasonable results. Even when counsel are more adversarial and antagonistic, they share case flow and efficiency goals.⁷² If prosecutors and defense counsel are strongly of the view that plea bargains are important to their ends, judges are unlikely in many courts to behave "unreasonably" and insist on a mechanical application of guidelines. Low-level judicial cooperation would likely produce acquiescence in bolder forms of charge bargaining. Active judicial cooperation may well produce sentence bargains inconsistent with the guidelines and bargained "mitigations" of sentence that defy the guideline draftsmen's goals.

d. Manipulation under the Model Act. The preceding subsections describe several artifices by which counsel could circumvent a system of real offense sentencing guidelines. They need not be so creative under the Model Act, for it contains several provisions that would permit the parties to avoid the guidelines. First, the Model Act permits enhanced sentences for "persistent offenders"⁷³ and "especially aggravated offenses."⁷⁴ The enhancements could be imposed, however, only at the initiative of the prosecutor.⁷⁵ Second, the Model Act contains a presumption in favor of consecutive sentencing. Although there are limits to the presumption's scope, as a general matter the prosecutor could determine sentence, under the guidelines, through his charging and charge dismissal decisions.⁷⁶ Finally, he can allege aggravating circum-

immediately. The opportunity to show off for a client would be denied, or the attorney would be scolded from the bench for petty matters that ordinarily were overlooked. In the absence of a strong defender organization that might counteract them, these norms bound many defense counsel closely to the courtroom organization.

J. EISENSTEIN & H. JACOB, *supra* note 14, at 108-09.

⁷² See, e.g., P. UTZ, *supra* note 14, where San Diego and Oakland courts are described as being more adversary than are the Chicago courts described in J. EISENSTEIN & H. JACOB, *supra* note 14.

⁷³ MODEL ACT § 3-105.

⁷⁴ *Id.*, § 3-106.

⁷⁵ *Id.* § 3-207(e).

⁷⁶ *Id.*, § 3-107. The comments acknowledge the dangers of prosecutorial manipulations. *Id.* at 121. § 3-107 contains a "single course of conduct" exception. Thus a defendant would not receive consecutive sentences for both burglary and possession of burglar tools. The comments pose, but don't answer, the question whether a forger or passer of bad checks should receive consecutive sentences for each separate offense. By silence, the comments suggest that

stances that would justify a severe deviation from the guidelines.⁷⁷ In all of these things the prosecutor would have authority under the Model Act to affect or determine sentence, and, given his institutional needs and those of other participants in the process, he is likely to be willing to bargain about its exercise.

3. *Real offense sentencing is unfair*

There are two basic injustices which make real offense sentencing unfair. The first is the likelihood, discussed in the preceding subsection, that defendants will be sentenced for committing an offense with which they were not charged or which was dismissed or of which they were acquitted. The second, discussed in this section, is that defendants will be deprived of the benefits of their bargains.⁷⁸

No doubt some defendants plead guilty from contrition, ignorance, or naivete.⁷⁹ But presumably most act as rational calculators who weigh the probable punishment given charge dismissals (P_1) against the probable punishment given conviction at trial (P_2) times the probability of conviction (C). Defendants in general should accept a charge dismissal plea bargain only if $P_1 < C(P_2)$.

Of course defendants make mistakes. They must act on imperfect knowledge and may misvalue P_1 , P_2 , or C ; nonetheless, some such calculation must take place. The defendant's guilty plea and waiver of rights are the price paid for immunity from punishment for the more serious dismissed charge. (More precisely, the guilty plea should buy the incremental difference in punishment ($C(P_2) - P_1$). One might well ask why a defendant would plead guilty in consideration of charge dismissals if the conviction offense does not matter, that is, if P_1 and P_2 have the same value.

the presumption in favor of consecutive sentences would apply. In short, the prophylactic provisions aimed at preventing prosecutorial abuse appear weak.

⁷⁷ *Id.*, §§ 3-109, 3-204.

⁷⁸ Under real offense sentencing there would be no benefit from the bargain. One generous view of the Model Act is that it is a subtle method for abolition of plea bargaining: Judges presumably should not accede to sentence bargains; real offense sentencing would nullify charge bargains. If charge bargains have no effect, there would be no reason to go through the motions. The absence from the Model Act of any discussion of the likely accommodative behavior of prosecutors and defense counsel makes the Trojan horse interpretation unlikely.

⁷⁹ The Model Act's draftsmen might want to distinguish between those dismissals (and failures to charge) that result from plea bargains, and those that do not. In the former case, the draftsmen's aim to counterbalance plea bargaining distortions could be pursued. By looking at the conviction, and not the "real" offense in the latter cases, some unfairnesses could be avoided. The difficulty, regrettably, is that the judge can't ascertain the prosecutor's "real" intentions. Thus the border between bargained and unbargained dismissals would be impossible to police.

Real offense sentencing would involve a form of misrepresentation that would not be tolerated in most marketplaces: People who buy Oldsmobiles expect to receive Oldsmobile engines; if they had wanted Chevrolet engines they would have paid less. Courts and public officials showed little hesitancy about protecting the reasonable expectations of Oldsmobile purchasers. People who buy charge dismissals expect to receive favorable sentencing dispositions. Surely when constitutional rights and personal liberty are at stake, marketplace dealings in justice should be at least as honest as marketplace dealings in cars.

Plea bargaining was only recently legitimated. Not so long ago, a successful plea bargain in many jurisdictions required that defendants be thespians who would perjure themselves by denying that their pleas resulted from anything other than acts of contrition or resignation. They could not say that inducements were involved. Fortunately the need for those charades is past. In *Blackledge v. Allison*, the Supreme Court observed that “[w]hatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country’s criminal justice system. Properly administered, they can benefit all concerned.”⁸⁰ Due process requires that the prosecutor keep his plea bargaining promise.⁸¹

The Supreme Court has emphasized that plea bargains *are* bargains. In *Bordenkircher v. Hayes*,⁸² Justice Stewart stressed the “mutuality of advantage” provided to prosecutors and defendants by plea bargains and observed, “by hypothesis, the plea may have been induced by promises of a recommendation of a lenient sentence or a reduction of charges, and thus by fear of a possibility of a greater penalty upon conviction after a trial.”⁸³

The defendant who enters into a charge bargain renounces his right to be tried before a jury or a judge, to benefit from the rules of evidence and the uncertainties of trial, and to be acquitted unless proven guilty beyond a reasonable doubt. To permit the prosecutor to induce defendants to plead guilty by enforceable promises of charge dismissals⁸⁴ and then deny the effect of the dismissals by punishing the defendant as if he had been convicted of the dismissed charges is patently shabby. Whatever the constitutionality of such a denial to the defendant,⁸⁵ it

⁸⁰ 431 U.S. 63, 71 (1976).

⁸¹ *Santobello v. New York*, 404 U.S. 257.

⁸² 434 U.S. 357 (1978).

⁸³ *Id.* at 363. See Note, *Plea Bargaining and the Transformation of the Criminal Process*, 90 HARV. L. REV. 564 (1977).

⁸⁴ “Enforceable” in the sense that the defendant may withdraw his guilty plea if the prosecutor breaks his promise. See, e.g., FED. R. CRIM. P. 11.

⁸⁵ See Schulhofer, *supra* note 18, at 765. “Reliance by the sentencing judge on actual offense behavior, properly ascertained, would likely survive constitutional attack.” *Id.*

would offend the values that underlie the constitutional concerns.

4. *Real offense sentencing is inefficient*

Because real offense sentencing is based on facts not necessarily encompassed in the elements of the offense of conviction, defendants could be expected routinely to contest facts alleged in the presentence report. A defendant, under the Model Act, would not be entitled to confront his accusers, to subpoena witnesses, to present evidence, or to cross-examine adverse witnesses (although it is within the court's discretion to do these things, if it so chooses).⁸⁶ Stephen Schulhofer has argued convincingly that a conscientious judge would want to hold an anomalous evidentiary hearing about genuinely disputed facts, even on matters that both counsel would rather not litigate. Also, no matter what the outcome of the hearing, the real offense determination would incur serious social costs. "The significance of the formal conviction would be depreciated, the defendant might feel he or she had been 'had,' and society would lose the effect of the longer statutory sentence range that would have been applied if the actual offense behavior had been determined by trial."⁸⁷

Even with the streamlined procedures of a sentencing hearing, contested hearings over actual offense behavior would be likely to consume substantially more court time than sentencing hearings now do. Even if defendants were neither driven nor induced to go to trial (as they might be with the plea bargaining incentive removed), thereby imposing a workload increase, the increase in court time required to handle real offense sentencing hearings would, no doubt, be considerable.

5. *Real offense sentencing under the Model Act is probably unconstitutional*

Real offense sentencing, as manifested in the Model Act, is probably unconstitutional. The Model Act does not limit real offense considerations to the offense of conviction or to the offenses charged. In extreme cases, section 3-206(d) would allow judges to sentence for a real

Schulhofer's conclusion is however premised on the view that such a finding would result in a "grievous loss" and therefore would require, for constitutional reasons, that the defendant be allowed to present and cross-examine witnesses. Under § 3-206(b) of the Model Act, the court "may" but need not permit such examinations. The general argument for the constitutionality of real offense sentencing in a guidelines system would be based on the broad latitude given judges in consideration of evidence relevant to sentencing. *Williams v. New York*, 337 U.S. 241 (1949); *Specht v. Patterson*, 386 U.S. 605 (1967); and on the cases upholding the constitutionality of the U.S. Parole Commission's decision to refer to the real offense in setting presumptive release dates, *see Billiteri v. U.S. Board of Parole*, 541 F.2d 938 (2d Cir. 1967). On the first argument, *see* the able summary and discussions in SENTENCING ALTERNATIVES, *supra* note 44, at 153-55.

⁸⁶ MODEL ACT § 3-206(b).

⁸⁷ Schulhofer, *supra* note 18, at 767-70.

offense more serious than the offense endorsed or for a more serious offense of which the defendant was acquitted. A defendant could be sentenced as an armed robber in the following three importantly different cases: *Case 1*—he was charged with armed robbery but pled guilty to theft; *Case 2*—he was charged with theft and pled guilty to theft (or some lesser offense); *Case 3*—he pled not guilty and was acquitted of armed robbery but convicted of theft.

The three cases raise separate issues. Case 1 raises the general issue of real offense sentencing. The Supreme Court, in *Williams v. New York*,⁸⁸ accorded wide evidentiary latitude to judges in setting sentences, including, in that case, consideration of alleged burglaries of which the defendant was not convicted. Given that wide latitude, reaffirmed in *United States v. Grayson*,⁸⁹ simple real offense sentencing is likely to survive constitutional challenge.⁹⁰

Case 2 raises more difficult notice questions. If the defendant is charged with theft and pleads guilty to theft but is sentenced for armed robbery, he is certainly entitled to object that he was not adequately informed of the charges against him. Although there are cases that uphold consideration of charges of which the defendant was acquitted or of charges dismissed as part of a plea bargain,⁹¹ those cases present fundamentally different issues. Those defendants were adequately apprised, by means of indictment or information, of the charges against them.

Lack of notice should be a fatal flaw in Case 2. The precise issue has, of course, never been raised. There are no avowed real offense sentencing systems. However defendants in later stages of the criminal process may not be subjected to "grievous loss" except following written notice of material charges. Written notice is a constitutionally required condition precedent to probation revocation (*Gagnon v. Scarpelli*),⁹² parole revocation (*Morrissey v. Brewer*),⁹³ and prison disciplinary proceedings (*Wolff v. McDonnell*).⁹⁴ No plausible argument can be made that the defendant in Case 2 has less important interests at stake than if he were threatened with revocation of parole or probation or loss of good time.

⁸⁸ 337 U.S. 241 (1949).

⁸⁹ 438 U.S. 41 (1978).

⁹⁰ The comments to the Model Act place primary reliance on the cases upholding the constitutionality of the U.S. Parole Commission's reliance in its guidelines on "actual offense behavior" determinations. For reasons discussed in Part III of this article, the argument from parole to sentencing is less than compelling.

⁹¹ See, e.g., *United States v. Needles*, 472 F.2d 652 (2d Cir. 1973) (dismissed counts of indictment); *United States v. Sweig*, 454 F.2d 181 (2d Cir. 1972) (acquittal); *United States v. Doyle*, 348 F.2d 715 (2d Cir. 1965), cert. denied, 382 U.S. 843 (1965) (circumstances of offenses charged in multi-count indictment although defendant pled guilty to only one count).

⁹² 411 U.S. 778 (1973).

⁹³ 408 U.S. 471 (1972).

⁹⁴ 418 U.S. 539 (1974).

Argument could be made that disclosure of the presentence report, which would describe the real offense, should satisfy the notice requirement. But if that is so, the state may as well indict generically for "criminal conduct," in all cases, with the details to be provided and to be used as the basis for the determination of sentence at the sentencing hearing. Courts could easily distinguish between ad hoc "real offense" decisions of individual judges and general rules that nullify the offense of conviction and thereby deny the defendant the protection of principles and standards that are basic to our criminal jurisprudence.

Real offense sentencing in Case 3 would also raise serious constitutional questions. One major objection would be that defendants simply should not, as a matter of due process, be punished in respect of conduct of which they were acquitted. In *Giacco v. Pennsylvania*,⁹⁵ the Supreme Court invalidated, as void for vagueness, a Pennsylvania statute that permitted the jury to impose court costs on an acquitted defendant. In separate concurrences, Justice Stewart wrote that "Pennsylvania allows a jury to punish a defendant after finding him not guilty. That . . . violates the most rudimentary concept of due process of law,"⁹⁶ and Justice Fortas observed, "[T]he Due Process Clause . . . does not permit a State to impose a penalty or costs upon a defendant whom the jury has found not guilty of any offense with which he has been charged."⁹⁷

Giacco can be distinguished from Case 3 on several bases: the defendant in *Giacco* was acquitted of all charges; the acquittal was a jury decision; the underlying question of imposition of costs on an acquitted defendant was not reached. Moreover, decisions have upheld the constitutionality of considering conduct that resulted in an acquittal when sentencing alleged criminals.⁹⁸ These decisions, however, involved acquittals in separate prosecutions. Whether they would be extended to reach acquittals in the case for which sentencing is being imposed remains to be seen, but it seems unlikely.

It may also be that objections noted earlier—that the Model Act's provisions undermine and trivialize the law of evidence, the burden of proof, and the substantive law—are procedural defects of constitutional gravity. Finally, real offense sentencing in Case 3 appears to offend double jeopardy notions.

Whatever the applicability of existing case law, the values that underlie due process must be offended by a sentencing system that would deprive defendants of the benefits of their acquittals. Even if real offense sentencing in partial acquittal cases did not offend double jeop-

⁹⁵ 382 U.S. 399 (1966).

⁹⁶ *Id.* at 405.

⁹⁷ *Id.*

⁹⁸ See note 91 *supra*.

ardy values, and was governed by standards that satisfied *Giacco*, Stephen Schulhofer's conclusion in reference to Case 3 is surely right nonetheless: "Whatever the [real offense] policy specified, the resulting procedures will severely threaten the appearance of fairness and the constitutionality of the system."⁹⁹

The constitutional problems presented by Case 3 can be sidestepped by making Case 3 a special exception to the real offense guidelines, as was done by the United States and New York State parole guidelines.¹⁰⁰ However, that one small concession would not overcome the many other problems with real offense sentencing.

Each argument posed in section II could, by itself, raise serious doubts about real offense sentencing. Taken together, they demonstrate that enactment of the Model Act's sentencing provisions would be unwise, uninformed, inefficient, unfair, and possibly unconstitutional. Lord Hewart's admonition in *R v. Sussex Justices* applies: "it is not merely of some importance but of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done." Real offense sentencing would look unjust, and be unjust.

III. OTHER CRITICISMS

Real offense sentencing aside, the Model Act has some strengths but even more weaknesses. This section outlines several of the major weaknesses. The treatment is brief, partly because the real offense problem is the primary focus of this essay, and partly because many of the points to be made were partially developed earlier. Although the Act purports to adopt "just deserts" as its overriding purpose of punishment, its application of that purpose is inconsistent and occasionally incoherent. The provisions intended to structure discretion and diminish disparity are unlikely to do so.

A. PURPOSES

The comments to the Model Act refer to just deserts as "the overriding philosophy,"¹⁰¹ the "major factor,"¹⁰² and the "philosophical basis,"¹⁰³ of the Model Act's sentencing provisions. General deterrence and incapacitation are given lesser roles. Broadly, the purposes describe a system of what, in Nigel Walker's analysis, might be called "limiting

⁹⁹ Schulhofer, *supra* note 18, at 766.

¹⁰⁰ *See* note 58 *supra*.

¹⁰¹ MODEL ACT, Prefatory Note, at 91.

¹⁰² *Id.* at 89.

¹⁰³ *Id.* at 96.

retributivism,"¹⁰⁴ and closely follow the proposed principles of sentencing in Norval Morris' *The Future of Imprisonment*.¹⁰⁵ An offender's punishment should not exceed that deserved "in relation to the seriousness of his offense."¹⁰⁶ Within the punitive upper limit, general deterrent and incapacitative considerations can play subsidiary roles. Finally, a principle of parsimony requires imposition of "the least severe measure necessary" and creates a presumption in favor of non-incarcerative sentences.¹⁰⁷

Kantian moral philosophy, as transmuted into "just deserts" by Andrew von Hirsch and others, is a doctrine of *deserved* punishments. Parsimony is a utilitarian doctrine aimed at avoiding punishment not required for preventive purposes.¹⁰⁸ Von Hirsch recognizes this tension and therefore argues for equality in sentencing through the mechanism of relatively modest sanctions, consistently imposed.¹⁰⁹ The Model Act misperceives the connection. Although "inequalities in sentences that are unrelated to a purpose of this Article should be avoided,"¹¹⁰ the ex-

¹⁰⁴ N. WALKER, SENTENCING IN A RATIONAL SOCIETY (1971).

¹⁰⁵ N. MORRIS, *supra* note 2, at 59-60.

¹⁰⁶ MODEL ACT § 3-101(1). That equation is conventional, but curious. Kant's concept of the abstract obligation to punish evil in the exactly same kind (death for death, injury for injury, etc.) is impractical. See I. KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE, at 99-108 (J. Ladd ed. 1965). For obvious epistemological reasons, no one can devise an objective "deserved" punishment for any conduct. The best substitute is a normative ranking of offense conduct, and a requirement that offenses with higher ranks, other things equal, receive more severe punishments than lower ranked offenses. The state criminal codes are not helpful. The newer codes based on the Model Penal Code divide felonies into 3 or 5 classes, but that small number of categories provides little guidance. The highest classes are reserved for truly serious crimes and the bulk of felonies are in the same one or two classes. The uncodified criminal laws, notably the federal law, contain hundreds of different combinations of sanctions for different offenses. The authorized sanctions for any particular offense are adventitious and provide no coherent basis for ranking offenses. As a result, most sophisticated guidelines have ranked offenses on the bases of exercises in which a group of people separately sort generic offenses into categories, identify the congruences, and compromise their differences. See, e.g., D. GOTTFREDSON, L. WILKINS, & P. HOFFMAN, GUIDELINES FOR PAROLE AND SENTENCING 69-80 (1978). Andrew von Hirsch recognized this problem and argued that the goal is to rank offenses and impose punishments that are scaled to the ranking. A. VON HIRSCH, *supra* note 2, at 76-83, 132-40. The Model Act seems to miss the problem. Optional § 3-112(b), for example, would authorize a sentencing commission to classify felonies into three classes if the criminal code does not already do so. If Class A is reserved for first degree murder, aggravated kidnapping, aggravated rape, and similar offenses, all other felonies must be grouped into classes B and C. It is not obvious why a sentencing commission would receive more guidance from that allocation than from a motley of unclassified felonies. Criminologists have wrestled with efforts to base notions of relative offense severity on public attitudes. See, e.g., Sellin & Wolfgang, *Weighting Crime*, in I CRIME AND JUSTICE, 167 (L. Radzinowicz & M. Wolfgang eds. 1971).

¹⁰⁷ MODEL ACT § 3-102(3).

¹⁰⁸ On parsimony, see J. BENTHAM, PRINCIPLES OF MORALS AND LEGISLATION Ch. XIII (1948).

¹⁰⁹ A. VON HIRSCH, *supra* note 2.

¹¹⁰ MODEL ACT § 3-102(2).

ception is greater than the rule. If the "deserved" punishment is an upper limit and enforcement is activated by general deterrent, incapacitative, and other purposes, then the result is more nearly utilitarian than retributive. "Unequal" sentences will be the norm, not the exception. "Just deserts" is not the "overriding philosophy" of the Model Act. An eclectic utilitarianism holds that place.¹¹¹

A law reform proposal premised on notions of deserved punishment should tie the defendant's punishment closely to the nature of his present offense, given the relevant present circumstances, broadly or narrowly defined. Yet the Model Act attaches overriding significance to the defendant's prior record, a matter that is wholly extrinsic to the moral character of his present act and the resulting calculation of deserved punishment.¹¹² If a previous offense earned a deserved punishment, that debt is paid. To punish a second offense more severely because of the prior offense offends the spirit (albeit not the constitutional requirements) of double jeopardy.

I am not suggesting that prior criminality can not sensibly be related to present punishment. Most utilitarian punishment philosophies would permit consideration of prior criminality. I suspect that most peoples' intuitive sense of justice would permit increased punishments for repeat offenders. However, a thoroughgoing retributivist would not do so,¹¹³ and the Model Act's "philosophical basis" is purportedly "just deserts," the modern version of a thoroughgoing retributivism.

Prior convictions play an important part under the Model Act. Section 3-104 would permit doubled maximum sentences for "persistent

¹¹¹ There are other inconsistencies in the Model Act. Only general deterrent considerations are said to be justifiable in sentencing. By contrast the comments stress that specific deterrence, "sentences based on deterring the particular offense involved," is forbidden. Comment to § 3-101(3)(i) at 97. Yet § 3-102(4)(iv) authorizes prison sentences when "measures less restrictive than confinement have frequently or recently been applied unsuccessfully." The threat to impose prison next time if the defendant fails to pay his fine or honor the conditions of probation may be necessary if those sanctions are to remain credible; still, no threat could be more precisely directed to a particular defendant. The Model Act's rejection of "predictive restraint" as a purpose of sentencing is chimerical. Comment to § 3-102(5). The comments reject basing sentences "on statistical or clinical judgments about a particular individual's future behavior: . . . unless based on prior criminal conduct." *Id.* at 101. The irony is that prior criminal record is at once both the best predictor of future criminality and subject to all of the problems of overprediction and false positives that led the Model Act's draftsmen to limit the role of incapacitation in sentencing. See MODEL ACT, at 92; Perlman & Stebbins, *supra* note 1, at 1196-97.

¹¹² Andrew von Hirsch has tried to justify sentence increases based on prior convictions in terms of a benefit of the doubt extended to first offenders which results in imposition of less than the deserved punishment. See A. VON HIRSCH, *supra* note 2, at 85; cf. G. FLETCHER, RETHINKING CRIMINAL LAW (1978). Whatever else may be said about von Hirsch's argument, as reified in the Model Act it is incompatible with rejection of specific deterrence as an allowable punishment purpose.

¹¹³ See H. HART, PUNISHMENT AND RESPONSIBILITY (1968).

offenders," defined (in section 3-105(a)) as a person who was twice previously convicted of a felony in the preceding five years at liberty. Prior convictions or "criminal behavior" also can be invoked as an aggravated circumstance to justify departures from guidelines.¹¹⁴ Finally, and astonishingly, the Model Act's sample sentencing matrix shown in Table 2¹¹⁵ would justify 1000 percent differences in sentence on the basis of "offender characteristics." The guideline sentence for a "9-10 point" armed robbery would vary between one and ten years, primarily on the basis of prior record factors. The difference is 2800 percent for a "7-8 point" armed robbery.

TABLE 2
SAMPLE MATRIX FOR ARMED ROBBERY

OFFENSE CHARACTERISTICS ^a	OFFENDER CHARACTERISTICS ^b				
	-5 to -1	0 - 2	3 - 8	9 -12	13 +
9-10	C ^c 1 year	C .2 years	C 4 years	C 6 years	C 10 years
7-8	Split C 90 days S ^c 2 years V ^c 6 mos.	C 1 year	C 3 years	C 4 years	C 7 years
	Split C 90 days S 2 years V 6 mos.	C 90 days S 2 years V 1 year	C 1 year	C 3 years	C 6 years
5-6	Split C 90 days S 2 years V 6 mos.	C 90 days S 2 years V 1 year	C 1 year	C 3 years	C 6 years
3-4	S 2 years V 6 mos.	Split C 90 days S 1 year V 1 year	C 8 mos.	C 2 years	C 4 years
0-2	S 1 year V 6 mos.	S 2 years V 6 mos.	Split C 90 days S 1 year V 1 year	C 1 year	C 3 years

^a Offense Characteristics:

Deadly weapon used	+10
Several victims	+ 4
Vulnerable victim	+ 4

^b Offender Characteristics:

Prior violent offenses	+ 5 per off.
Prior felonies	+ 2 per off.
Prior revocations	+ 1 per viol.
Made restitution	- 1
Under 18 years of age	- 1

^c Symbols: C = Continuous confinement; S = Supervision in community; V = Confinement for violation of conditions

Source: MODEL ACT, at 141

This "just deserts" statute offers a bit of everything except rehabilitation. Incapacitation, the engine that powers the Model Act's prior record machinery, will continue to be a goal of sentencing without re-

¹¹⁴ MODEL ACT § 3-107.

¹¹⁵ MODEL ACT, at 141.

gard to the purposes clauses of criminal codes. At least two comments to the Model Act acknowledge as much.¹¹⁶ People who appear to be dangerous will be locked up and few of us as judges would do otherwise. General deterrence will probably continue to animate sentencing for a long time to come, and its implications are inconsistent with a principle of equality¹¹⁷ in sentencing. Rehabilitation as a purpose of punishment appears to have caused more harm than good, and the Model Act, accordingly, would prohibit rehabilitative considerations from sentencing.¹¹⁸

Taken as a whole, then, the Model Act would establish a sentencing system in which retributive concerns establish an upper limit on permitted punishments: within that limit, retributive, incapacitative, and deterrent concerns, parsimoniously applied, can be considered in setting sentence. There is nothing disreputable about that mixture of punishment purposes. Other credible reform proposals have adopted it.¹¹⁹ It is not, however, a "just deserts" mixture and it is unclear why the Model Act's draftsmen would claim that it is.

B. STRUCTURED DISCRETION

The usual rationale for determinate sentencing is that discretion must be structured if sentencing disparities are to be reduced. Unfortunately, the Model Act would not structure discretion very tightly. The statutory purposes of sentencing give little meaningful guidance to judges or members of a sentencing commission. The Act offers no guidance as to the form guidelines should take. Section 3-112 merely provides that the sentencing commission "shall adopt in a form determined by the commission sentencing guidelines as provided by this Act." The

¹¹⁶ *Id.*, comment to § 3-105 (defining "persistent offenders"): "The essential link between offense and punishment is preserved (by authorizing extended terms for persistent offenders) while at the same time implementing *society's justified interest in extended punishment for multiple offenders*" *id.*, at 116 (emphasis added); comment to § 3-106 (defining "especially aggravated offense"): "The punishment deserved for the offense is enhanced as well as society's claim to incapacitation." *Id.* at 119.

¹¹⁷ *Id.*, § 3-102(2) provides: "Inequalities in sentences that are unrelated to a purpose of this Article should be avoided." Almost any inequality could be "related to" deterrent, retributive, and incapacitative purposes making the equality exhortation a purely phatic proscription.

¹¹⁸ *Id.*, § 3-102(5). The implications of rehabilitative considerations in sentencing are more complex than the Model Act's renunciation suggests. The problem with rehabilitation in sentencing was that prison sentences and indeterminate terms were justified on the basis of rehabilitative aims. That appears to have been unwise; hence the renunciation of rehabilitative sentencing. But, might not rehabilitative aims play a role when they argue *against* imprisonment? The classic cases are the defendant who can continue to receive drug treatment or psychological counselling only in the community and the youthful offender who may be hardened by prison experience and forever lost.

¹¹⁹ See, e.g., N. MORRIS, *supra* note 2.

guidelines could thus take any form, from the verbal exhortations of the California Judicial Council's general guidelines¹²⁰ to the narrowly drafted sentencing matrix of the Minnesota Sentencing Guidelines Commission.¹²¹ The Model Act grants substantial manipulative power to the prosecutor; he (and only he) may invoke the procedures calling for extended terms for "persistent offenders" and "especially aggravated offenses";¹²² using a statutory presumption in favor of consecutive sentences,¹²³ he can determine sentence by his charging horizontal charge bargaining decisions; and he can allege the existence of aggravating circumstances that justify more severe sentences.¹²⁴ Appellate sentence appeal would ostensibly police judicial compliance with the guidelines. However the standard for appellate review is nebulous at best,¹²⁵ and the American experience with appellate sentence review provides little basis for a sanguine prediction that appellate sentence review would be rigorous.¹²⁶ Finally, while parole release indiscretions would be eliminated through the abolition of parole, a day-for-day good time system would give correctional administrators immense power to affect the durations of sentences.¹²⁷

The points outlined in Section III are fairly damaging. Nonetheless, they are subsidiary. However, taken together with the fundamental problems raised by real offense sentencing they suggest that states would be well advised not to adopt the Model Sentencing Act.

IV. NEXT STEPS

The draftsmen of the Model Act deserve credit for percipience and ambition: the former, for recognizing the practical prosecutorial problem presented by most prescriptive punishment programs; the latter, for

¹²⁰ JUDICIAL COUNCIL OF CALIFORNIA, REPORT TO THE GOVERNOR AND THE LEGISLATURE—1978, SENTENCING RULES FOR THE SUPERIOR COURTS 7-31.

¹²¹ MINNESOTA SENTENCING GUIDELINES COMMISSION, REPORT TO THE LEGISLATURE (1980).

¹²² MODEL ACT § 3-207(e).

¹²³ *Id.* § 3-107.

¹²⁴ *Id.* § 3-109. This is especially so because the lists of allowable aggravating and mitigating factors in sentencing each end with "any other factor consistent with the purposes of this Article and the principles of sentencing." *Id.* §§ 3-108(12), 3-109(9).

¹²⁵ MODEL ACT § 3-208: "[the sentence imposed is] unduly disproportionate to sentences imposed for similar [real?] offenses on similar defendants or . . . does not serve the purposes of this Article and the principles of sentencing better than the sentence provided in the guidelines." See note 102 *supra*. Compare 1978 Minn. Laws, ch. 723; 244 MINN. STAT. § 11: "The supreme court may review whether the sentence is inconsistent with statutory requirements, unreasonable, inappropriate, excessive, unjustifiably disparate, or not warranted by the findings of fact."

¹²⁶ See, e.g., Zeisel & Diamond, *Search for Sentencing Equity: Sentence Review in Massachusetts and Connecticut*, 1977 AM. BAR FOUNDATION RESEARCH J. 881.

¹²⁷ MODEL ACT §§ 3-501, 4-502. Only one-fourth of accumulated good time would vest.

trying vigorously to reflect that recognition in their reform regimen. Regrettably, the Model Act's real offense provisions are fundamentally misconceived. One interesting question is why so experienced a body as the Uniform Law Commissioners should have lapsed so badly in its corporate judgment. This final section offers a few speculative answers to that question and presents a thumbnail description of more promising sentencing reform ideas that might inform efforts to develop the next Model Sentencing Act. First, however, it may be appropriate to devote a few paragraphs to refutation of the argument that the Model Act's real offense proposals raise no problems not present in existing practices.

A. THE REVISIONIST RESPONSE

One response to the critique of real offense sentencing is that the Model Act's proposals contain little that is new. Most courts now operate on a real offense system; they simply don't admit to it. The objection has initial force. The offenses to which defendants plead guilty are often artifacts of plea bargaining. Under *Williams v. New York*,¹²⁸ courts are permitted to range widely in their consideration of evidence at sentencing hearings. That reality raises two questions: why is real offense sentencing now practiced, and does its ubiquity undercut the arguments against the Model Act's overt adoption of the practice?

Present practice results from three things: the generality of the definitions of some criminal offenses; the rehabilitative mystique that permeated American thinking about punishment during much of this century; and the absence from American systems of meaningful appellate sentence review.

The elements of offense definitions are generic. Standard definitions encompass conduct ranging from bank robberies by sub-machine gun to forcible takings of bicycles in schoolyards. Most people would want to distinguish between youthful bicycle thieves and professional armed robbers. Because the offense definitions often make no such distinctions, judges have become accustomed to looking behind the applicable conviction labels in order to reflect such distinctions in their sentencing decisions. Thus, the substantive law predisposes judges to real offense sentencing.

That predisposition was further encouraged by the prevalent rehabilitative ideology that suffused the criminal justice system during most of this century until the mid-seventies. If the causes of criminal conduct reside in inadequacies in the defendant and his environment, and if the solutions to these inadequacies involve efforts to rehabilitate him, what could be more natural than that the judge consider all possible informa-

¹²⁸ 327 U.S. 241 (1949).

tion that might contribute to an accurate diagnosis of the defendant's failings and thereby inform the prescription for his reformation. *Williams v. New York*, for example, explicitly invokes rehabilitative punishment goals in justifying the decision that the sentencing hearing is not subject to the rules of evidence or to other constraints on the admissibility of evidence. Thus, if the generality of some offense definitions invited consideration of real offense conduct, rehabilitative concerns broadened the invitation.

Finally, the absence of systems of meaningful appellate sentencing has meant that trials courts' sentencing practices have seldom been reviewed by higher courts. Little about sentencing criteria has been litigated or made the subject of appellate opinions. Once *Williams v. New York* let everything be considered at sentencing, there was no further opportunity for courts to consider whether, for example, a defendant convicted by a jury of theft although charged with armed robbery may later be sentenced as if he had been convicted of armed robbery.

Given that something like real offense sentencing is familiar practice in many courts, does that undermine the objections to the Model Sentencing Act's provisions? Probably not. The Model Act, indeed most sentencing reform efforts, represents an effort to bring greater fairness and predictability to sentencing. The comments to the Model Act make much of its commitment to "just deserts" and the realization of the goal that similarly situated defendants receive similar punishments. The Model Act's real offense proposals are animated by a concern that prosecutors will manipulate guidelines and thereby frustrate the normative values that are reified in the guidelines. These concerns for consistency and fairness are expressly invoked by the Model Act's draftsmen. The arguments presented here meet and reject the Model Act's real offense proposals on precisely those bases. The erratic and unprincipled nature of sentencing in many courts is a major cause of modern sentencing reform initiatives. The argument that something like real offense sentencing (though not under that name) is now common is not an argument for the Model Act's proposals, but against them. All of the objections apply equally to the unacknowledged systems of real offense sentencing that exist today in many jurisdictions.

B. THE PAST

The Model Act's fundamental failure appears to be the product of two factors. First, the United States Parole Commission's real offense parole guidelines were adopted, rather unreflectively, as a model for sentencing guidelines. Parole and sentencing are the business, respectively, of executive and judicial agencies, which perform quite distinct func-

tions and present substantially different policy and constitutional implications. The equation of parole and sentencing appears to have been a mistake. The second debilitating factor was that the Model Act was premature. Determinate sentencing was too novel, its methods untried, and its ramifications insufficiently appreciated when the Model Act was drafted. Several hypotheses can be offered to explain why the Uniform Law Commission acted prematurely.

1. *Parole and the primrose path*

The Model Act's draftsmen seem to have been spellbound by the United States Parole Commission's real offense guidelines. The Model Act's comments do not discuss the practical, policy, and constitutional issues raised by real offense sentencing. They simply indicate that the real offense provisions are intended to minimize prosecutorial influence on sentencing. The constitutionality of real offense sentencing was simply assumed. At two places¹²⁹ the comments allude to constitutional implications and—in an impressive non-sequitur and without elaborating—cite *Billiteri v. United States Board of Parole*,¹³⁰ as if it assured the constitutionality of real offense sentencing. *Billeteri* upheld the United States Parole Commission's real offense guidelines. The Model Act's comments appear, through silence, to assume that what is constitutional and wise in parole release decision-making is necessarily constitutional and wise in sentencing. That, however, is not an inexorable equation. The nature and structural setting of parole release decision-making is fundamentally different from judicial sentencing in court.

The United States Parole Commission's parole release guidelines appear, on balance, to have been a social good. They created knowable criteria for parole release decisions. Their application is evening out the grosser disparities that result from having more than 500 federal district court judges imposing sentences. Release dates are now set on the basis of actual offense behavior and consistently applied offender variables, without regard for the sentence imposed (except when mandatory minimum sentences exceed the guideline release date or when the sentence expires before the release date). The specific offenses of which federal defendants are convicted are often artifacts of plea bargaining. Whether a defendant who committed an armed bank robbery will be convicted of armed robbery, robbery, theft, or something else is largely adventitious; it depends on local plea bargaining patterns. Where sentence bargaining is the norm, the defendant may plead guilty to armed robbery with knowledge that his sentence will not exceed *x* years.

¹²⁹ Comments to the Model Act, at 144-45, 159-60.

¹³⁰ 541 F.2d 938 (2d Cir. 1976).

Where vertical charge bargaining is the norm, the defendant may plead guilty to robbery or theft. Where horizontal charge bargaining is the norm, the prosecutor may dismiss two armed robbery counts if the defendant pleads guilty to a third. It is difficult to imagine a philosophy of punishment in which the quantum of deserved or justified punishment depends on the prevalent pattern of plea bargaining in the court in which the defendant was convicted. By ignoring offenses of conviction and, to the extent legally possible, the prisoner's nominal sentence, the Parole Commission's guidelines probably tend to further the general aim that like prisoners be treated alike. The federal system lacks appellate sentence review and the Parole Commission is the only agency that can monitor sentences and ameliorate anomalies.

The Parole Commission has expressly rejected rehabilitative rationales for parole release decisions. Furthermore, since the variables in its guidelines system are known at, or shortly after, sentencing, the Commission has probably reduced prisoners' anxieties by its practice of setting presumptive release dates early in the sentence. A plausible argument can be made that, on balance, the parole guidelines have been for the good, even while acknowledging that the guidelines do pose significant policy problems.¹³¹

However, what is good for parole is not necessarily good for sentencing. Parole is an administrative decision, unconstrained by the rules of evidence or the criminal court's probative standard, and subject only to rudimentary requirements of procedural due process. Decisions are made in the first instance by parole hearing examiners. There are a small number of examiners and they are subject to formal and informal controls by the hierarchically organized Parole Commission. Both formal administrative controls and the examiners' career prospects conduce to a conscientious compliance with the parole guidelines. Decisions are made by two-person panels, thus reducing the likelihood of idiosyncratic decisions; the examiners have every incentive to follow the guidelines.

By contrast, as developed earlier,¹³² any account of the courts that describes judges as the sole determiners of sentences is grossly oversimplified. Power configurations may vary from court to court and from jurisdiction to jurisdiction, but rarely is the judge free from the influence of others.

A second major structural difference between judges and parole examiners is that the judge's sentencing decision is seldom subject to ap-

¹³¹ See, e.g., Coffee, *Repressed Issues of Sentencing: Accountability, Predictability, and Equality in the Era of the Sentencing Commission*, 66 GEO. L.J. 975 (1978).

¹³² See text accompanying notes 65-72 *supra*.

peal; when it is, the criteria for review are far from precise, and the likelihood of reversal is slight. The decision of the parole hearing examiners, by contrast, may be challenged through a succession of regional and national administrative appeals.¹³³

A third structural difference is that the judge's sentencing decision is not subject to the same organizational controls as are the decisions of the parole examiners. Trial judges need not worry about being fired, or transferred, or not promoted, because they deviate from the guidelines. Those are all matters of concern to hearing examiners. In sum, parole hearing examiners and judges are more unlike than alike, and there should be no surprise that a decision tool should be appropriate for one and not the other.

There are, moreover, important differences between the decisions made by parole examiners and judges. Parole examiners decide how long a prisoner will serve before release. The judge first decides whether to sentence a defendant to prison and then for how long. These are different decisions and the guiding criteria for each may be different. The incarceration decision could, for example, be primarily deterrent, or retributive, even rehabilitative, while at the same time the duration decision might be based primarily on incapacitative concerns. By combining the two decisions into one set of guidelines, problems are raised for sentencing that are not raised under the parole guidelines.¹³⁴

Parole release decisions are amenable to one set of guiding criteria set by a small collegial body. Under the United States Parole Commission's guidelines, those criteria have largely incapacitative aims. The aims could be otherwise but there would still be one set of criteria. By contrast, individual sentencing decisions involve the views and needs of individual judges and prosecutors subject to the particular dynamics of particular courtrooms.

Further, because the parole guidelines are primarily incapacitative, they can plausibly permit large differences in release dates for people who committed the same "real" offense. The offender characteristics that predict recidivism provide a basis for justifying different release dates. Sentencing, however, is increasingly perceived as a decision in which retributive and deterrent considerations should guide decision-making. Neither rationale is likely to justify dramatic differences in sentences on the basis of the offenders' personal characteristics. Yet use of an incapacitative parole guideline model may produce that result.

The last adverse consequence of use of the parole guideline model for sentencing is that it suggests that sentencing can be mechanized into

¹³³ U.S. Parole Commission Rules, 28 C.F.R. §§ 2.24-2.27 (1980).

¹³⁴ For example, how to induce guilty pleas.

a process in which a few well-defined factors determine results. To the contrary, sentencing is a matter of high drama, rich and complex, and pregnant with moral and ethical content. Sentencing should be the product of informed, compassionate human judgment, not the result of ministerial tabulations of characteristics and calculations of point totals.

For all these reasons, parole decision-making is fundamentally different from sentencing. Accordingly, the *Billiteri* decision, upholding the use of real offense considerations in parole guidelines, does not mean that courts should or would uphold a comparable approach to sentencing guidelines.

2. *Too much too soon*

The model laws developed by the Uniform Law Commissioners are variously successful in gaining enactment, but few are embarrassments. They may be too bold and ambitious. They may be on subjects that do not inspire legislators. But they are usually drafted and quarreled over by lawyers who are experts in the area of the law under consideration and they usually show that influence.

The mistake here may have been to include a sentencing section in the Model Act. The matters of correctional policy and organization that concern the Model Act's other five Articles were ripe. The sentencing issues were not. Thus, the speculations that follow do not apply to the entire Model Act but only to Article 3 on sentencing.

The primary reporters for the Model Act have written: "[T]he major policy decisions which serve as the foundations for the provisions of the Act . . . were based on the perceptions of the 'state of the art' of corrections initially held by the authors. . . ." ¹³⁵ Regrettably, the state of the sentencing reform art was primitive in 1974, when development of the Model Act began, and was still primitive in April 1978 when the drafting committee held its last meeting. By 1978, only a handful of states had passed determinate sentencing laws, and no one knew how they would work. It is now clear that those early laws were badly misconceived. The California law encouraged prosecutorial manipulation. The Maine, Indiana, and Illinois laws abolished parole but gave no meaningful guidance to judicial sentencing decisions. During most of the period of the drafting committee's work, the sentencing reform literature consisted largely of exhortations. ¹³⁶ The efforts to work out details were few in number and the exhortations, while immensely useful in

¹³⁵ Perlman & Potuto, *supra* note 1, at 928.

¹³⁶ *See, e.g.*, M. FRANKEL, *supra* note 2; N. MORRIS, *supra* note 2.

moving us forward, were underdeveloped.¹³⁷ Thus, while model and uniform laws usually pull together the most advanced and sophisticated thinking on a subject, synthesizing practical experience with various existing approaches, and promising new approaches to a problem, there were no useful sentencing reform experiences and no legacy of law and lore on which the Model Act's draftsmen could draw.

The second problem is that there were no experts. As there were few enacted determinate sentencing laws, and no useful indications of how they would work or whether they would realize their proponents' aims, there could be no experts. When the Uniform Law Commissioners consider a model law on a common law subject, on a commercial or business law subject, even on a criminal law or criminal procedure subject, experts are available, and they are used. Talented lawyers who work day-to-day in a particular field know the problems they face and can make well-informed guesses about the implications of proposals for change. There simply were no equivalent experts on sentencing reform in 1975-78. Moreover, neither the Model Act's drafting committee, nor its review committee, nor its staff or consultants included a single person of national prominence in sentencing reform. And in those early days even national prominence could seldom mean expertise. The issues were not ripe and that almost necessarily meant that there were no trained gardeners to tend them.

Finally, the cornucopia of federal money for crime-related research and projects may have disserved the Uniform Law Commissioners. LEAA was then required to spend enormous amounts of money annually and the Uniform Law Commissioners could not have been a safer, more establishmentarian institution to which to give it. The money was probably available, the Uniform Law Commissioners were a safe grantee, and the idea of a Model Sentencing Act was not inherently implausible. Once the money was asked for and received, there could be no choice but to proceed.

Someday, presumably, there will be a second edition of the Model Sentencing and Corrections Act. The following subsection gives a few general suggestions that offer some promise for the reduction of sentencing disparities and the achievement of a system of principled and reasonably evenhanded sanctions.

C. THE FUTURE: AGENDA FOR A SECOND EDITION

The second edition of the Model Sentencing and Corrections Act should chart a straighter path to just sentencing. The goals should be

¹³⁷ See, e.g., TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, *supra* note 2; A. VON HIRSCH, *supra* note 2.

unchanged—reduce unwarranted disparities; create a presumption against imprisonment that can be overcome only by the demonstrated requirements of retribution, general deterrence, and incapacitation; and limit the role of rehabilitation as a sentencing rationale. Even the basic structure of the Act should be unchanged. A sentencing commission (full-time rather than part-time) could be established to develop general criteria for sentencing. Appellate sentence review should be established on the basis of an unambiguous review standard, albeit without prosecutorial appeals or the prospect of sentence *increases* on appeal. Parole release should remain abolished. A good time system should be maintained, but good time credits should “vest.” These points, however, are peripheral. They involve relatively crude efforts to police the key decisions of judges, prosecutors, and defense counsel.

The critical features of realistic sentencing reform are these:

1. Narrow the continuum of sentencing choices

When judges are able to choose sentences ranging from probation to 25 years, they will do so. At a stroke, sentencing disparities could be dramatically reduced by reducing maximum sentences for classes of felonies from the conventional life (death) -25 years-12 years-6 years-3 years established by state criminal codes to, say, life (death) -8 years-4 years-2 years-1 year. Sentence durations could be shortened openly or by subterfuge. Open action is preferable and has been recommended by major national commissions in Canada and England.¹³⁸ Wide sentencing frames were enacted in the era of indeterminate sentences and, in a sense, could be discounted by the likelihood of parole. With the demise of parole, the justification disappears and the certain injustice of anomalous, unduly long sentences remains. A Model Act should be forward-looking. There may be political difficulties to be overcome in reducing sentence maximums by, say, two-thirds, but the draftsmen of a model for reform legislation should be guided by their collective wisdom and best judgment, not by their worst fears of political posturing.

However, if caution counsels subterfuge, several courses are available. The Study Draft of the National Commission on Reform of Federal Criminal Laws, for instance, artfully camouflaged its drastically reduced sentence maximums.¹³⁹ Table 3 below shows the Study Draft's nominal and actual maximum prison sentences.

¹³⁸ ADVISORY COUNCIL ON THE PENAL SYSTEM, SENTENCES OF IMPRISONMENT—A REVIEW OF MAXIMUM PENALTIES, 77-88, 147-64 (1978); LAW REFORM COMMISSION OF CANADA, IMPRISONMENT AND RELEASE, 21-22 (1975).

¹³⁹ NAT'L COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS, STUDY DRAFT §§ 3201-02 (1970).

TABLE 3
NOMINAL AND ACTUAL MAXIMUM SENTENCES

FELONY CLASS*	NOMINAL	ACTUAL	
		WITHOUT SPECIAL FINDING	WITH SPECIAL FINDING
A	30 years	15 years	25 years
B	15 years	4 years	12 years
C	7 years	3 years	5 years

* The vast majority of felonies, and felons, would fall within Felony classes B and C and thus, ordinarily, be subject to terms of incarceration not longer than 3 or 4 years. An enormous amount of sentencing disparity would disappear.

The Study Draft also envisioned parole release eligibility at no later than one-third of the maximum sentence. The Commission accomplished its legerdemain by including a mandatory parole term *within* the maximum sentence (5 years, 3 years, 2 years, respectively), and by requiring a special finding that the defendant “presents an exceptional risk to the safety of the public”¹⁴⁰ before an especially long sentence could be imposed. The Study Draft contains much wit and not a little wisdom. The special-finding requirements are, in effect, a set of guidelines for sentencing and could be incorporated into a statutory framework of much shorter maximums.

Another simple subterfuge would be to adopt sentence maximums that include a large proportion of vesting good time. The Model Act recommends day-for-day good time but only part of that would vest. The effect is to cut the sentence maximums in half for well-behaved prisoners. This approach to shortening sentences, regardless of whether the good time vests is little more than a public relations gimmick. However, if good time does not vest, the potential for abuse is enormous. If, for example, a ten year sentence meant, in effect, five years in prison and five years good time, then in a non-vesting system correctional administrators would have power to deprive a prisoner of five years of liberty, subject only to rudimentary procedural requirements. Abuse and anomalies would be inevitable. In any event, so severe a deprivation should result only from conviction for a new criminal offense following a conventional prosecution.

2. *Incapacitate imprisonment*

Among the grossest sentencing injustices are those which befall the

¹⁴⁰ The “exceptional risk” finding authority was not open-ended, but was limited to three closely defined situations: the defendant must have been a “persistent felony offender,” a “professional criminal,” or a “dangerous, mentally abnormal offender.” *Id.* at § 3202(3)-(5).

defendants who receive prison sentences after convictions for offenses that seldom result in prison sentences. The decision whether to imprison an offender is the most crucial punishment choice. Where experience tells us that imprisonment is seldom ordered, and then for reasons that are, overall, inexplicable,¹⁴¹ the sentence inevitably is more of a comment on the idiosyncrasies of the judge rather than a comment on the culpability of the offender. The solution: create a statutory sentencing structure in which prison sentences are reserved only for truly serious criminality, perhaps with the statutory possibility of imprisonment for lesser offenses *only* after the defendant has received, say, five prior convictions.

3. *Structure plea bargaining*

The Model Act's real offense proposal, for all its infirmities, was an indirect effort to prevent prosecutorial manipulation of sentencing guidelines. The more promising approach to redress prosecutorial inconsistency is from the front. Estimable bodies have long called for development of administrative rules for prosecutorial charging, plea bargaining, and sentencing decisions.¹⁴² Some prosecutors' offices have developed and implemented such regulations.¹⁴³ Others have "abolished" plea bargaining: in Alaska the abolition seems to have been a success; the incidence of plea bargains was greatly reduced, defendants continued to plead guilty, the courts were not inundated by trials, and case processing time did not increase.¹⁴⁴ The next Model Act should approach the problem of constraining prosecutorial decision-making head-on, working out the details of a model set of prosecutorial guidelines.

The Model Act was a good idea that misfired. We have learned much since it was drafted, however, and the second edition, should there ever be one, will have much more substantial experience on which to draw. This first Model Act should be abandoned. Its flaws can be re-

¹⁴¹ Less than half of federal defendants convicted of fraud and embezzlement, for example, receive prison sentences. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1979, Table 5-30. One recent study concluded that regression analyses can explain only 7.5 percent of the variance in sentences received by federal defendants convicted of embezzlement. L. SUTTON, VARIATIONS IN FEDERAL CRIMINAL SENTENCES: A STATISTICAL ASSESSMENT AT THE NATIONAL LEVEL (1978).

¹⁴² PRESIDENT'S COMM'N LAW ENFORCEMENT & ADMINISTRATION OF JUST., THE CHALLENGE OF CRIME IN A FREE SOCIETY 133-34 (1967); AMERICAN BAR ASSOCIATION STANDARDS, THE PROSECUTION FUNCTION § 2.5 (1971); NAT'L ADVISORY COMM'N ON CRIMINAL JUST. STANDARDS & GOALS, COURTS, Standards 13.3 (1973).

¹⁴³ See, e.g., Kuh, *Plea Bargaining: Guidelines for the Manhattan District Attorney's Office*, 11 CRIM. L. BULL. 48 (1975); Kuh, *Sentencing Guidelines for the Manhattan District Attorney's Office*, 11 CRIM. L. BULL. 62 (1975).

¹⁴⁴ ALASKA, note 20 *supra*.

dressed only by starting over. Still, it may well turn out that it will have played a useful role by showing us how not to go about the complex business of sentencing reform.