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CRIMINAL PROCEDURE

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Sentencing Guidelines—Revised Statutes 15:306-313

During the 1987 Regular Session, the Louisiana Legislature enacted a statute which may produce one of the most fundamental changes in Louisiana criminal justice since the enactment of the 1942 Criminal Code. The Louisiana Sentencing Commission was established by 1987 Louisiana Acts No. 158 for the purpose of developing and implementing a "uniform sentencing policy for use by the Louisiana judiciary."[1] The specified means of accomplishing this goal is "formulating such [sentencing] policy in the form of advisory sentencing guidelines."[2]

The idea of adopting sentencing guidelines for use by the judiciary is by no means new. States such as Minnesota and Washington have had guidelines for years.[3] Others have either implemented, attempted to implement, or are in the process of implementing guidelines proposals.[4] In the Comprehensive Crime Control Act of 1984, Congress established the United States Sentencing Commission and charged that body with the responsibility to draft and promulgate sentencing guidelines for use by federal courts in criminal cases.[5] Thus, as the Louisiana Sentencing Commission begins its work of guideline formulation it can take advantage of the experience of several other jurisdictions.

Sentencing guidelines can serve various functions. A consensus regarding the primary purposes they are to serve in Louisiana is critical to the project's success.

The guidelines should provide uniformity in sentencing practices throughout the state.[6] Under present law, judges given the same set of

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1. La. R.S. 15:306(B) (as enacted by 1987 La. Acts No. 158).
2. Id.
3. See A. von Hirsch, K. Knapp, & M. Tonry, The Sentencing Commission and Its Guidelines 8 (1987). The author wishes to express his gratitude to the Center for Effective Public Policy, especially to Gerald Kaufman, President, and Linda Adams, director of the Center's National Jail and Prison Overcrowding Project. The author was given the opportunity to attend excellent workshops sponsored by the Center at which experts like Dr. Kay Harris and Ms. Kay Knapp presented their views on sentencing policy and sentencing guidelines.
4. Id.
5. 28 U.S.C. §§ 991-998 (Supp. 1987).
6. For example, 28 U.S.C. § 991(b)(1)(B) (Supp. 1987) provides in pertinent part that "[t]he purposes of the United States Sentencing Commission are to . . . establish sentencing policies . . . that . . . provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct." See also 18 U.S.C. § 3553(a), (b) (1985 & Supp. 1987).

facts may impose rather different sentences. The outcome depends on each judge's individual philosophy.[7] This may not be wholly unsatisfactory. Local concerns with particular kinds of offenses may lead judges in one region to view certain criminal conduct as more serious than in other regions. Also, some argument can be made for the proposition that Louisiana judges are elected by a "constituency" and are selected to exercise their best individual judgment as to the proper sentence in a particular case. These two arguments, although legitimate, are outweighed by the valid concern with a system that results in a substantially harsher sentence for one of two very similarly situated offenders because the sentencing philosophy of one of the two judges varies significantly. The goal of uniformity of sentences for similarly situated offenders is an appealing one and is a very persuasive argument in favor of adopting sentencing guidelines.

Another goal of a sentencing guideline system is to provide for sentences which are "proportionate" given the nature of the offense and the character of the offender.[8] All will agree that achieving proportionality in a criminal sanction system is a desirable goal. Unreasonably harsh or lenient sentences are unacceptable. However, determining the normative standards to be applied in determining what a properly "proportional" sentence is for a particular case is not an easy thing to do. Some suggest that in order to commence the task of structuring sentencing guidelines in a logical, consistent fashion, the Commission must first identify the goal of the sanction system.[9] For example, the Commission must decide whether the purpose of the sentence is to rehabilitate or to incapacitate the offender, to deter others from the offense, or simply to see that the offender "gets what was coming to him" (i.e. his "just deserts") for what he did. However, developing a consensus on the philosophical basis for imposing sentences is a venerable problem which can be redebated with regularity.

Although some may argue that failure to settle upon a consistent philosophical basis will launch the venture on a voyage without direction, attempting to settle that ancient debate could easily result in the voyage

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7. Louisiana's criminal statutes frequently provided for a wide range of sentencing options with relatively little guidance from appellate courts. Although disparity is a factor considered by appellate courts, uniformity is not an absolute prerequisite to a non-excessive sentence. See State v. Bourgeois, 406 So. 2d 550 (La. 1981); State v. Sepulvado, 367 So. 2d 762 (La. 1979).

8. See 18 U.S.C. § 3553(a)(1) (1985 & Supp. 1987).

9. See A. von Hirsch, K. Knapp, & M. Tonry, The Sentencing Commission and Its Guidelines (1987). For an excellent selection of writings of various scholars who have addressed the problem, see G. Dix & M. Sharlot, Criminal Law 107-33 (2d ed. 1979). Interestingly, 28 U.S.C. § 994(k) (Supp. 1987) identifies the "inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant."

not being undertaken. Furthermore, the development of a set of guidelines is not a task which ends when the initial guidelines are promulgated. Even in the absence of an explicitly stated "sentencing philosophy," a uniform philosophy could emerge from the guidelines and shape their future development.

Nevertheless, in determining the "proportionate sentence," the issues of the proper actual length of the sentence and the proper factors to consider concerning the offense and the offender are going to require careful deliberation.[10]

It is at this juncture that "proportionality" and "uniformity" can be at odds. For example, harsh mandatory sentences can achieve "uniformity" in the sense that all persons convicted of a particular offense may receive a very similar sentence. However, mitigating factors may exist in a particular offender's case which justify a lesser punishment and cause the harsher (uniform) sentence to be disproportionately severe. Therefore, isolating the relevant factors and assigning the proper weight to be given to them is very important.

The Commission must decide what factors ought to be considered in determining the proper range of sentences. The Commission must enumerate those factors which make the offense more serious (aggravating), as well as those which make the defendant deserving of less severe punishment (mitigating).[11] Since all possible cases and factors cannot be conceived in advance, departure provisions are to be suggested so that a judge will have some guidance in handling cases which, for peculiar reasons, do not fit within the guidelines.[12]

Simply drawing up a list of properly considered aggravating and mitigating factors can present troublesome problems. For example, should the mere fact of a prior arrest ever be given any weight as an aggravating circumstance? Should only prior convictions be considered? Should other criminal acts for which no conviction was obtained be considered? If the facts will show that a defendant actually committed ten armed robberies, as opposed to only the one to which he is pleading guilty, surely he is more blameworthy than an offender who has only committed

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10. 28 U.S.C. § 994(e) (Supp. 1987) requires that the federal guidelines "reflect the general *inappropriateness* of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant." (emphasis added). The identification of appropriate and inappropriate factors for consideration in sentencing can stir significant debate. For example, arguably a good employment record could be considered a positive factor for the defendant to be considered in imposing less severe sentence.

11. La. R.S. 15:311(B) (as enacted by 1987 La. Acts No. 158).

12. La. R.S. 15:311(C)(3) (as enacted by 1987 La. Acts No. 158). See also 18 U.S.C. § 3553(b) (1985 & Supp. 1987). See also Sentencing Guidelines and Policy Statements for the Federal Courts, 41 Crim. L. Rep. (BNA) 3140 (April 13, 1987).

one armed robbery. However, assigning the proper weight to offenses for which no conviction was obtained and determining the procedures to be followed in finding that the offender in fact committed those offenses are major challenges facing the Commission. A related issue is the "discount" which the defendant should receive if he enters a guilty plea.[13]

It is easy to say that various factors should be "taken into account." It is much more difficult, however, to draw the equation when some numerical weight having a direct bearing on the length of the sentence has to be assigned to such factors.

The typical sentencing guideline approach is to isolate the relevant offense characteristics (e.g., how much was the victim's loss of property; how serious were the victim's injuries; was the defendant armed with a loaded handgun, etc.) and offender characteristics (was the offender relatively young; how serious is the offender's prior criminal history, etc.). A "base score" or number of points may be assigned to the offense of conviction. Points are then assigned to the various relevant factors. If aggravating factors are established, points are typically added; if mitigating factors are established, points are typically subtracted. This gives each offender a "score" based on relevant offense and offender characteristics. That "score" determines a fairly narrow range of sentences which either should or must be imposed, depending on whether the guidelines system is mandatory or advisory—an issue to be discussed later. Thus, the presence or absence of mitigating and aggravating factors will increase or decrease the score, and hence, the actual sentence.[14]

Since the isolation of appropriate sentencing factors is crucial in the process of developing guidelines, the factual basis of the sentence will achieve an even greater significance than it has now. If the existence (or non-existence) of a particular fact carries with it an enhancement (or reduction) of a sentence by a specific term, the judicial system must assure that the procedures adopted to determine the presence or absence of relevant sentencing factors will produce a highly accurate result.[15]

An illustrative case may prove helpful in understanding why this problem is very significant.[16] Suppose, for example, that having a loaded, workable handgun increases the "score" for an offender convicted of armed robbery. The armed robbery statute does not require as an element proof of use of a handgun, only that the offender was "armed with a

13. See Sentencing Guidelines and Policy Statements for the Federal Courts, 41 Crim. L. Rep. 3129 (April 13, 1987).

14. For an example in the federal sentencing guidelines, see the sentencing table in id. at 3133.

15. See the procedures set forth and the commentary in id. at 3142.

16. For an example in the federal sentencing guidelines, see id. at 3099.

dangerous weapon."[17] Furthermore, cases have held that an "unloaded pistol" can be a dangerous weapon for purposes of the armed robbery statute.[18] At the guilt trial, the state is not required to prove by admissible evidence beyond a reasonable doubt that the instrumentality was a loaded and workable handgun. How then, and by what standard of proof, is the state to establish the existence of the aggravating factor of "loaded, workable handgun"?

In our hypothetical, suppose that the offender pointed what appeared to be a .38 caliber pistol at the victim, who surrendered the cash in the register. Shortly after the robbery, a fully loaded .38 caliber pistol was seized from the offender following his arrest. However, because the arrest was without probable cause, the pistol could not be introduced at the trial on the merits.[19] The defendant nevertheless may be convicted of armed robbery based on the testimony of eyewitnesses who can positively identify the defendant.

Several questions arise regarding the "loaded pistol" factor, which adversely affects the length of the defendant's sentence. First, can the "illegally obtained" evidence be considered by the sentencing court? The "exclusionary rule" utilized to enforce the fourth amendment has not been applied to sentencing hearings.[20]

Second, what procedures are to be followed by the sentencing court in finding that the offender used a loaded pistol? Generally, the "hearsay rule" has not been applicable to sentencing hearings.[21] Although the facts relied upon in imposing sentence must be "reliable," the rules of evidence and the sixth amendment's "right of confrontation" are not applied to the sentencing hearing.[22]

Third, by what "degree of certainty" must the sentencing judge be convinced that the defendant used a "loaded firearm" during the robbery? The term "burden of proof" implies that a party to the litigation must offer evidence which convinces the fact finder to some degree of certainty (e.g., beyond a reasonable doubt, by clear and convincing evidence, by a preponderance of evidence, etc.). To the extent that sentencing factors are to be determined by the court acting independently of the parties, the term "burden of proof" may be inappropriate. Nevertheless, some consideration should be given to the sentencing court's

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17. La. R.S. 14:64(A) (1986).

18. See State v. Green, 409 So. 2d 563 (La. 1982); State v. Levi, 259 La. 591, 250 So. 2d 751 (1971).

19. See Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684 (1961).

20. United States v. Schipani, 435 F.2d 26 (2d Cir. 1970), cert. denied, 401 U.S. 983, 91 S. Ct. 1198 (1971).

21. See Williams v. New York, 337 U.S. 241, 69 S. Ct. 1079 (1949).

22. See Farrow v. United States, 580 F.2d 1339 (9th Cir. 1978); United States v. Weston, 448 F.2d 626 (9th Cir. 1971), cert. denied, 404 U.S. 1061, 92 S. Ct. 748 (1972).

degree of certainty required to find the presence of an aggravating factor which has the effect of increasing the sentence.

A fourth and closely related question emerges regarding the role of the court and the parties in the fact finding process surrounding sentencing. For example, will the state and the defendant be permitted to stipulate that aggravating and mitigating facts exist or do not exist, thereby binding the court not to go beyond the stipulation? Can or should the sentencing court find the presence of aggravating and mitigating factors based on the trial record or a presentence report filed by a probation officer? As part of a "plea agreement," can the prosecutor and the defense lawyer enter into a stipulation that will preclude the sentencing judge from finding that a loaded firearm was used?[23] To the extent that such a stipulation is acceptable, the goal of uniformity is certainly undercut.[24] On the other hand, one must ignore reality if one disregards the constitutional authority of the Louisiana prosecutor to charge an offense less than the maximum offense which fits the facts. The issue then relates to the application of the theory of prosecutorial discretion in the sentencing phase. Because the sentencing process generally has not been structured in Louisiana as it is in jurisdictions with guidelines, obviously these issues have never been litigated or even discussed by Louisiana courts.[25]

Thus the creation of sentencing guidelines will greatly enhance the significance of the process by which courts find the factors relevant to sentence. The process of developing guidelines cannot occur without adequate consideration of these closely related procedural issues.

In addition to "uniformity" and "proportionality," some guidelines commissions, such as the United States Sentencing Commission, were established to achieve the goal of "honesty" in sentencing. "Honesty" in sentencing in this context refers to a close relationship between the length of the sentence imposed and the actual time served in custody. In other words, under the federal system established by Congress, if a defendant is sentenced to three years, he will actually serve very close to that term rather than being, in all likelihood, released on parole after

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23. See Sentencing Guidelines and Policy Statements for the Federal Courts, 41 Crim. L. Rep. 3142-43 (April 13, 1987).

24. In commentary, the Sentencing Commission provides:

> "[T]he stipulation must fully and accurately disclose all factors relevant to the determination of sentence. . . . [I]t is not appropriate for the parties to stipulate to misleading or nonexistent facts."

Id. at 3143.

25. The above noted commentary also refers to 28 U.S.C. § 994(a)(2)(E) (Supp. 1987) and the concern of Congress that trial courts examine plea agreements to "make certain that prosecutors have not used plea bargaining to undermine the sentencing guidelines." S. Rep. No. 225, 98th Cong., 1st Sess. 63, 167 (1983).

serving one year (one-third of his maximum sentence).[26] To achieve this, the sentence should reflect the number of years (or months) to be served in actual custody with only limited reductions of time for "good behavior." If "honesty" is a goal to be achieved, a guidelines project must evaluate the efficacy of the parole and "good time" systems in effect. Louisiana's project does not envision the abolition of parole or further limitations on good time credits. Parole eligibility in Louisiana varies, depending on the offense of conviction, as well as on the offender's prior criminal history.[27] In setting up guidelines for crimes like armed robbery in which defendants are ineligible for parole,[28] that factor must be taken into account in fixing the recommended length of the sentence. Similarly, guidelines for second felony convictions should probably reflect the fact that the offender is eligible for parole only after serving one-half (as opposed to one-third) of the maximum sentence.[29] An offender serving a felony sentence upon third conviction is not eligible for parole.[30]

"Good time" is earned by the prisoner for good behavior in serving his sentence.[31] However, some offenders are denied eligibility to earn "good time" because of the offense of conviction, and others, because of prior criminal history.[32] The general rule (that a prisoner in custody of the Department of Corrections can earn 15 days per month) allows a prisoner to "earn" his release under parole conditions after serving

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26. In the Guidelines, the Sentencing Commission noted that Congress "sought honesty in sentencing." The Commission said:

> [Congress] sought to avoid the confusion and implicit deception that arises out of the present sentencing system which requires a judge to impose an indeterminate sentence that is automatically reduced in most cases by 'good time' credits. In addition, the parole commission is permitted to determine how much of the remainder of any prison sentence an offender will actually serve. This usually results in a substantial reduction in the effective length of the sentence imposed, with defendants often serving only about one-third of the sentence handed down by the court.

Sentencing Guidelines and Policy Statements for the Federal Courts, 41 Crim. L. Rep. 3089 (April 13, 1987).

27. La. R.S. 15:574.4 (1981 & Supp. 1987) defines parole eligibility in Louisiana.

28. La. R.S. 14:64 (1986) provides that the sentence for armed robbery is to be served "without benefit of parole." La. R.S. 15:574.4(B) (1981) provides that "[n]o person shall be eligible for parole consideration who has been convicted of armed robbery and denied parole eligibility under . . . R.S. 14:64." If the sentencing judge fails to specify that the sentence is without parole, the disability does not attach. See State v. Fraser, 484 So. 2d 122 (La. 1986); State v. Jackson, 452 So. 2d 682 (La. 1984). See also Joseph, Developments in the Law, 1985-1986—Criminal Procedure, 47 La. L. Rev. 267, 280 (1986).

29. La. R.S. 15:574.4(A)(1) (Supp. 1987).

30. Id.

31. La. R.S. 15:571.3(A) (1981).

32. La. R.S. 15:571.3(C) (1981).

approximately two-thirds of his sentence.[33] The actual time of release during the period between one-third and two-thirds (assuming both parole and good time eligibility) is governed by the parole board's decision regarding parole.[34] This system means, of course, that in many cases the period of *actual* incarceration will not be fixed by the guidelines or by the sentencing judge, but will depend instead upon the parole board or corrections officials' assessment of the offender's institutional behavior. This is a "reality" of the present Louisiana sanction system against which the effect of the guidelines must be understood. If no changes are made in the parole and good time system, the Louisiana sentencing scheme will continue to remain largely "indeterminate."[35] This is another factor which complicates the formulation of guidelines and prevents the guidelines from being an effective means to regulate prison population with a high degree of certainty.

The development of guidelines may also have a significant effect on the development or revision of Louisiana's substantive criminal law. A review of the 1942 Criminal Code and the present provisions of that portion of Title 14 of the Revised Statutes which is still referred to as "the Criminal Code" reveals that there are relatively few forms of behavior which were not criminal in 1942 but which are now covered by a criminal provision.[36] The pattern of amendment to the Criminal Code is one of "repackaging culpability" to redefine and frequently to punish more severely behavior which was previously included within another offense.[37] In some instances, the repackaging was clearly done to increase the severity of a lesser offense in order to eliminate difficulties encountered in proving the elements of the greater offenses.[38]

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33. La. R.S. 15:571.4(B) (Supp. 1987). The amount of "good time" varies with the date of imposition of sentence. La. R.S. 15:571.5 sets forth the conditions of good time release.

34. La. R.S. 15:574.4(G) (1981).

35. For a very thorough discussion of the Louisiana sentencing system. See Professor Louis Westerfield's article: Westerfield, A Study of the Louisiana Sentencing System and Its Relationship to Prison Overcrowding: Some Realistic Solutions,, 30 Loy. L. Rev. 5 (1984).

36. Id.

37. See, e.g., simple robbery (La. R.S. 14:65 (1986)), "purse snatching" (La. R.S. 14:65.1 (1986)), simple battery (La. R.S. 14:35 (1986)) and sexual battery (La. R.S. 14:43.1 (1986)).

38. See, e.g., simple burglary (La. R.S. 14:62 (1986)) and unauthorized entry of an inhabited dwelling (La. R.S. 14:62.3 (1986)). The addition of the unauthorized entry crime was an obvious response to the supreme court's decision in State v. Jones, 426 So. 2d 1323 (La. 1983) in which the court set aside Jones' conviction based on a finding of insufficient evidence of intent to steal or commit a felony. Jones was caught inside the victim's home at night. He was highly intoxicated. *Jones* was decided in January, 1983. The new felony of unauthorized entry of an inhabited dwelling was enacted during the following legislative session. See 1983 La. Acts No. 285.

In order to explain, examples of "repackaging culpability" are helpful. This has occurred frequently in the homicide, rape, robbery, burglary, battery, and theft "families" of crimes. The addition of new elements to the lesser grades of the crimes for the purpose of increasing the penalty without requiring proof of a greater grade of the offense is typical.

Take a simple example from the series of burglary offenses. Simple burglary prohibits the "unauthorized entry" into any "structure" with intent to commit a theft therein.[39] Due to serious problems with simple burglaries of homes (not amounting to aggravated burglaries due to absence of elements of the greater offense) and simple burglaries of pharmacies, two new burglary crimes were added: simple burglary of an inhabited dwelling[40] and simple burglary of a pharmacy.[41] Simple burglary encompasses the conduct proscribed in both new statutes but does not carry the mandatory minimum sentence of the two new crimes.[42] Thus, the purpose of the enactment was really only to impose the mandatory minimum sentence.

Another simple example arises from the battery series. Simple battery prohibits the use of force or violence upon the person of another without his or her consent.[43] No minimum sentence is provided. Between 1981 and 1987, three new crimes were enacted proscribing simple battery of certain types of victims: policemen,[44] teachers,[45] and child welfare workers.[46] The purpose of the statutes was clearly to provide for mandatory sentences in those kinds of simple batteries, not to prohibit conduct not previously defined as criminal under the simple battery statute.[47]

The reader may well ask what difference it makes to have a variety of statutes dealing with specific kinds of offenses which may also be covered by a "generic" offense. The development of a comprehensive rational sentencing policy is not furthered by proliferation of "special" crimes to deal with the interests of particular types of victims or par-

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39. La. R.S. 14:62 (1986).

40. La. R.S. 14:62.2 (1986).

41. La. R.S. 14:62.1 (1986).

42. The mandatory minimum sentence in both offenses is one year without benefit of probation or parole.

43. La. R.S. 14:35 (1986).

44. La. R.S. 14:34.2 (1986).

45. La. R.S. 14:34.3 (1986).

46. La. R.S. 14:34.4 (as enacted by 1987 La. Acts No. 902).

47. In all three new offenses, the maximum term of imprisonment is six months without hard labor, just as in the simple battery statute. However, a fifteen day minimum sentence without benefit of suspension is required for each of the new offenses. In the case of "school teacher" battery, a suspended sentence is permissible in lieu of the fifteen day sentence if the offender is required to perform five days of community service or serve two days in jail as a condition of suspension.

ticular situations. Certainly, an overview of the sentencing policy of Louisiana should include consideration of the peculiar risks faced by different types of victims of battery. The fact that the defendant was aware that the victim was a police officer acting in the course of duty is very relevant to sentencing.[48] However, also relevant to sentencing is the fact that the victim suffered various degrees of physical harm.[49]

The point is not that the nature of the victim of battery or the type of structure burglarized should not be considered as aggravating sentencing factors. These factors, as well as all other relevant factors, should be weighed in the process of developing a rational, comprehensive sentencing policy. Hopefully, the penalty issue can be isolated and evaluated from a broad perspective of the entire sentencing system.

The writer acknowledges that a legitimate argument can be made for the proposition that the factors most relevant to the "level of culpability" as reflected by the sentence ought to be included as essential elements of the offense.[50] Making these factors elements assures the defendant that the state must prove them beyond a reasonable doubt

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48. However, it is arguably no more serious to push a policeman who is trying to control a crowd at the scene of a fire than it is to push a fireman in an effort to obstruct his efforts to fight the fire. There is, as of the time of this writing, no special offense of simple battery of a fireman.

49. The original 1941 Law Institute Report on the Preparation of Projet of a Criminal Code for the State of Louisiana, in the unnumbered articles defining the offenses of "Aggravated Assault and Battery" and "Simple Assault and Battery," provided that the penalty for those offenses vary, depending on whether the offense resulted "in serious personal injury." Almost 40 years later, in the second degree battery statute, the concept of increasing the penalty exposure for battery depending on intentional infliction of "serious bodily injury" was incorporated into Louisiana law. See La. R.S. 14:34.1 (1986) (enacted by 1978 La. Acts No. 394).

50. See McMillan v. Pennsylvania, 106 S. Ct. 2411 (1986) (Stevens, J., dissenting). Justice Stevens said:

> It would demean the importance of the reasonable doubt standard—indeed, it would demean the Constitution itself—if the substance of the standard could be avoided by nothing more than a legislative declaration that prohibited conduct is not an "element" of a crime. A legislative definition of an offense named "assault" could be broad enough to encompass every intentional infliction of harm by one person upon another, but surely the legislature could not provide that only that fact must be proved beyond a reasonable doubt and then specify a range of increased punishments if the prosecution could show by a preponderance of the evidence that the defendant robbed, raped, or killed his victim "during the commission of the offense."

Id. at 2425. In *McMillan*, the Court upheld the constitutionality of Pennsylvania's "firearm enhancement" statute which required a minimum mandatory five year sentence for commission of a felony with a firearm. The Pennsylvania statute did not provide that use of the "firearm" was an element of the offense, but rather was a sentencing factor to be proven by a preponderance of evidence at the sentencing hearing. For a discussion of Louisiana's similar statutory scheme, see Joseph, Developments in the Law, 1985-1986—Criminal Procedure, 47 La. L. Rev. 267, 274 (1986).

to the finder of fact at the guilt phase of the proceedings. This also assures that the traditional rules of evidence will govern the admissibility of evidence necessary to prove those facts. The traditional evidentiary rules are generally designed to enhance the reliability of the fact finding process. Thus, one may argue that it is inappropriate to rely heavily on factors in determining sentence when those factors are not included within the elements of the offense. The critic would thus say that the "on duty police" status of the victim should be an element of an upgraded battery offense if a mandatory minimum fifteen day jail sentence is to be imposed for battery of a police officer.

There is merit to the idea that a factor which significantly enhances the severity of an offense should be an element of that offense. This assures that reliable fact finding will be utilized to determine the existence of such factors. Thus the process of developing sentencing guidelines and restructuring substantive criminal law in conjunction with that effort requires a careful consideration of which "aggravating" factors should be elements of an offense and which should be sentencing factors.

Another major issue to be faced by the Sentencing Commission is whether to structure its sentence ranges to reflect the Commission's composite "vision of justice in sentencing" or to control prison population.[51] These are two very different approaches to guidelines and neither is mandated by the statute creating the Commission. As indicated earlier, the only goal set forth is to develop a "uniform sentencing policy." Uniformity is a legitimate goal, but uniformity alone does not address the issue of how many offenders are to be incarcerated and for how long.

The "vision of justice" approach to setting a uniform sentencing policy should disregard (although that is impossible) fiscal restraints and prison population limits in developing guidelines. If this theory is adopted, the Commission should simply draft guidelines which inform sentencing judges of the circumstances for and length of incarceration. The normative views of the Commissioners and their philosophy of the "purpose" of criminal sanctions (e.g. deterrence, rehabilitation, incapacitation, just deserts) are all they really need to guide them.

It may be helpful to illustrate the issue in the context of a specific situation such as, for example, armed robbery. The issue under the "vision of justice" theme should be seen in terms of the length of time an offender with particular characteristics (e.g., he has a prior simple robbery conviction and is a 35 year old, unemployed, drug addict) should be sentenced to serve if he has committed an armed robbery under particular circumstances (e.g., he carried a loaded firearm, stole over

51. For an excellent discussion, see A. von Hirsch, K. Knapp, & M. Tonry, The Sentencing Commission and Its Guidelines (1987).

$10,000.00, and caused serious physical harm by beating the victim). How many years in a range of sentences should the weight assigned to those factors produce? In reaching a consensus, debates will focus simply on the typical issues of "deterring" others, giving the offender what he "deserves," keeping him locked up so that he cannot harm others, etc. The effect of the length of his incarceration (and that of similarly situated offenders) on prison population need not be taken into account.

On the other hand, a guideline system can be drawn with the purpose of controlling prison population.[52] If a state decides that it can afford to build and maintain a specific number of penal institutions with a specific population capacity, then guidelines can be drawn with the view to developing a uniform sentencing policy which will not overtax the population capacity of correctional institutions. The question then becomes phrased in terms of how much prison space society can afford for various types of offenses and offenders. With good data, sociologists and correctional experts can apparently predict with a fair degree of certainty what kinds of offenses and offenders will be processed by the criminal justice system.[53] In effect, those projections and the available prison resources can be matched in the process of deciding how much of the prison capacity can be assigned to housing the variety of offenders.

The focus in the "population control" guideline system is very much more pragmatic than the "vision of justice" guideline system. The "population control" system decisions are very much constrained by policy makers who decide what share of a state's fiscal resources will be devoted to corrections (as opposed to education, highways, health care, etc.).

In order to formulate "population control" guidelines, the statistical data necessary to predict the incidence of offenders entering the system is obviously very important. Since that data may not be readily available in Louisiana and may have to be acquired in "archeological fashion" by "digging" through the files and records in prosecutors' offices and courthouses throughout the state, following a "population control" approach may be very difficult in Louisiana.

Another problem with the "population control" approach in Louisiana is the "advisory" rather than the "mandatory" effect of the guidelines. Because the enabling legislation clearly creates an advisory guidelines system, population control may be difficult to achieve because of the difficulty of predicting the incidents of wide variations from the guideline sentence in any particular type of case.

The advisory nature of the guidelines also creates another series of problems. The system may do little more than give the sentencing judge

52. Id.
53. Id.

a "recommended" sentence from the Commission. While this at first blush might appear to accomplish very little, the author believes that over a period of time, the guidelines can have a major influence on sentencing policy despite their "advisory" nature. The guidelines will be the source of helpful information to experienced judges and are very likely to be followed by new judges who have limited experience in the difficult task of arriving at a fair sentence.

In Louisiana, trial judges are statutorily required to articulate the reasons for sentence.[54] If appellate courts will accept, without further justification, a sentence within the guidelines, and will require more extensive articulation of reasons for sentences more harsh than the guidelines, the effect may not be very different from sentencing under a "departure provision" under mandatory guidelines.[55] Even if the effect of advisory guidelines is not immediately felt, over a period of time, the writer believes that their influence will be very significant.

Given all of the challenges which will be encountered, how should the Sentencing Commission approach its task of formulating guidelines? The background from which the Commission arose and its composition help to provide some answers.

The enabling legislation was the product of the Governor's Task Force on Prison Overcrowding and was guided through the process of enactment by Judge Thomas Tanner, Chairman of the Louisiana Commission on Law Enforcement. The Task Force was charged with seeking solutions to the problems of prison overcrowding. Therefore, one of the Sentencing Commission's goals must obviously be to keep prison population limits clearly in mind when promulgating guidelines. The Commission may not be charged formally to operate on a "population control" theory, and it may not have access to sufficient data to do so. However, it must gather the data as it does its work, and it must monitor carefully the effect of the guidelines on Louisiana's prison population. It certainly ought to develop a sentencing policy which will bring about an overall reduction in the length of sentences in this state. The cost of lengthy incarceration for larger numbers of offenders is far too great to continue to maintain our present rate of prison population growth.

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54. La. Code Crim. P. art. 894.1(C).

55. La. R.S. 15:313(B) (as enacted by 1987 La. Acts No. 158) provides that "[n]o sentence shall be declared unlawful, inadequate, or excessive solely due to the failure of the court to impose a sentence in conformity with the sentencing guidelines." This significantly limits the role which appellate courts can play in enforcing the guidelines. However, this provision does not prohibit appellate courts from accepting guideline sentences with less detailed articulation of reasons for sentence than sentences which depart from the guidelines. In other words, the court of appeals can still require the trial court to explain why the sentencing court chose to depart from the guideline sentence.

The composition of the Commission also gives an insight as to how it should approach its "advisory" mission. The size of the Commission is large.[56] Most of its eighteen voting members are involved in the actual operation of the criminal justice system.[57] The Commission has a heavy judicial and "lawyer" composition. It has eight judges (five district judges, two appellate judges, one city court judge) and four lawyers who are regular advocates in criminal trials (two district attorneys and two defense lawyers).[58] All four legislative members are also likely to be lawyers.[59] The two sheriffs will possibly be the only non-lawyer voting members.[60]

The voting membership is also composed largely of elected public officials. All but the two defense lawyers were elected to the posts they hold. As is the case with all elected public officials, the Commission members will undoubtedly be attentive to their perceptions of the views of the public.

The voting members, in all likelihood, will bring with them an excellent understanding of the sentencing process and a great deal of experience with that process. They will also bring with them an awareness of the practical and theoretical problems facing the criminal justice system.

The "revolving" nature of the fourteen gubernatorially appointed voting members and their relatively short terms (two and four years with no consecutive reappointment) reflects a view that the Commission should have a regular infusion of new people and new ideas.[61] This should mean that the initially promulgated guidelines will not be "written in stone," but rather will be continually reevaluated and altered if necessary.

Several very significant legislatively mandated chores face the Sentencing Commission at the outset. Section 310 of Title 15 directs the Commission to "classify all felony offenses" and "misdemeanor offenses punishable by imprisonment for six months or greater." The classification must be based on the "severity" of the offense. There are to be five categories of felonies and three categories of misdemeanors.[62] Although section 310(B) sets forth certain rather obvious factors to be taken into account in "determining the proper classification" such as the "degree of harm," "deterrent effect," and "incidence of the of-

56. La. R.S. 15:308(A) (as enacted by 1987 La. Acts No. 158).
57. La. R.S. 15:308(B) (as enacted by 1987 La. Acts No. 158).
58. La. R.S. 15:308(B)(2) (as enacted by 1987 La. Acts No. 158).
59. La. R.S. 15:308(B)(1) (as enacted by 1987 La. Acts No. 158).
60. La. R.S. 15:308(B)(2)(c) (as enacted by 1987 La. Acts No. 158).
61. La. R.S. 15:308(C) (as enacted by 1987 La. Acts No. 158).
62. La. R.S. 15:310(A) (as enacted by 1987 La. Acts No. 158).

fense," the Commission must consider "any . . . relevant" factors.[63] Thus, the classification ought to reflect the Commission's view of the "order of severity" of felonies and serious misdemeanors. This grouping of offenses into "order of severity" ought to be helpful in determining whether penalty provisions are consistent with other offenses in the same category and what proportionate share of Louisiana's "jail space" ought to be taken by persons convicted of those offenses. The classification should not be based solely on the legislatively enacted penalty provision of the offense. Listing factors such as "incidence," "degree of harm," and "deterrent effect" clearly implies that an independent assessment by the Commission is necessary.

Once crimes have been thus classified, some serious thought should be given to recommending a uniform penalty provision for each offense in the category, such as providing that all offenses within a particular category shall be punishable by the same maximum term of imprisonment (either with or without hard labor) and the same maximum fine.[64] If minimum penalties are to be imposed or parole or probation eligibility denied, this should be applicable to all offenses in the category. The penalty provisions associated specifically with individual offenses should be eliminated. Such a restructuring of criminal penalties hopefully will help to control proliferation of "special interest" crimes statutes enacted solely to provide for a mandatory penalty and also will provide a uniform range of penalties for all offenses determined to be of equivalent "severity."

Whether the task of classification will be difficult or easy remains to be seen. There will be some inevitable disputes. For example, presumably misdemeanor offenses such as DWI,[65] Vehicular Injury,[66] and Simple Battery of a Policeman[67] could be classified as "first degree" misdemeanors, or by whatever name is chosen to describe the most severe category of misdemeanors. These offenses arguably involve the greatest risk of serious injury to people. However, should misdemeanor theft or the newly enacted misdemeanor grade of theft of goods (shoplifting)[68] go into the higest, middle, or lowest classification? Or, for that matter, should any misdemeanor grade of a crime of wrongful acquisition (e.g. theft of crawfish,[69] theft of utility services,[70] theft of

63. La. R.S. 15:310(B) (as enacted by 1987 La. Acts No. 158).

64. For examples of such a system, see Final Report of the National Commission on Reform of Federal Criminal Laws, §§ 3002, 3201, and 3301, U.S. Government Printing Office (1971).

65. La. R.S. 14:98 (1986 & Supp. 1987).

66. La. R.S. 14:39.1 (1986).

67. La. R.S. 14:34.2 (1986).

68. La. R.S. 14:67.10 (enacted by 1987 La. Acts No. 914).

69. La. R.S. 14:67.5 (1986).

70. La. R.S. 14:67.6 (Supp. 1987).

dogs,[71] issuing worthless checks,[72] etc.) be placed in the "first degree" category? Into which category of misdemeanor should simple possession of marijuana[73] be placed? These are the kinds of questions which will confront the Commission.

Once the classification into categories is completed, the Commission must "adopt advisory guidelines for consideration by the court imposing sentence in particular cases. . . ."[74] The guidelines are to be based on "reasonable offense and offender characteristics" and are to specify a "presumptively correct range of sentences."[75] The range should be fairly narrow. If the ranges are too wide, the purpose of guidelines as a means of channeling the exercise of sentencing discretion is defeated.[76] The determination of the range into which the defendant's case will fall will depend upon the presence of aggravating and mitigating circumstances.

The Commission is also to give guidance concerning the circumstances under which the sentencing judge may wish to "depart from the guidelines."[77] The guidelines are also to give judges direction with regard to whether to impose a fine, grant probation, or impose concurrent sentences in cases of multiple convictions.[78]

Since the failure to draft guidelines for some offenses has no effect on the validity of sentences for those (or other) offenses,[79] and since the Louisiana guidelines (for reasons stated) cannot initially be effective means of controlling prison population, the writer believes that the Commission should approach its task in what critics would correctly call a "piecemeal" approach. The Commission should first endeavor to draft and promulgate guidelines for some of the "basic families" of crimes such as burglary, battery, robbery, and sexual assault (aggravated rape, forcible rape, sexual battery, etc.) without trying to provide initially a comprehensive guideline system governing all offenses. By first dealing with only some of the offenses which are commonly committed in Louisiana, the Commission will be able to narrow its focus and thereby gain access to more data from which to determine and evaluate present sentencing patterns. These (as well as any number of others) are also

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71. La. R.S. 14:67.2 (1986).

72. La. R.S. 14:71 (1986).

73. La. R.S. 40:966(D) (Supp. 1987).

74. La. R.S. 15:311(A) (as enacted by 1987 La. Acts No. 158).

75. La. R.S. 15:311(C)(4) (as enacted by 1987 La. Acts No. 158).

76. See 28 U.S.C. § 994(b) (Supp. 1987) which requires the United States Sentencing Commission to establish a sentencing range for "each category of offense involving each category of defendant" and requires that the range not exceed six months variation or a variation of twenty-five percent, whichever is greater. There is an exception for ranges which include life imprisonment.

77. La. R.S. 15:311(C)(3) (as enacted by 1987 La. Acts No. 158).

78. La. R.S. 15:311(C) (as enacted by 1987 La. Acts No. 158).

79. La. R.S. 15:313(A) (as enacted by 1987 La. Acts No. 158).

crimes whose typical offense and offender characteristics are well known to the Commission members. Each of these "families of crimes" also contains examples of the proliferation of new offenses primarily designed to raise penalties and provide minimum mandatory penalties.

The Commission can firmly and promptly establish its value if effective advisory guidelines can be drafted and promulgated for some of the commonly committed offenses. Along with the initial guidelines, however, the Commission must recommend to the legislature the basic procedures for imposing and reviewing guideline sentences. The Commission can then proceed in whatever order of priority it sets to work out guideline sentence ranges for the other "families of crimes" such as theft-type offenses, controlled substance offenses, property damage offenses, etc.

Sentencing is becoming a very complex matter. The need for development of legal principles to guide the process has certainly become apparent in the last decade. Those principles will take the form of rules governing the factors which may be considered in imposing sentence, the weight to be assigned to those factors, the scope and nature of appellate review, and the procedures and evidentiary principles to be followed in determining the presence (or absence) of the relevant factors. Appellate review, which was introduced in Louisiana about eight years ago with the *Sepulvado* case,[80] has already had a profound impact on the system. Eventually, sentencing guidelines will further enhance the uniformity and procedural fairness of the process.

Second Offender Probation

The Governor's Task Force on Prison Overcrowding recommended an amendment to article 893 of the Code of Criminal Procedure which would have explicitly authorized trial judges to grant probation to second felony offenders.[81] The Louisiana Law Institute had earlier unsuccessfully sponsored legislation to delete the first offender limitation on the judge's authority to grant probation in felony cases.[82] The 1966 Code did not restrict the authority to grant probation only to cases of first felony offenders.[83] A lengthy period of time lapse following the first felony conviction and various extenuating circumstances could conceivably satisfy the sentencing judge that probation is appropriate, particularly if the second offense is a nonviolent felony like issuing worthless checks.

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80. State v. Sepulvado, 367 So. 2d 762 (La. 1979).

81. See La. H.R. 470, Regular Sess. (1986) and La. H.R. 534, Regular Sess. (1987). Both failed to pass.

82. See La. S. 71, Regular Sess. (1972).

83. See Projet of the Louisiana Code of Criminal Procedure, La. State Law Inst., art. 893 (1966). See also 1966 La. Acts No. 310, § 1.

Although the Task Force proposal sponsored by Representative Lynn failed to pass, the legislature passed a more limited second offender probation bill by Representative Jetson.[84] The Jetson bill contains several well-intended but somewhat ill-conceived restrictions. The amended Code of Criminal Procedure article 893 authorizes the suspension of sentence for a second felony conviction only if the court makes certain findings. The article provides that the judge cannot suspend the sentence "unless the court finds that such offense did not involve the use of a dangerous weapon by the defendant, the offense occurred at least five years after the date of the first conviction, and the defendant was not charged with any other felony since the date of first conviction."[85]

The limitations were imposed in a good faith effort to permit judges to grant probation in deserving cases where non-dangerous felonies are committed by offenders who have done no wrong for a five year period since the first conviction. However, the language used is unfortunate for several reasons.

In the first place, the statute appears to place the burden on the defendant to prove that he has not been "charged with any other felony" within the five year period.[86] If there is nothing in the record to reflect a felony conviction within the last five years or a filing of other felony charges against him, the finding could be made. However, eliminating discretion to grant probation due to a mere filing of felony charges seems unfair. The term "charged" presumably means formally charged by indictment or bill of information rather than simply being arrested and booked on a felony "charge."[87]

Even restricting the term "charged" to the formal filing of an indictment or information is not enough. For example, if defendant was convicted of a nonviolent felony (e.g., carnal knowledge of a juvenile) and then was subsequently charged with another felony (e.g., aggravated battery) for which he was acquitted (for self defense), no time lapse will erase the disability. Any felony charge "since the date of the first conviction" will deprive the defendant of probation eligibility.[88] If the offender is convicted twenty years later of writing a $150.00 worthless check, he is ineligible for probation under the terms of the statute. That is not a reasonable limitation, and the writer predicts that sentencing

84. La. H.R. 12, Regular Sess. (1987) was enacted as 1987 La. Acts No. 721.

85. La. Code Crim. P. art. 893(A) (as amended by 1987 La. Acts No. 721).

86. Id.

87. See State ex rel. Coco, 363 So. 2d 207, 210 (La. 1978), in which the supreme court construed the term "charged" as used in statute dealing with the jurisdiction of the district court over persons who are fifteen and sixteen years old to mean the filing of an indictment by a grand jury or a bill of information by the district attorney.

88. La. Code Crim. P. art. 893(A) (as amended by 1987 La. Acts No. 721).

courts may wish to ignore the limitation.[89] However, in cases in which the prosecutor objects and appeals, the court of appeal will be bound to enforce the limitation. With deference to the good faith and wisdom of Louisiana prosecutors, this places an inappropriate amount of power in the hands of the prosecutor to control the sentence. By merely filing a felony charge subsequent to a first felony conviction (even if a misdemeanor conviction or acquittal follows), the prosecutor can assure that the individual will not be eligible for probation—unless the prosecutor agrees not to object to probation. If the prosecutor does not object and appeal, the writer believes that any judgment which imposes a suspended sentence becomes final and valid in the sense that the judgment cannot be collaterally attacked by a party other than the prosecutor.[90]

The five year period and the nature of second offense provisions are probably more leniently phrased than may have been intended. The five year period makes no exception for time spent in actual custody.[91] For example, if the defendant was convicted of felony theft and sentenced to ten years in prison, and after serving six years was released on parole only to steal an automobile during his second day of freedom, he would not be barred from probation under article 893. He would be barred from probation only if sentenced as a habitual offender under Revised Statutes 15:529.1 as amended during the last session.[92]

Another interesting aspect of the 1987 amendment is its description of the kinds of second felony offenses for which probation can be granted. The second offense must not "involve the use of a dangerous weapon by the defendant."[93] A conviction of attempted second degree murder involving the offender's effort to strangle his victim with his hands or second degree battery in which the offender inflicted serious bodily injury (e.g., blinding the victim) with his fists would clearly not be covered by the prohibition on probation because no "dangerous weapon" was involved.[94] On the other hand, if a dangerous weapon was used by the defendant, even though no injury was inflicted and use of the weapon was not an element of the second felony offense,

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89. See State v. Fraser, 484 So. 2d 122 (La. 1986).

90. See Joseph, Developments in the Law, 1985-1986—Criminal Procedure, 47 La. L. Rev. 267, 380 (1986).

91. Compare the provisions of La. R.S. 15:529.1(C) (1981) which clearly specify that "any period of servitude . . . in a penal institution . . . shall not be included in the computation" of the five year "cleansing period" provided in the "habitual offender law."

92. See 1987 La. Acts No. 774.

93. La. Code Crim. P. art. 893 (as amended by 1987 La. Acts No. 721).

94. Neither attempted second degree murder under La. R.S. 14:27 (1986) and La. R.S. 14:30.1 (1986) nor second degree battery under La. R.S. 14:34.1 (1986) require the use of a dangerous weapon as an element of the offense.

the offense would arguably still "involve the use of a dangerous weapon."[95] However, the phrase may have been intended to include only situations in which the second conviction was for an offense requiring use of a dangerous weapon as an element. Hopefully, the courts will construe it in that fashion.

A similar issue arises regarding second offenses in which dangerous weapons are wielded by co-offenders. For example, suppose the evidence shows that the defendant grabbed and held the victim while the codefendant struck the victim with a knife. Both offenders would be guilty of aggravated battery of the victim under the principal theory.[96] Similarly, if the defendant paid his codefendant to stab the victim, both would be guilty of aggravated battery even though the defendant was not physically involved in the act. In both instances, the offense "involved the use of a dangerous weapon." However, in both cases, the weapon was used by another and not "by the defendant."

Geriatric Parole Provision

The Governor's Task Force on Prison Overcrowding also proposed an amendment to the statutory provisions governing parole eligibility. The so called "geriatric parole" provision grants parole eligibility for prisoners who have reached the age of sixty and who have served twenty years in actual custody. The amendment to Revised Statutes 15:574.4 applies to all cases, except life sentences, of sentences of over thirty years, whether the prisoner is serving a single sentence or multiple consecutive terms.[97] It also expressly applies and is only relevant to cases of offenders who are serving very long sentences or are otherwise prohibited by law from parole eligibility.

An example is helpful. If an armed robber is sentenced to 198 years as a multiple offender without benefit of parole, under the "geriatric" parole provisions he will nevertheless ("Notwithstanding . . . any other law to the contrary . . .") become eligible when he has served twenty years and has reached the age of sixty.[98] If sentenced at age forty-five, he will have to serve until he is sixty-five to complete the twenty years. On the other hand, if sentenced at age thirty he will have to serve thirty years before reaching age sixty.

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95. Actual harm is not a criminal consequence of attempted second degree murder under La. R.S. 14:27 (1986) and La. R.S. 14:30.1 (1986). For example, if defendant fired a shot at his victim and missed, he would be guilty if he acted with a specific intent to kill.

96. La. R.S. 14:24 (1986).

97. 1987 La. Acts No. 60.

98. La. R.S. 15:574.4(3) (as enacted by 1987 La. Acts No. 60).

Since the statute requires that the offender serve "at least twenty years . . . in actual custody," time spent on parole does not count as part of the twenty years.[99]

An explicit provision of the statute excepts prisoners "serving a life sentence unless the sentence is commuted to a fixed term of years."[100] This excludes all of the "lifers" from "geriatric" parole eligibility unless the pardon board and Governor act favorably on a commutation.[101] The pardon board could, for example, commute the sentence to one hundred years, and the "geriatric parole" provision would still apply. The length of the sentence does not control parole eligibility as long as the sentence is commuted to a "fixed term of years." Therefore a sixty year old "lifer" who has served at least twenty years can apply to the pardon board for a "fixed term" commutation. If granted, he becomes eligible for parole. Of course, the pardon board is not bound to grant the requested commutation, and the parole board may still refuse to grant parole release to the prisoner. However, if a "fixed term" commutation is granted, the effect is to create parole eligibility under the statute.

Since the effect of this procedural provision appears to be remedial, it should be given effect to all cases of prisoners currently serving long sentences at hard labor without benefit of parole.[102] It should not be restricted only to cases involving sentences imposed after its effective date. The provision simply removes a bar to parole and hence should be given full "retroactive" effect.[103] Therefore, "lifers" who have been granted "fixed term" commutations and other "long timers" who are over sixty and who have been in prison over twenty years should be considered for parole release. Indeed, such offenders are unlikely to be a danger to society. Prison experts would probably agree that society is better off paying to keep them in nursing homes than in prison.

Post Sentence Amendment of Felony Jail Sentences

One of the fundamental policy decisions reflected in the 1966 Code of Criminal Procedure is the theory that the sentencing judge in felony cases is divested of authority to alter the sentence once that sentence is imposed and the prisoner commences to serve the sentence. Comment(c) to article 893 of the Projet of the Code of Criminal Procedure

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99. Id.

100. Id.

101. La. R.S. 15:572(A) (1981) sets forth the pardon power of the Governor and the Pardon Board. See also La. Const. art. IV, § 5 (1974).

102. See State v. Collins, 370 So. 2d 533 (La. 1979); State v. English, 367 So. 2d 815 (La. 1979); State v. Curtis, 363 So. 2d 1375 (La. 1978); State v. Martin, 351 So. 2d 90 (La. 1977); State v. Anderson, 440 So. 2d 205 (La. App. 3d Cir. 1983).

103. See cases cited supra note 102.

explained that the provision expressly prohibiting suspension of a felony sentence "after the defendant has begun to serve the sentence" was included in the provisions of the 1960 and 1942 probation laws. The comment quoted from a report of the Parole Rehabilitation Committee filed in January, 1960, explaining the objection to "belated probation":

> Although there is nothing conceptually wrong with allowing the judge to grant a suspended sentence or probation after a person has begun to serve his sentence, the facts that parole is available after one-third . . . of the sentence is served, and that the trial judge should not be harassed by continuous probation petitions has prompted the prohibition.[104]

A very similar view was expressed in Code of Criminal Procedure article 881, which authorized amendment of a legally imposed felony sentence only "prior to the beginning of execution of the sentence." Comment (a) to article 881 of the Projet of the Code of Criminal Procedure reflects that the Louisiana district judges were asked to vote at the April, 1964 meeting of the Louisiana District Judge's Association on a proposal to include a provision similar to former Rule 35 of the Federal Rules of Criminal Procedure. The proposal would have allowed the sentencing judge to reduce a felony sentence within sixty days after imposition of sentence. The judges voted "unanimously" to retain the prohibition against amendment after execution. The comment, in summarizing the judges' objection, said that judges felt that "[s]uch a procedure can subject the sentencing judge to continuous harassment by the defendant's relatives, friends, and attorneys, and would virtually constitute the judge a 'one man pardon board.'"[105]

Article 894 expressly authorized the judge to suspend "a misdemeanor sentence after the defendant has begun to serve the sentence." That provision remains unchanged and gives the judge the authority to alter the sentence of imprisonment of a jailed misdemeanant. In effect, the judge in the misdemeanor case may act as a "one man parole board." This flexibility was obviously deemed desirable. Furthermore, misdemeanants, who will generally be serving relatively short terms in local jails, were not and still are not eligible for parole under the authority granted to the parole board.[106]

In 1974, the legislature enacted a Louisiana Law Institute recommendation amending article 895 to specifically authorize judges in felony

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104. La. Code Crim. P. art. 893, comment (c).

105. La. Code Crim. P. art. 881, comment (a).

106. La. R.S. 15:574.4 (1981) only refers to parole of prisoners in the custody of the Department of Public Safety and Corrections. To the writer's knowledge, the Louisiana Parole Board has no statutory authority to grant parole to prisoners serving sentences for felony convictions in the custody of the sheriff or of a multi-parish prison superintendent.

cases to impose a term of imprisonment without hard labor not to exceed one year as a condition of probation.[107] That period was extended to two years in 1982.[108]

The purpose of the amendment was twofold. One purpose was to allow judges to impose an "intermediate sanction" of short term confinement without hard labor rather than a penitentiary sentence for young offenders who, in the judge's opinion, needed to spend time in custody. In some cases of felonies necessarily punishable at hard labor, the choice between releasing the offender on probation or sending him to the state prison was not satisfactory. The intermediate option of giving him a "taste of jail" as a condition of probation is a good alternative if the judge chooses to use it.

The second purpose was to create a felony jail sentence over which the judge can control duration. Under article 896, conditions of probation can be modified "at any time." Thus, for example, the defendant sentenced in a felony case can be placed on probation for five years and ordered as a condition of that probation to serve two years in jail.[109] For example, after the defendant has served six months of that term, the judge can modify the two year imprisonment condition to reduce it to six months, thereby releasing the defendant from custody.[110]

Although this option only applies in cases in which the offender is eligible for probation, the sentencing judge can, in effect, control the duration of confinement after commencement of execution of a felony sentence despite articles 881 and 893.

The Law Institute subsequently recommended an amendment to article 881 to address directly the issue by authorizing amendment of a felony sentence to imprisonment without hard labor after commencement of execution. The recommendation was not received with enthusiasm and failed.[111]

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107. 1974 La. Acts No. 211.

108. 1982 La. Acts No. 27.

109. La. Code Crim. P. arts. 893 and 895.

110. La. Code Crim. P. art. 896. The writer does not imply that any particular period of time spent in custody is a minimum period.

111. See La. H.R. 592, Regular Sess. (1980). The bill was withdrawn from the House files on June 4, 1980. The Institute was prepared to recommend the proposed legislation again in the 1982 Regular Session. However, the bill was not submitted in deference to the almost unanimous objection of the Louisiana District Judge's Association. In reporting the disapproval of the Louisiana District Judges, the late Judge Paul Lynch of the First Judicial District wrote the following to Professor William Crawford, Director of the Louisiana Law Institute in a letter dated March 30, 1982:

> The Louisiana District Judge's Association, at its meeting held in Lafayette on March 24-25, 1982, took actions on three matters of interest to the Law Institute.
>
> The Executive Committee presented to the membership, which had 161 judges

In 1987, on the recommendation of the Governor's Task Force on Prison Overcrowding, the legislature amended articles 881 and 893. The amendment permits the judge to retain the authority to reduce a felony sentence or to amend the sentence to grant probation in cases "in which the defendant has been sentenced to imprisonment without hard labor."[112]

The effect is to authorize the judge to release a jailed felon just as the judge can release a jailed misdemeanor offender. In view of the overcrowding situation in the parish jails (as well as in the state prisons), and an apparent increase in the number of cases in which judges choose to confine convicted felons (in cases punishable with or without hard labor) in parish jails, the amendment will hopefully provide an important means of releasing offenders who no longer require confinement. Further, as in the case of misdemeanor offenders serving jail sentences, the parole board under existing legislation is not charged with the authority and responsibility to grant parole release to offenders who are not in the custody of the Department of Corrections.[113]

The 1987 amendment simply removes a previous restriction. It is therefore procedural in effect and should apply to all cases without respect to the date of original sentencing.[114]

Although judges can certainly require the filing of a written motion and an adversary hearing with the prosecutor before granting a reduction of sentence or release on probation, this is not required by the statute.[115] The statute only requires that notice be given to the district attorney and to the "arresting law enforcement agency" in the form of a "copy of the minute entry reflecting the judgment reducing or amending the sentence."[116]

Although the judge can act without an adversary hearing, the writer feels that the state's interest will not suffer. In cases in which a dramatic reduction of sentence may be granted, the writer doubts that district judges will act without giving the district attorney an opportunity to be heard, at least in an informal setting.

Allowing the judge to act on his own motion without setting forth formalities such as a written motion and adversary hearing was a good

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registered for this conference, the question of where the association stood regarding Article 881 of the Louisiana Code of Criminal Procedure. The membership, with one announced dissenting vote, voted its opposition to the proposed change.

See correspondence files, Louisiana State Law Institute.

112. See 1987 La. Acts No. 59.

113. La. R.S. 15:574.4 (1981).

114. See cases cited supra note 102.

115. La. Code Crim. P. art. 881(B) (as amended by 1987 La. Acts No. 59).

116. Id.

decision. This reflects the high degree of flexibility which ought to be available to alter a jail sentence in the interest of justice.

If problems arise, the legislature can certainly amend the code article to impose the restrictions of motion and hearing. However, the writer doubts this change will be necessary.

Intentional Exposure to AIDS—Revised Statutes 14:34.4

In a commendable effort to help curb the already dangerous health menace created by the alarming spread of AIDS (acquired immune deficiency syndrome) virus, the legislature enacted a new offense. The statute provides that "[n]o person shall intentionally expose another to any . . . AIDS virus through sexual contact without the knowing and lawful consent of the victim."[117] The offense is located in the assault and battery series of articles and is a felony punishable by a maximum fine of five thousand dollars and a maximum term of imprisonment with or without hard labor for ten years.

An analysis of the elements of the offense poses some interesting problems. The bill, as originally introduced as House Bill 1634, provided that the transmission of AIDS through sexual contact resulting in death constituted second degree murder. House Bill 1728, which became Act 663 enacting the crime of "intentional exposure to AIDS," was substituted for the second degree murder bill.

The offense requires "intentional exposure." By "intentional," the legislature must have intended to require the state to prove that the offender was *aware* of his or her AIDS infection and, despite this awareness, intentionally engaged in "sexual contact" with someone else. The term "intentionally" arguably also carries the connotation that the offender was aware that the virus can be spread through "sexual contact." In effect, "intentionally" may really mean "knowingly." The state may have to prove that the offender has acted "knowingly" with respect to his AIDS infected condition and with respect to the danger of transmission of the virus through "sexual contact."

A more "strict liability" approach to the statute would be an unfair and harsh construction. Take the hypothetical case of a prostitute who is diagnosed as having AIDS. Is she guilty of violating the intentional exposure statute for engaging in acts of sexual intercourse prior to her diagnosis? She certainly acted "intentionally" with respect to "sexual contact." But the real issue must be whether she acted "intentionally," in the sense of "knowingly," with respect to her own AIDS infected

117. See 1987 La. Acts No. 663 (enacting La. R.S. 14:34.4). Since two newly created offenses of the 1987 Regular Session were both numbered 34.4 of Title 14, the Law Institute will be required to renumber one of the two. See also 1987 La. Acts No. 902. The Law Institute's authority to renumber is found in La. R.S. 24:253 (1975).

status and with respect to the potential for transmission of AIDS through sexual contact. Clearly the state cannot prevail merely by proving that she engaged in sexual contacts without knowledge of her infection. Arguably, a knowledge of potential for transmission of the virus is also implied by "intentional exposure." Thus it might follow that our hypothetical prostitute should be acquitted even though she was aware that she had AIDS if she is not shown to have reasonable grounds to believe that she was "exposing" her "customers" to AIDS because of "safe sex" precautions she was taking or requiring them to take.

Actual knowledge of AIDS infection appears a required element of proof—not mere knowledge of symptoms which would lead a reasonably well educated person to believe that he had AIDS. Evidence of awareness of symptoms might be sufficient to infer *actual* knowledge even absent a physician's diagnosis. However, proof of actual knowledge, even if circumstantially established, would seem to be required.

The element of "exposure" can be established without proving that anyone actually contracted AIDS. Death or contracting the disease is not a criminal consequence. The creation of risk of infection is the element of the offense.

The statute clearly only deals with the risk of spreading the AIDS virus. However, the statute certainly could logically be amended to include other communicable diseases spread by sexually promiscuous behavior.

Similarly, only the risk of infection through "sexual contact" is addressed. Although the term "sexual contact" is not defined, the term is obviously descriptive of numerous forms of behavior involving use of the sexual organs of one or more of the participants or involving other forms of physical contact for the purpose of satisfying or gratifying the "sexual desires" of one of the participants. For example, "kissing" would seem to be "sexual contact" even though the mouth is not a "sexual organ." However, "biting" in anger would not constitute sexual contact.[118]

The element lack of "knowing *and* lawful consent" of the sexual partner poses an interesting series of questions. The concept of "knowing consent" would appear to refer to the awareness of the victim that the defendant had the AIDS virus. Arguably, for the consent to be "knowing," hence valid, the victim must also be aware that the virus can be spread through sexual contact.

Under this theory, the state could carry its burden of proof of "lack of knowing consent" by proving either that the victim was unaware

118. Some statutes may be designed to deal with assaults and batteries committed by AIDS infected persons by biting the victim. See United States v. Moore, 669 F. Supp. 289 (D.C. Minn. 1987).

of the AIDS infected condition of the defendant or that the victim was unaware that engaging in the contemplated form of sexual contact would "expose" the victim to AIDS. "Lack of knowing consent" is obviously an element of the offense to be proven by the state as opposed to an affirmative defense to be proven by the defendant.

The term "lawful consent" is an enigma. Arguably, the word "lawful" implies no more than "voluntary." Certainly a forced "sexual contact" by an AIDS infected offender (who is aware both of his infected condition and of the risk of contagion) with a victim would be covered by the statutory proscription. Since the term "consent" carries with it the concept of voluntariness, "lawful" may merely be used for emphasis rather than to add another dimension to the statute.

More troubling is the possibility that courts might construe the term "lawful" to vitiate consent if the victim is deemed "mentally incompetent" through youth, for example, to consent to being exposed to the dreaded AIDS virus. If the legislature meant to provide that the offense is committed even if a sub-seventeen year old victim is aware of the risk and is willing to take it, then the legislature should have clearly specified, as it has in numerous cases of the sex offenses involving minors, that "consent" is simply not a defense if the victim is under a certain age.[119]

Although the statute may have been directed primarily towards prostitutes, other "commercial sex peddlers" such as panderers may be guilty as principals for knowingly encouraging prostitutes to continue to work despite AIDS infection and the risk of contagion. Furthermore, the statute also governs other lawful and unlawful consensual sexual conduct between adults.[120] As the disease continues to spread through our society, prosecutors and health officials may feel compelled to investigate the sources of infection and to bring charges under this statute.

Second Degree Felony Murder through Drug Dealing—Revised Statutes 14:30.1

Act 465 of the 1987 session amended the second degree murder statute to include two new subsections. The new provisions provide that the offender is guilty of second degree murder in two situations:

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119. See, e.g., La. R.S. 14:80 (1986); La. R.S. 14:81 (1986 & Supp. 1987); La. R.S. 14:92(7) (1986).

120. The term "sexual contact" is broad enough to include consensual sexual intercourse between adults of opposite sexes which would be otherwise lawful. It would also include "unnatural carnal copulation" between consenting adults which might be covered by the "crime against nature" statute (La. R.S. 14:89 (1986)).

> When the offender unlawfully distributes or dispenses a controlled dangerous substance listed in Schedules I or II of the Uniform Controlled Dangerous Substance Law which is the direct cause of the death of the recipient who ingested or consumed the controlled dangerous substance; or
>
> When the offender unlawfully distributes or dispenses a controlled dangerous substance listed in Schedules I or II of the Uniform Controlled Dangerous Substances Law to another who subsequently distributes or dispenses such controlled dangerous substance which is the direct cause of the death of the person who ingested or consumed the controlled dangerous substance.[121]

The statute covers both the "street dealer" who distributes directly to the "consumer," as well as the "wholesaler" who transmits the drugs to a "street dealer" who distributes them to the "consumer" who takes the drugs and dies as a "direct cause" of the ingestion.

The writer believes that the addition of the offense of distribution of schedule I or II controlled dangerous substances to the list of felonies enumerated in the second degree "felony murder" statute would have had the same effect.[122] However, the two new "felony murders" spell out directly the degree of causal relationship ("direct cause") required rather than having this issue developed jurisprudentially.[123]

For example, suppose that the defendant regularly supplied heroin to the victim, who, in order to finance his drug addiction, turned to armed robbery. If the victim was killed by a policeman during the commission of a robbery which the victim was committing while under the influence of drugs supplied by the defendant, the causal relationship would be too tenuous for second degree murder liability under the statute.[124] The legislation seems to address only the risk of death from overdose which stems directly from the distribution of the most dangerous types of drugs.

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121. 1987 La. Acts No. 465 (amending La. R.S. 14:30.1 to add subsections (3) and (4)).

122. In an unrelated amendment, the legislature added first degree robbery, La. R.S. 14:64.1, and forcible rape, La. R.S. 14:42.1, to the list of felonies enumerated in the "felony murder" section of the second degree murder statute, La. R.S. 14:30.1(2). See 1987 La. Acts No. 653.

123. The felony of distribution of a controlled dangerous substance is different in nature from the other "aggravated felonies" enumerated in Louisiana's felony murder doctrine. The other crimes are aggravated kidnapping, aggravated escape, aggravated arson, aggravated rape, forcible rape, aggravated burglary, armed robbery, first degree robbery, and simple robbery. Those offenses involve a far greater and more direct risk of death than distribution of schedule I and II controlled substances.

124. For an excellent discussion of causation see R. Perkins and R. Boyce, Criminal Law § 9 (1982). See also People v. Taylor, 11 Cal. App. 3d 57, 89 Cal. Rptr. 697 (Cal. App. 1970).

Theft of Merchant's Goods—Revised Statutes 14:67.10

During the 1987 session, the legislature added to the growing list of "special theft" crimes.[125] Act 914 enacted a statute specifically proscribing the theft of "anything of value . . . held for sale by a merchant."[126] Limiting the statute's scope only to things of value "held for sale by a merchant" was an evident effort to create a special crime of "shoplifting."[127] The Code of Criminal Procedure has a special provision authorizing the detention of suspected shoplifters by merchants,[128] and the definition of "anything of value" in article 2 of the Criminal Code has a special "retail price" definition to assist in determining value of things taken in shoplifting cases.[129]

Prior to the present enactment, however, there was no statute specially limited to the crime of shoplifting. "Shoplifters" were prosecuted under the provisions of the general theft statute first enacted in the 1942 Criminal Code.[130]

The new statute seems designed to address some of the particular means utilized by persons who steal goods held for open counter sales in retail establishments. The offense is "value graded" in the same manner as is the general theft statute; that is, the value of the thing (or things) stolen determines the grade of the offense.[131]

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125. In the 1942 Criminal Code, the general theft article, La. R.S. 14:67 (1986), was designed to encompass the behavior denounced by a host of separate theft-type offenses. The list is included in the Reporter's Comment to article 67. Subsequent to the enactment of the code, a number of special theft statutes were erected. See, e.g., theft of livestock, La. R.S. 14:67.1 (1986); theft of dogs, La. R.S. 14:67.2 (1986); unauthorized use of access card, La. R.S. 14:67.3 (1986 & Supp. 1987); theft of domesticated fish, La. R.S. 14:67.4 (1986); theft of crayfish, La. R.S. 14:67.5 (1986). See generally the proliferation of statutes in subpart C of Part III, Offenses Against Property, Title 14 of the Louisiana Revised Statutes.

126. La. R.S. 14:67.10 (as enacted by 1987 La. Acts No. 914).

127. Id.

128. La. Code Crim. P. art. 215.

129. La. R.S. 14:2(2) (1986) in part provides: "In all cases involving shoplifting the term 'value' is the actual retail price of the property at the time of the offense." There is no definition of "shoplifting." The term was obviously intended to apply to theft of goods held for sale on open counters.

130. La. R.S. 14:67 (1986).

131. The penalty provision of La. R.S. 14:67.10 is identical to the penalty provision of the general theft statute, La. R.S. 14:67 (1986). The three "value levels" are five hundred dollars or more, one hundred dollars or more, and under one hundred dollars. The least serious grade (zero to one hundred dollars) is a misdemeanor with a maximum of six months in jail. The two higher grades are felonies with a maximum penalty of imprisonment with or without hard labor for two years and ten years. The fine maximums are five hundred dollars, two thousand dollars, and three thousand dollars. There is also a "multiple offender" provision which makes subsequent convictions even for small amounts (under one hundred dollars) a felony punishable by imprisonment with or without

The new statute defines a series of circumstances from which the finder of fact may infer a specific intent to deprive the merchant permanently of the item which was taken or misappropriated. The statute does not eliminate the element of "intent to deprive . . . permanently" as has been done in some of the specialized theft statutes and in some of the robbery statutes.[132] Neither did the legislature jeopardize the constitutionality of the statute by creating presumptions of intent to deprive permanently.[133]

The "larcenous intent"[134] may be inferred from a series of enumerated circumstances. The first is when a person "[i]ntentionally conceals, on his person or otherwise, goods held for sale."[135] The fact finder can certainly use such a fact to find intent to "steal" or deprive permanently. However, this conduct also bears on the question of whether the offender misappropriated the item "by means of fraudulent conduct."[136] The conduct is at least as relevant to proof of the element of misappropriation by "fraudulent conduct" as it is to the element of intent to deprive permanently.

The obvious purpose of the statutory inference is to deal with the problem of apprehending and successfully prosecuting persons who have intentionally concealed items on their person in an effort to slip them unnoticed out of the store.[137] The state must still prove beyond a reasonable doubt that the concealment was done for the purpose of depriving the merchant of his goods without payment. The elements of misappropriation by fraudulent conduct and intent to deprive permanently are still in the statute. Proof is aided by the inference only in the sense that the fact finder is informed by the statute that the fact of intentional concealment may be considered in determining whether the defendant intended to steal.[138]

The third enumerated circumstance is very similar to the first and involves the transfer of "goods from one container or package to another" or the placing of "goods in any container, package, or wrap-

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hard labor for two years and a one thousand dollar fine. Both also provide for aggregating the amounts when a series of distinct acts of theft is involved. See State v. Joles, 492 So. 2d 490 (La. 1986), cert. denied, 107 S. Ct. 933 (1987).

132. See La. R.S. 14:67.6 (Supp. 1987); La. R.S. 14:67.5 (1986); La. R.S. 14:64 (1986); La. R.S. 14:65 (1986).

133. See State v. Lindsey, 491 So. 2d 371 (La. 1986); State v. McCoy, 395 So. 2d 319 (La. 1980).

134. Common law larceny required that the offender have an "intent to steal" or to deprive permanently. See R. Perkins and R. Boyce, Criminal Law Ch. 4F (1982).

135. La. R.S. 14:67.10(A)(1) (as enacted by 1987 La. Acts No. 914).

136. La. R.S. 14:67.10(A) (as enacted by 1987 La. Acts No. 914).

137. See State v. Victor, 368 So. 2d 711 (La. 1979); State v. Khoury, 108 Cal. App. 3d Supp. 1, 166 Cal. Rptr. 705 (Cal. App. Dep't Super. Ct. 1980).

138. See State v. Lindsey, 491 So. 2d 371 (La. 1986).

ping in a manner to avoid detection."[139] This is similar to the "concealment on the person" provision because the "repackaging" must be done "in a manner to avoid detection."

The second and fifth enumerated circumstances from which "larcenous intent" or intent to deprive permanently may be inferred are the alteration or transfer of "any price marking reflecting the actual retail price of the goods," and the removal of "any price marking with the intent to deceive the merchant as to the actual retail price of the goods."[140] The offender is not trying to avoid total payment and is endeavoring to deprive the merchant of the difference in the price rather than the thing itself. Such "price switching" schemes are obviously a major concern of merchants.

The fourth enumerated circumstance appears to be directed to schemes to "jam" the various electronic price reading devices on sales registers. An intent to permanently deprive can be inferred if the offender "willfully causes the cash register or other sales recording device to reflect less than the actual retail price of the goods."[141] This is another form of "price switching" to avoid full payment for the item.

The bill did not amend the responsive verdict article of the Code of Criminal Procedure.[142] Therefore, the responsive verdicts for the highest grade of new offense will include a long list of all lesser included offenses under article 815.[143] The lesser grades of theft of goods, unauthorized use of movables, and attempts to commit the various offenses would all be responsive. Arguably, even lesser grades of the general theft article are also responsive because this would include anything of value such as a display item which was not actually "held for sale by a merchant." An amendment to Code of Criminal Procedure article 814 which adopts responsive verdicts parallel to those of theft is necessary to eliminate the unwieldy list of responsive verdicts.

Although the writer appreciates the need to devise new legislation to keep pace with new schemes to misappropriate, the new "theft of goods" statute could have been more effective if the enumerated circumstances from which the inference of intent may be drawn were simply substituted for the elements of the theft offense. In short, the legislation could have addressed the problem more directly. For example, the legislature could have directly defined as an offense the intentional removal of a price marking of goods held for sale by a merchant with intent to deceive the merchant as to the actual retail price of the goods.

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139. La. R.S. 14:67.10(A)(3) (as enacted by 1987 La. Acts No. 914).
140. La. R.S. 14:67.10(A)(2), (5) (as enacted by 1987 La. Acts No. 914).
141. La. R.S. 14:67.10(A)(4) (as enacted by 1987 La. Acts No. 914).
142. La. Code Crim. P. art. 814.
143. La. Code Crim. P. art. 815.

It would seem more logical to define the proscribed conduct as an offense rather than as a circumstance from which an inference of criminal intent may be found.

Right to Jury Trial for DWI— Revised Statutes 14:98(J)

In March of 1986, the Louisiana Fourth Circuit Court of Appeal held in *State v. Henderson* that DWI defendants are entitled to jury trials because the "special costs" assessed in DWI cases raise the maximum fine above the statutory jury trial line of five hundred dollors.[144] The Supreme Court of Louisiana reversed, holding that the five hundred dollar figure set forth in article 779 of the Code of Criminal Procedure meant only the fine provided in the penalty clause of the statute defining the offense.[145] The supreme court based its decision on the distinction between "fines" and "costs." In order that the issue be clarified, an amendment to article 779 was enacted codifying the *Henderson* analysis.[146]

Meanwhile, a panel of the United States Court of Appeals for the Fifth Circuit in *Landry v. Hoepfner* held that DWI defendants are entitled to a jury trial in Louisiana because of the serious consequences of conviction and the seriousness of the offense.[147] The panel approached the problem from a broader perspective than simply examining the maximum penalty.

Judge Redmann's opinion for the Louisiana Fourth Circuit Court of Appeal in *Henderson* also alluded to the "severity" theory adopted by the federal appellate panel.[148] However, that issue was not the primary basis for the holding in *Henderson* and was not really addressed by the Louisiana Supreme Court. Nevertheless, the practical effect of the Louisiana Supreme Court's opinion in *Henderson* and the panel's opinion in *Landry* is to create a split on the question of jury trial rights for DWI defendants. The Fifth Circuit has granted an en banc rehearing in *Landry*.

On rehearing, the en banc panel will obviously consider whether the sixth amendment jury trial right attaches to "serious offenses" even if the maximum jail sentence exposure is only six months. The en banc panel may also determine whether the fact that a defendant can suffer adverse financial consequences beyond a five hundred dollar fine gives rise to a sixth amendment jury trial right. So far, the sixth amendment "bright line" rule of *Duncan* and *Baldwin* only requires a jury trial if

144. 485 So. 2d 656 (La. App. 4th Cir. 1986).
145. State v. Henderson, 491 So. 2d at 651.
146. 1986 La. Acts No. 852.
147. 818 F.2d 1169 (5th Cir. 1987), en banc reh'g granted in July, 1987.
148. *Henderson*, 485 So. 2d at 656-57.

a defendant is faced with a maximum term of imprisonment exceeding six months.[149] The five hundred dollar fine amount is thus far not required by a constitutional "bright line" rule, but rather is a statutory rule found in article 779 of the Code of Criminal Procedure.

A 1987 amendment (1987 La. Acts No. 303) enacting paragraph (J) to Louisiana Revisted Statutes 14:98 provides that "[i]n the parishes of Caldwell, Catahoula, Concordia, Franklin, LaSalle, and Tensas, each offender [convicted of DWI] shall be fined twenty-five dollars *in addition to the fines provided for in this section.*"[150] The "additional twenty-five dollars" raises the maximum fine exposure in those *six* parishes for first and second offense DWI from five hundred dollars to five hundred and twenty-five dollars, and has the effect (if the amendment is valid) of making first and second offense DWI a jury triable misdemeanor in those parishes.[151] If the panel opinion in *Landry* is upheld, this issue created by the 1987 amendment will lose significance. Indeed, if that is the case, the writer predicts a prompt and substantial increase in the five hundred dollar maximum fine for first and second offense DWI. However, regardless of whether the panel opinion in *Landry* is overruled (which the writer believes will be the case), the legislature has statutorily granted jury trials to defendants in those six rural parishes alone if Act 303 was constitutionally enacted.[152]

There are serious questions concerning the validity of Act 303 under Louisiana Constitution article III, §§ 12 and 13. Act 303 deals primarily with Louisiana Revised Statutes 13:1894.1(C) which provides for allocation of fines from DWI convictions to municipal and parish treasuries. Section 1898 (C) specifies how the money is to be divided. Subsection (2) of paragraph (C) provides that "fines levied pursuant to R.S. 14:98(J) and collected in Caldwell, Catahoula, Concordia, Franklin, LaSalle, and Tensas parishes shall be remitted to the Northeast Louisiana Substance Abuse Center." Section (J) was added to article 98 of the Criminal Code to provide for the additional twenty-five dollar fine for DWI committed in those six parishes.

The laudable purpose of section (J) was to raise an extra twenty-five dollars in those enumerated parishes to be used to fund the good work of the substance abuse center which obviously serves those parishes. The writer seriously doubts that the legislature realized that the effect of the amendment was to increase the maximum fine to five hundred twenty-five dollars in those parishes with the concurrent attachment of

149. See Muniz v. Hoffman, 422 U.S. 454, 95 S. Ct. 2178 (1975). See also State v. Henderson, 491 So. 2d 647 (La. 1986).

150. 1987 La. Acts No. 303 (enacting La. R.S. 14:98(J) (emphasis added)).

151. La. Code Crim. P. art. 779.

152. Id.

the right to jury trial. Rather, the legislature wanted to require judges simply to add an extra twenty-five dollars to any DWI fine imposed in those parishes to support the Northeast Substance Abuse Center. Adding an extra twenty-five dollars in costs in those parishes or simply providing that twenty-five dollars of every DWI fine in those parishes be paid to the Center would have had the desired effect. Unfortunately, the legislation does not merely "recut the pie"; it increases the defendant's maximum fine exposure.

The legislation is clearly "local and special" as designated in Louisiana Constitution article III, §§ 12 and 13 (1974) and is not valid unless the proper notices were published in the "official journal" of the six parishes affected.[153] Unless the notice was published at least 30 days prior to the filing of the bill which eventually became Act 303, the legislation is unconstitutional.[154]

The fact that the "local and special" features were amended into the bill after it was introduced does not save its constitutionality. Professor Hargrave pointed out in his law review article on Article III that the constitution does not merely forbid introduction of a local and special bill without the publication, it also prohibits amending a bill which has already been introduced to make the bill "local."[155] Thus, unless there was prior publication of notice in the six parishes, the bill was not validly amended during the session to incorporate the "local" feature.

Even if the notice was properly published (which was not, as required by the constitution, stated in the bill), the act has two other very serious constitutional problems. In the first place, the Louisiana Constitution's equal protection clause may be offended by an additional fine in only six parishes.[156] Having a higher maximum penalty for the same offense depending on the parish in which the offense was committed smacks of a denial of equal protection. If the "rational basis" is the need to raise revenue for worthwhile public agencies, that can be accomplished without raising the maximum penalty.

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153. La. Const. art. III, § 13 (1974). See also, Hargrave, "Statutory" and "Hortatory" Provision of the Louisiana Constitution of 1974, 43 La. L. Rev. 647, 665 (1983).

154. The notice does not appear to have been published. Further, the bill does not "recite that notice has been given." La. Const. art. III, § 13 (1974).

155. Professor Hargrave discusses the significance of the constitution's provision that no local or special bill "shall be enacted" without publication of the notice. Professor Hargrave clearly demonstrates that the "shall be enacted" language was chosen for the express purpose of preventing the enactment of "local and special" laws by amendment of bills which were initially introduced without such "local and special" features. Hargrave, supra note 153, at 672.

156. La. Const. art. I, § 3 (1974). See Hargrave, The Declaration of Rights of the Louisiana Constitution of 1974, 35 La. L. Rev. 1 (1974). See also Hargrave, supra note 153, at 670.

In the second place, surely, the legislature could not, for example, make the offenses of first and second offense DWI a relative felony punishable with or without hard labor for one year (as opposed to six months without hard labor) in those six parishes. Article III contains an express prohibition against enacting any local and special law "defining any crime."[157] Professor Hargrave points out the Constitutional Convention's concerns with the former multiplicity of trespass laws depending on the parish. Criminal offenses enacted by the legislature must be of statewide application or at least be rationally based upon geographical conditions (not merely parochial boundaries) which are relevant to the commission of the offense.[158]

Since the penalty provision is traditionally intimately associated with the offense and determines the grade of the offense,[159] a "local and special" law which provides for a variance in maximum (or mandatory minimum) sentence, depending solely upon the parish in which the offense was committed, must run afoul of the Louisiana constitutional proscription against the legislature enacting a "local law" which defines a crime. For purpose of that constitutional provision, it is only logical to conclude that the penalty must be considered part of the "definition" of the offense. Otherwise, as the example illustrates, an offense which is a misdemeanor in some parishes could be a felony in other parishes.

One last aspect of the problem presented by this legislation is noteworthy. If, as noted in the hypothetical example, the legislature had amended the DWI penalty by providing in Section (J) that the maximum penalty for first offense DWI in the six parishes was one year imprisonment with or without hard labor and a two thousand dollar fine, a defendant charged in one of those parishes would surely challenge the constitutionality of the statute. However, since only twenty-five dollars is involved and a jury trial is waivable by the defendant, the challenge to the constitutionality of this statute is likely to be raised by a district attorney who objects to trying DWI cases before a jury. This is a reverse of the role of the state's attorney, who is normally in the position of defending the constitutionality of a criminal statute.[160]

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157. La. Const. art. III, § 12(10) (1974).

158. Hargrave, supra note 153, at 665.

159. La. Code Crim. P. art. 933; La. R.S. 14:2(4), (6) (1986).

160. The writer is unaware of constitutional, legislative, or jurisprudential limitations on the authority of the district attorney to attack the constitutionality of legislation.