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(IN SENTENCING)?**

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ESSAY

CAN ALABAMA HANDLE THE TRUTH (IN SENTENCING)?

*Joseph A. Colquitt**

*Nearly all want sentencing made more consistent, whether in the name of justice, efficiency, effectiveness, or economy.***

INTRODUCTION

When it comes to criminal sentencing, there are two immediate questions for Alabama: Do we really want truth in sentencing? And, if so, can we handle it?¹

For decades, public officials, prosecutors, law enforcement officers, and crime victims have called for truth-in-sentencing laws because they are frustrated by the image of lengthy prison sentences undercut by the reality of early release under parole or good-time laws. In support of their concerns, they have cited cases which they perceive as unjust. Consider, for example, this case: The defendant was convicted of three murders for

* Jere L. Beasley Professor of Law, University of Alabama School of Law; retired circuit judge, State of Alabama; Chair, Alabama Sentencing Commission. The author thanks the University of Alabama Law School Foundation for its generous support. Many thanks to Lynda Flynt, Executive Director of the Alabama Sentencing Commission, for her helpful observations. Brigitte Ohlig provided valuable research assistance. Although I serve as Chair of the Alabama Sentencing Commission, the statements and opinions in this Essay are solely my own and do not necessarily represent the positions, views, or opinions of the Alabama Sentencing Commission, its staff, or its Advisory Council. Naturally, I alone remain responsible for any errors.

** MICHAEL TONRY, SENTENCING MATTERS 4 (1996). Both the Alabama Legislature and the Alabama Sentencing Commission agree. See ALA. CODE § 12-25-31 (2006) (basing sentencing law overhaul on “protect[ing] public safety by providing a fair, effective, and efficient criminal justice system”).

1. The questions, appropriate to the present undertaking, are paraphrased from the popular courtroom-drama movie *A Few Good Men*, in which a principal character, Navy Lieutenant Daniel Kaffee, cross-examines Marine Colonel Nathan R. Jessep during the court-martial of two Marines, stresses: “I want the truth!” Colonel Jessep shouts in response, “You can’t handle the truth!” A FEW GOOD MEN (Columbia Pictures 1992). Tom Cruise played Lt. Kaffee and Jack Nicholson played Col. Jessep.

the fatal shootings of his estranged wife, her mother, and a college student. He was sentenced to death. The conviction and sentence were set aside when Alabama's 1975 death penalty scheme was declared unconstitutional.² On retrial, he was again convicted, and the jury sentenced the defendant to imprisonment for two life terms plus 10,000 years³—the longest sentence ever imposed in the United States.⁴ The news media carried stories, sometimes with banner headlines,⁵ about the record-breaking sentence, but the reports also cautioned that despite the severe sentences, the defendant would be eligible for parole consideration in just a few years.⁶ Cases such as this one, albeit perhaps not always as sensational and attention-grabbing,⁷ have fueled the growing dissatisfaction with Alabama's sentencing scheme.

In 2000, our legislature took action. It created the Alabama Sentencing Commission⁸ and charged it with the task of analyzing the existing sentencing model⁹ and recommending changes that promote "certainty in sentencing."¹⁰ Based on the sentencing commission's findings, the legislature passed the Alabama Sentencing Reform Act of 2003,¹¹ a broad, sweeping article that set into motion major changes in Alabama's criminal justice system. The stated purpose of the Act was to "manage [the] criminal justice system in the manner best able to protect public safety and make the most effective and efficient use of correctional resources."¹² This legislation directed the sentencing commission to begin implementing voluntary sentencing guidelines based on historical data, abolish parole and good-time credits, eradicate unwarranted sentencing disparity, make available alternate punishment options, address prison overcrowding, incapacitate dangerous and violent felons, and ensure truth in sentencing while main-

2. *Ex parte Kyzer*, 399 So. 2d 330 (Ala. 1981), *rev'g* *Kyzer v. State* 399 So. 2d 317 (Ala. Crim. App. 1979); *see also* *Beck v. Alabama*, 447 U.S. 625 (1980) (declaring Alabama's 1975 death penalty procedure unconstitutional).

3. *See* *Kyzer v. State*, 484 So. 2d 1202 (Ala. Crim. App. 1986).

4. For some years, the sentence initially was reported to have been the longest sentence imposed in the world. *See, e.g.*, GUINNESS 1983 BOOK OF WORLD RECORDS 434 (1983).

5. *See, e.g.*, Doris Flora, *Kyzer Handed Two Life Terms, 10,000 years*, TUSCALOOSA NEWS, Dec. 5, 1981, at 1 (banner headline and accompanying report).

6. *See, e.g., id.*, at 2 (quoting a state probation and parole officer as saying, "[F]or all practical purposes he [Kyzer] would become eligible for parole after serving 10 years."). Of course, at the time of sentencing, the defendant had been in custody for a number of years, which counted as presentence jail credit against his minimum parole-eligibility term.

7. *See, e.g.*, Susan Daker, *Lawyer Who Got 120-Year Sentence is Free*, MOBILE PRESS-REG., Feb. 27, 2006, available at http://sentencingcommission.alacourt.gov/News/news_art_mobile_2.27.06.html.

8. ALA. CODE § 12-25-1 (2006).

9. *Id.* § 12-25-2 (2006).

10. *Id.* § 12-25-2(a)(2) (2006).

11. 2003 Ala. Acts 948, Act No. 2003-354 (codified as amended at ALA. CODE § 12-25-30 (2006)).

12. ALA. CODE § 12-25-31(a) (2006).

taining judicial discretion.¹³ Further, the legislature mandated that voluntary truth-in-sentencing standards be implemented in 2006¹⁴—a date that was extended to 2009 (and that the commission is requesting the legislature to further postpone) due to the complexity of the issue.¹⁵

My purpose in presenting this Essay is to briefly examine truth in sentencing, discuss its strengths and weaknesses, and analyze what it will mean for our state. In doing so, I act neither as a proponent nor an opponent. Rather, my intent is to shed light on the issues, induce a healthy dialogue, and encourage us to understand that unless we develop a broad base of knowledge, carefully deliberate, properly design our truth-in-sentencing scheme, and ensure that we have built the necessary infrastructure to support truth in sentencing, we act imprudently. Ideally, we will reach our conclusions only after a meticulous collection and study of both Alabama's data and the experiences of those states that already have implemented various forms of truth-in-sentencing schemes. The sentencing commission has undertaken these tasks and to date has proceeded methodically and carefully.¹⁶

To ensure a basic understanding of sentencing theory, in this Essay I first describe the two principal sentencing models—indeterminate and determinate sentencing—and then explain truth in sentencing. This succinct review of sentencing models is helpful because Alabama presently utilizes an indeterminate scheme, while the truth-in-sentencing model is quite determinate. Thus, the move to truth in sentencing constitutes a sea change for Alabama. Moreover, the terms are used somewhat loosely by some writers, and clear definitions reduce the possibility of miscommunication. After providing background information on sentencing models, I give a brief history of indeterminate sentencing in this country and the move by many states over the past three decades toward a determinate model in general and truth in sentencing in particular. In so doing, I point out examples of success and failure from other states. Then, focusing on Alabama, I cover Alabama's historical and current approach to sentencing as well as our current system's strengths and weaknesses. Finally, I analyze the important issues that concern both proponents and critics of truth in sentencing, document the Alabama Sentencing Commission's progress, and explain what the effect of such a model shift will mean. I also briefly describe alternative sentencing and community corrections programs because the availability of such programs is an essential component of any successful truth-in-sentencing scheme.

13. *Id.* § 12-25-31(a)–(b) (2006).

14. *See id.* § 12-25-34(a)(4) (2006) (amended 2006).

15. *See id.* § 12-25-34(a)(4) (Supp. 2008).

16. The commission's success to date in designing, developing, and drafting a truth-in-sentencing model for Alabama in large part results from the tireless leadership and unrelenting efforts of Lynda Flynt, Rosa Davis, and the small but dedicated and productive staff at the commission.

INDETERMINATE VS. DETERMINATE SENTENCING MODELS

States employ either indeterminate or determinate sentencing, or some combination of the two approaches.¹⁷ Indeterminate sentences are of unknown duration and come in various forms. A true indeterminate sentence would consist of a range of punishment such as two to twenty years.¹⁸ An indeterminate sentence could also consist of a definite sentence that constitutes the maximum term of imprisonment but which may be reduced by discretionary awards of incentive good-time deductions or parole.¹⁹ The indeterminate sentencing model springs from the rehabilitative theory of punishment; prisoners are released when they are suitably rehabilitated.²⁰ Normally in jurisdictions utilizing indeterminate sentencing, a parole board decides the actual release date.²¹

True determinate sentences, on the other hand, do not involve parole and are based on incapacitation and specific deterrence goals.²² Under a truth-in-sentencing type of determinate model, offenders are sentenced to a definite term of imprisonment, and their release date is determined by the percentage of the sentence that the individual must serve. Thus, instead of a discretionary release decision, under truth in sentencing the law establishes the release date. For instance, in the federal system, a prisoner must serve 85% of the sentence imposed;²³ while in Georgia, offenders serve 100% of the sentence for six of Georgia's "seven deadly sins" crimes.²⁴ It

17. See, e.g., ALA. CODE § 13A-5-9(c)(3)-(4) (2006) (containing both indeterminate and determinate sentencing features); WIS. STAT. ANN. § 973.01 (West 2008) (establishing Wisconsin's bifurcated truth-in-sentencing scheme).

18. BLACK'S LAW DICTIONARY 1394 (8th ed. 2004). Alabama used this approach for about twenty years. See *infra* text accompanying note 43.

19. See BLACK'S LAW DICTIONARY 1394 (8th ed. 2004) (defining an indeterminate sentence as "[a] maximum term that the parole board can reduce . . . after the inmate has served the minimum time required by law"). Alabama currently utilizes this indeterminate sentencing model. See, e.g., Alabama Correctional Incentive Time Act, ALA. CODE §§ 14-9-40 to -42 (1995 & Supp. 2008).

20. See, e.g., LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 160 (1993).

21. See, e.g., ALA. CODE § 15-22-24(a) (1995) (charging the parole board "with the duty of determining what prisoners serving sentences in the jails and prisons of the State of Alabama may be released on parole and when and under what conditions").

22. Some determinate schemes, though, do permit term reductions through incentive good-time credits. See, e.g., Paula M. Ditton & Doris James Wilson, *Truth in Sentencing in State Prisons*, in BUREAU OF JUSTICE STATISTICS SPECIAL REPORT 1, 1 (1999) (noting that determinate sentencing involves "fixed prison terms which [can] be reduced by good-time or earned-time credits," and truth in sentencing restricts or eliminates parole and incentive good-time credits, thus requiring "offenders to serve a substantial portion of their prison sentence"); Thomas B. Marvell & Carlisle E. Moody, *Determinate Sentencing and Abolishing Parole: The Long-Term Impacts on Prisons and Crime*, 34 CRIMINOLOGY 107, 108 (1996) (discussing the adoption of determinate sentencing in ten states; noting that all ten states abolished parole but continued to allow term reductions through credits for good time and pretrial incarceration).

23. See 18 U.S.C. § 3624(b)(1) (2006).

24. GA. DEP'T OF CORR., "TRUTH IN SENTENCING" IN GEORGIA 2 tbl., available at <http://www.dcor.state.ga.us/pdf/TruthInSentencing.pdf> (reporting that parole has been abolished and prisoners must serve 100% of their sentences for six non-murder "deadly sins" crimes). Wisconsin's

should be noted, though, that no state has a truth-in-sentencing scheme under which all types of offenders serve 100% of their sentence.²⁵

Under the indeterminate sentencing model, no one—including the sentencing judge—can accurately calculate a release date for an individual at the time of sentencing simply because the release decision involves the exercise of discretion by a state agency.²⁶ Adoption of a truth-in-sentencing paradigm—at least in part—scraps the indeterminate model and eliminates the discretionary release of incarcerated offenders. The release date is established by the length of the sentence imposed by the sentencing judge and can be readily calculated at the time of sentencing.

The differing effects of sentence lengths imposed in jurisdictions utilizing determinate and indeterminate sentencing can be quite significant. Consider, for example, a person convicted of a crime for which the statutory range of punishment is not less than two or more than twenty years.²⁷ In an indeterminate system, the offender might be sentenced to ten years imprisonment for the offense. That sentence might be reduced through an incentive good-time program, or the offender might be paroled after serving only three and one-half years of the ten-year sentence. On the other hand, in a truth-in-sentencing jurisdiction, an offender sentenced to ten years imprisonment might be required to serve 85% of that sentence—meaning eight and one-half years. In such a scenario, the potential period of incarceration more than doubles in the truth-in-sentencing jurisdiction.²⁸ Interestingly, though, if the inmate serving the indeterminate sentence happens not to receive incentive good-time credits or make parole, it is

truth-in-sentencing law also provides for 100% of the incarceration component of the sentence (i.e., a “split sentence” with both incarceration and supervision components), but depending upon the crime involved, prisoners can petition for early release upon serving 85% or 75% of that sentence. See Thomas J. Hammer, *The Long and Arduous Journey to Truth-in-Sentencing in Wisconsin*, 15 FED. SENT’G REP. 15, 17 (2002) (discussing petitions).

25. See GA. DEP’T OF CORR., *supra* note 24, at 1.

26. During a sentencing seminar at Yale Law School while serving as a state trial judge, I raised the point that Alabama judges were not even provided with accurate data establishing the length of time served under the sentences imposed. An official with the Alabama Department of Corrections in attendance responded that the department did not want judges to have such information because the judges likely would respond by increasing the length of sentences imposed on offenders to offset discretionary release.

27. For example, a Class B felony in Alabama. See ALA. CODE § 13A-5-6(a)(2) (2006).

28. A parole board may utilize a schedule of parole eligibility that nearly mirrors the determinate sentencing model. The Alabama Parole Board’s operating rules and procedures in one respect utilizes one truth-in-sentencing feature. Rule 7 provides that in serious violent felonies “the initial parole consideration date shall be set in conjunction with the inmate’s completion of 85 (eighty-five) per cent of his or her total sentence or 15 (fifteen) years, whichever is less, unless the designee finds mitigating circumstances.” Of course, this is not a determinate-sentencing provision because it governs discretionary release. Additionally, the Board has the discretion to either release after the lesser term of fifteen years or to consider mitigating circumstances and reduce the term. ALA. BD. OF PARDONS AND PAROLES, RULES, REGULATIONS, AND PROCEDURES, art. 1, § 7, available at <http://www.pardons.state.al.us/ALABPP/Main/ALABPP%20MAIN.htm>.

conceivable that the term of imprisonment could be longer than had the same sentence been imposed under a determinate sentencing scheme.

A VERY BRIEF HISTORY OF AMERICAN SENTENCING MODELS

The indeterminate sentencing model was the dominate scheme in the United States for about eighty years,²⁹ but criticism of the model by opponents from all parts of the political spectrum gained momentum in the 1970s. Liberal-minded individuals complained that terms of imprisonment were too long and harsh and that judges had too much discretion, which resulted in widely disparate sentences even for similar offenses. More conservative opponents of the system objected to lenient sentences and early parole releases, and they blamed the existing practices for the perceived skyrocketing crime rate. Furthermore, research showed that the rehabilitative ideal was unsuccessful.³⁰ Therefore, both the federal government and a number of states sought to reduce discretion at each decision-making step of the criminal justice process.³¹ Some states began shifting to a determinate scheme. Maine abolished parole in 1975.³² In 1984, the state of Washington adopted truth in sentencing.³³ Many others followed suit. To further encourage the movement away from indeterminate sentencing, the federal government passed the 1994 Crime Act,³⁴ which granted funds to states that implemented truth in sentencing. Fifteen of the twenty-seven states that had some form of truth-in-sentencing laws in place reported that the grants influenced them at least in part to change their sentencing schemes.³⁵ Since then, most of the remaining states have begun employing some degree of truth in sentencing, although not always clean-

29. See, e.g., LYNNE GOODSTEIN & JOHN HEPBURN, DETERMINATE SENTENCING AND IMPRISONMENT: A FAILURE OF REFORM 12 (1985) (noting that indeterminate sentencing “rapidly gained favor with nearly every state legislature and became the prevailing mode of criminal sanctioning by the beginning of the [twentieth] century”); TONRY, *supra* note **, at 4 (“In 1970, every state and the federal system had an ‘indeterminate sentencing system’ . . .”).

30. See, e.g., Michael Tonry, *Reconsidering Indeterminate and Structured Sentencing*, SENT’G & CORRS., Sept. 1999, at 1, 6.

31. See, e.g., TONRY, *supra* note **, at 4 (“[N]early every state has in some ways repudiated indeterminate sentencing and recast sentencing policies to set standards for judges’ and parole boards’ decisions and thereby to narrow or eliminate their discretion.”). In Alabama, the legislature has also sought to limit the discretion of prosecutors. ALA. CODE § 12-25-2(a)(7) (2006) (assigning as part of the sentencing commission’s tasks to “[l]imit the discretion of district attorneys in determining the charge or crime”).

32. TONRY, *supra* note **, at 4.

33. Reportedly, the state of Washington was the first state to adopt truth in sentencing. Ditton & Wilson, *supra* note 22, at 2.

34. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994).

35. Norman J. Rabkin, *Truth in Sentencing: Availability of Federal Grants Influenced Laws in Some States*, 11 FED. SENT’G REP. 163, 163-64 (1998).

ly, efficiently, or effectively. Not all states, though, have rejected indeterminate sentencing.³⁶

ALABAMA'S SENTENCING MODEL

Alabama presently uses an indeterminate sentencing model under which the legislature fixes the range of permissible punishment for each crime,³⁷ judges impose a fixed sentence³⁸ within that range,³⁹ and the state's parole board determines the prisoner's release date.⁴⁰

With variations, the state has followed some type of indeterminate model since at least 1897. In that year, the legislature expanded the governor's power by authorizing the governor to not only pardon but also parole incarcerated individuals.⁴¹ Initially, judges or juries sentenced offenders to prison,⁴² and only the governor was empowered to release them before they completed their full sentence. In 1919, the Alabama legislature adopted judicially imposed indeterminate sentencing,⁴³ whereby sentences were comprised of a range of imprisonment (e.g., not less than three or more than five years) subject to discretionary parole by the governor, but only after the prisoner had served the minimum term. The 1919 legislation also established a state parole board to assist the governor, but the governor retained the power to grant or deny paroles. In 1939, the legislature

36. See, e.g., UTAH SENT'G COMM'N, A STATEMENT REGARDING UTAH'S INDETERMINATE SENTENCING SYSTEM (2006) (explaining why the state of Utah retained an indeterminate system), available at <http://www.sentencing.state.ut.us/Policy/IndetermSentPosition.pdf>.

37. ALA. CODE §§ 13A-5-6 (fixing the ranges of punishments for felonies), 13A-5-7 (same, for misdemeanors), 13A-5-9 (same, for habitual felony offenders), 13A-5-45(a) (setting the punishments for capital murder at either life imprisonment without parole or death) (2006).

38. ALA. CODE §§ 13A-5-1(a), -2(a) (2006) (providing for judicial sentencing); ALA. R. CRIM. P. 26.6(a) (same).

39. ALA. CODE § 13A-5-1(a) (2006) (providing that all offenders shall be sentenced "by the court"—i.e., judge—in compliance with the provisions of Chapter 5 of the Code, which sets forth the ranges of punishment for most Alabama crimes).

40. Prisoners also may be released upon serving their term of imprisonment without the benefit of parole. This term also may be reduced by way of incentive good-time credits.

41. 1896 Ala. Acts 867, Act No. 1896-345 (approved Feb. 13, 1897) (authorizing the governor to discharge "any convict from custody and suspend the sentence of such convict without granting a pardon" and empowering the governor to revoke paroles for cause); see also ALA. CONST. art. V, § 124 ("The governor shall have power . . . to grant . . . paroles He shall communicate to the legislature at each session every . . . parole, . . . with his reasons therefor, . . . stating the name and crime of the convict, the sentence, its date, and the date of . . . parole"). As discussed in the text, this provision was later repealed.

42. Prior to January 1, 1980, for many years, Alabama utilized both judge and jury sentencing. Compare ALA. CODE tit. 14, §§ 318 (murder), 395 (rape), 415 (robbery) (1958) (repealed), all of which authorize jury sentencing, with ALA. CODE tit. 15, § 328 (1958) (repealed) (mandating judge sentencing "unless the power is expressly conferred on the jury"). Currently, though, judges sentence. ALA. CODE §§ 13A-5-1(a), -2(a) (2006); ALA. R. CRIM. P. 26.6(a) (providing that judges fix sentences except for "offenses committed prior to January 1, 1980"). For a more in-depth discussion of the Criminal Code, see Joseph A. Colquitt, *The Alabama Criminal Code—25 Years and Counting*, 56 ALA. L. REV. 967 (2005).

43. See 1919 Ala. Acts 148, Act No. 1919-161 (1919) (approved Feb. 18, 1919).

acted again. This time, lawmakers established essentially the current Alabama indeterminate sentencing scheme in which the offender is sentenced to a maximum term, and the parole board—rather than the governor—grants or denies parole during the term of imprisonment. The system was established through adoption of a constitutional amendment⁴⁴ and shortly thereafter by passage of an enabling statute.⁴⁵ It is this process that has resulted in a legislative mandate that the sentencing commission devise a truth-in-sentencing model.

Even though Alabama utilizes an indeterminate model, some of our statutes, such as the Habitual Felony Offender Act,⁴⁶ are in part undeniably determinate. Consider, for example, the fact that a habitual offender with three or more previous felonies, at least one of which was a Class A felony, upon conviction for another Class A felony, must be sentenced to life imprisonment without parole.⁴⁷ The punishment is determinate because it is not subject to discretionary release by either parole or incentive good-time credit.⁴⁸

This early move toward determinate sentencing had unforeseen results and required legislative tweaking. For decades our Habitual Felony Offender Act provided that felons committing their fourth offense—if that offense constituted a Class A felony—would be sentenced to life imprisonment without parole.⁴⁹ But by 2000, the legislature had taken note of the number of prisoners serving life-without-parole sentences. In an effort to address the growing life-without-parole population, the provision was amended to grant judges the discretion to sentence certain defendants to imprisonment for either life or life without parole.⁵⁰ Nevertheless, in December 2008, 538 habitual offenders were serving life-without-parole sentences in Alabama prisons.⁵¹

44. ALA. CONST. art. V, § 124, *amended by* ALA. CONST. amend. 38.

45. 1939 Ala. Acts 426, Act No. 1939-275 (approved Aug. 25, 1939).

46. ALA. CODE § 13A-5-9 (2006).

47. ALA. CODE § 13A-5-9(c)(4) (2006). Moreover, if the Class A felony offender has three prior felony convictions, none of which are a Class A felony, the offender may be, but need not be, sentenced to life imprisonment without parole. *Id.* § 13A-5-9(c)(3) (2006).

48. For other examples of at least partially determinate sentencing in Alabama, see ALA. CODE § 15-22-27.2 (1995) (barring parole eligibility for certain violent recidivists); *id.* § 15-22-27.3 (Supp. 2008) (barring parole for some child sex offenders). Although Section 15-22-27.2 still appears in the Code, the courts have ruled that it was implicitly repealed by the Habitual Felony Offender Act. *State v. Thomas*, 611 So. 2d 472, 474 (Ala. Crim. App. 1992).

49. *See* ALA. CODE § 13A-5-9(c)(3) (1982).

50. 2000 Ala. Acts 1736, Act No. 2000-759, § 1 (codified at ALA. CODE § 13A-5-9(c)(3) (2006)).

51. ALA. DEP'T OF CORR., DECEMBER 2008 MONTHLY STATISTICAL REPORT 9, *available at* <http://www.doc.state.al.us/docs/MonthlyRpts/2008-12.pdf>. But it must be noted that additional inmates are serving life-without-parole sentences for capital murder. *See* ALA. CODE § 13A-5-45(a) (2006) (establishing death or life imprisonment as the alternative punishments for capital murder). So, rather than 538 inmates serving sentences of life imprisonment without parole in Alabama, there were 1,427. ALA. DEP'T OF CORR., *supra*, at 9.

ALABAMA SENTENCING COMMISSION'S PLAN AND CONSIDERATIONS

Charged with the task of developing a truth-in-sentencing scheme, the sentencing commission devised a two-step process. First, the commission addressed sentencing disparity by creating voluntary sentencing guidelines for the twenty-six felony offenses which constituted 87% of the most frequent crimes of conviction. These guidelines are based on historical sentencing data. The primary purpose of this model is to encourage judges who normally impose either more or less severe sentences to conform to the historical norm, thereby reducing unwarranted disparity. For example, if the data demonstrates that Alabama judges usually sentence first-time third-degree robbers to imprisonment for two years, the sentencing standards would encourage—but not require—judges to impose a two-year prison sentence. Using these guidelines, judges retain discretion because the guidelines are voluntary, and they can grant probation. This first step was completed and implemented in 2006 after the legislature adopted the sentencing standards that had been developed and previously presented for their approval in 2004 and 2005.

The commission's second step will be to implement truth-in-sentencing standards after judges become accustomed to the initial guidelines and the data is collected, examined, and tested for effect. The Alabama legislature initially instructed the sentencing commission to submit the truth-in-sentencing standards during 2006,⁵² but the commission obtained a three-year extension of the original submission deadline⁵³ for several reasons, including difficulty with the collection and analysis of voluntary standards sentencing data; the complexity of fully implementing truth in sentencing; the lack of a statewide community corrections system; and the need to increase the number of officers to supervise probationers, persons sentenced to alternative programs, and post-incarceration offenders.⁵⁴ The commission has asked that the compliance date be extended to 2011, but a proposed act to extend the time failed in the 2008 legislative session.⁵⁵ The bill to delay implementation has been introduced in the 2009 session.⁵⁶

52. See Alabama Sentencing Reform Act of 2003, 2003 Ala. Acts 948, Act No. 2003-354.

53. 2006 Ala. Acts 663, Act No. 2006-312.

54. The sentencing commission has listed three reasons for the delay. ALA. SENT'G COMM'N, 2004 ANNUAL REPORT 31, available at <http://sentencingcommission.alacourt.gov/Publications/ASC%202004%20Final%20Report.pdf>. I have expanded the list based on my experiences and discussions with others during the process.

55. See S. 326, 2008 Leg., Reg. Sess. (Ala. 2008).

56. See H.B. 396, 2009 Leg., Reg. Sess. (Ala. 2009).

ANALYSIS OF TRUTH-IN-SENTENCING ISSUES

Although the Alabama legislature charged the commission with the task of developing truth in sentencing, its implementation may not come easily. While truth in sentencing is embraced by some, it also has its detractors. However, the political rhetoric of truth in sentencing frequently fails to focus on critical specifics and subtleties. Proponents and opponents alike discuss the pros and cons as though it is a well-defined, circumscribed approach to sentencing when in fact, truth in sentencing varies significantly from state to state. Alabama's version essentially remains undefined.⁵⁷ The impact of truth in sentencing on Alabama depends greatly upon how we choose to modify our existing system, and to date those modifications have not been fully defined.

When Alabama adopts truth in sentencing, what should be its appropriate definition and reach? Should truth-in-sentencing guidelines apply to all crimes, only to felonies, or only to violent felonies? What would be the impact of each option? Those charged with designing a truth-in-sentencing scheme understand that they must consider its impact on the entire Alabama criminal justice system to avoid unanticipated problems such as those that occurred in Mississippi and Wisconsin. In 1995, our neighboring state of Mississippi adopted a broad truth-in-sentencing scheme⁵⁸ that abolished parole for all convicts,⁵⁹ but without sufficient planning and infrastructure in place, their incarceration rate and prison population ballooned.⁶⁰ By 2001, they had revised their statute to allow parole for certain nonviolent first offenders,⁶¹ a change that made some 2,000 prisoners eligible for parole.⁶² In Wisconsin, anticipated key legislation failed to pass, which left judges sentencing under a truth-in-sentencing model but with no

57. See ALA. CODE § 12-25-36 (2006) (containing only a rudimentary sketch of a truth-in-sentencing model).

58. 1995 Miss. Laws ch. 596.

59. MISS. CODE ANN. § 47-7-3(1)(g) (West 1995); see also JUDITH GREENE & VINCENT SCHIRALDI, JUST. POL'Y INST., CUTTING CORRECTLY: NEW PRISON POLICIES FOR TIMES OF FISCAL CRISIS 10 (2002), available at http://www.justicepolicy.org/images/upload/02-02_REP_CuttingCorrectly_AC.pdf.

60. Between 1996 and 2001, Mississippi's incarceration rate per 100,000 residents climbed from 498 to 715. CHRISTOPHER J. MUMOLA & ALLEN J. BECK, U.S. DEP'T OF JUST., PRISONERS IN 1996, at 3 (1997), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p96.pdf>; see also PAIGE M. HARRISON & ALLEN J. BECK, U.S. DEP'T OF JUST., PRISONERS IN 2001, at 4 (2002), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p01.pdf>. By 2003, it had risen to 768. PAIGE M. HARRISON & ALLEN J. BECK, U.S. DEP'T OF JUST., PRISONERS IN 2003, at 1 (2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p03.pdf>. The figures were obtained from annual reports published by the U.S. Department of Justice, Bureau of Justice Statistics. The annual reports from 1994 to 2006 are available at <http://www.ojp.usdoj.gov/bjs/prisons.htm>.

61. MISS. CODE ANN. § 47-7-3 (West 2008).

62. GREENE & SCHIRALDI, *supra* note 59, at 10 ("By the end of 2001, more than 2,000 of the state's prisoners became parole-eligible under the reform.")

guidelines to which they could refer.⁶³ With such histories in mind, the Alabama Sentencing Commission is proceeding carefully.

A. Sentencing Disparity

One issue that resurfaces with a truth-in-sentencing scheme is sentencing disparity. The 2003 Sentencing Act sought in part to eliminate unwarranted disparity in sentencing, but truth in sentencing does not alleviate, and may actually exacerbate, the problem. Presently, the Alabama Criminal Code establishes wide ranges of punishment for felonies, which are grouped into three classes.⁶⁴ The scheme facilitates sentencing disparities, but under the indeterminate model, the parole board can adjust for disparities. For example, if two similar individuals commit virtually identical crimes (e.g., theft) and receive greatly disparate sentences (e.g., three years and ten years), by denying parole to the person serving three years and granting parole to the person serving ten years, the time served by the individuals approach uniformity. Similarly, if a judge were to over-sentence an offender, such as imposing an unwarranted maximum term of imprisonment on a first-time, young offender, the parole board can grant a parole to ameliorate the problem. But under a truth-in-sentencing approach, there is no discretionary release, so disparity and over-sentencing must be addressed in other ways. Some states utilize mandatory or presumptive sentencing guidelines,⁶⁵ while others provide for appellate review of sentences or guideline departures.⁶⁶ Another approach would be to narrow the range of available periods of incarceration. Each of these methods of addressing disparity do so by limiting judicial discretion, but the Alabama Sentencing Commission is legislatively mandated to maintain judicial discretion.⁶⁷

In Alabama, the present plan is to utilize voluntary sentencing standards, leave intact the existing wide ranges of available sentences, and reject appellate review of sentences.⁶⁸ Under such a system, the issue of

63. Thomas J. Hammer, *The Long and Arduous Journey to Truth-in-Sentencing in Wisconsin*, 15 FED. SENT'G REP. 15, 17 (2002).

64. ALA. CODE § 13A-5-3(b) (2006). Capital murder is not classified. *See* ALA. CODE § 13A-5-45(a) (2006) (stating permissible punishments for capital murder).

65. *See*, for example, the laws of Minnesota (presumptive) and North Carolina (mandatory). *See* NEAL B. KAUDER & BRIAN J. OSTROM, NAT'L CTR. FOR STATE COURTS, STATE SENTENCING GUIDELINES: PROFILES AND CONTINUUM 17, 19 (2008), available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/NCSC%20Sentencing%20Guidelines%20profiles%20July%202008.pdf.

66. Two such examples are Alaska and Oregon. *See* KAUDER & OSTROM, *supra* note 65, at 8, 21.

67. ALA. CODE § 12-25-2(a)(5) (2006).

68. Thus, with regard to appellate review, the system would remain unchanged. Currently there is no appellate review of sentences. Even an allegation of abuse of discretion fails to afford appellate review. As long as a judge sentences an offender within the statutory range of permissible punishments for the crime of conviction, virtually no opportunity for appellate review of the sentence arises.

preventing disparate sentences can only be addressed through either voluntary judicial adherence to the sentencing standards or a governor's pardon.

B. Prison Overcrowding

Another issue that is potentially exacerbated by truth in sentencing is prison overcrowding, yet the reduction of overcrowding was another of the goals of the 2003 Sentencing Act.⁶⁹ Because prisoners will be required to serve a higher percentage of their sentences before they are released, prison overcrowding is a frequently advanced criticism of truth in sentencing. Opponents contend that truth in sentencing will exacerbate Alabama's already critical prison-overcrowding problem⁷⁰ and impose even more costs on a significantly expensive, albeit underfunded, department of government. If that were true, such an increase in prison overcrowding might prove truth in sentencing short-lived.⁷¹

As of December 31, 2008, Alabama had 25,223 "in-house" inmates serving sentences in a prison system designed for 13,403, which results in an occupancy rate of 188.2%.⁷² Moreover, county jails regularly hold state prisoners who await beds in state facilities. In recent years, Alabama has even housed prisoners in other states to ease prison overcrowding.⁷³ Although the Department of Corrections is one of the—if not, *the*—most frugal prison systems in the United States,⁷⁴ it still costs the citizens of Alabama more than \$400 million a year to operate its prisons.⁷⁵

69. ALA. CODE § 12-25-2(a)(4) (2006).

70. See, e.g., Editorial, *Ending Parole Sells, it Just Won't Work*, TUSCALOOSA NEWS, Oct. 23, 2007, at 6A.

71. Originally, the State of Mississippi passed a broad truth-in-sentencing law, but after a few years, the state amended the law to grant parole eligibility to first offenders after serving only one-fourth of their sentences. See *supra* text accompanying notes 58–62; see also GREENE & SCHIRALDI, *supra* note 59, at 10.

72. See ALA. DEP'T OF CORR., DECEMBER 2008 MONTHLY STATISTICAL REPORT 3, available at <http://www.doc.state.al.us/docs/MonthlyRpts/2008-12.pdf>.

73. See, e.g., *Alabama Prisoners Transferred to Louisiana Facility*, WSFA 12 NEWS, Feb. 19, 2006, available at <http://www.wsfa.com/Global/story.asp?S=4495194&nav=0RdE> (reporting on the transfer of 140 Alabama male inmates to a privately operated penal facility in Louisiana and noting that 311 Alabama female inmates were housed in another Louisiana facility); Dana Beyerle, *70 Inmates Moved to Louisiana*, N.Y. TIMES, Apr. 15, 2003, available at <http://query.nytimes.com/gst/fullpage.html?res=9907EFDD113BF936A25757C0A9659C8B63> (reporting that 70 Alabama female inmates were transferred to a Louisiana penal facility). Presently, though, Alabama is not housing prisoners in other states. See ALA. DEP'T OF CORR., CRAZY IN ALABAMA 14 (2008), available at http://sentencingcommission.alacourt.gov/Publications/Prison%20Overcrowding_AL_National%20Perspective.pdf (reporting the returns of prisoners from other states).

74. See, e.g., JFA INST., PUBLIC SAFETY, PUBLIC SPENDING: FORECASTING AMERICA'S PRISON POPULATION 2007–2011, at 33 tbl.A-7 (2007) (listing Alabama's 2005 expenditures per prisoner at 49th among the 50 states), available at <http://www.pewcenteronthestates.org/uploadedFiles/Public%20Safety%20Public%20Spending.pdf>.

75. See ALA. DEP'T OF CORR., ANNUAL REPORT FISCAL YEAR 2007, at 23 (2008), available at <http://www.doc.state.al.us/docs/AnnualRpts/2007AnnualReport.pdf>. The 2007 costs were up \$36

Obviously, our state cannot endlessly build and staff prisons. However, although it is true that a move to truth in sentencing could exacerbate prison overcrowding, it is not necessarily so.⁷⁶ The impact of truth in sentencing on Alabama's prisons substantially depends on the design of the model. With proper analysis, planning, and implementation, the impact can be anticipated and even controlled. In fact, a properly designed scheme could be population-neutral, in that it would neither aggravate nor diminish Alabama's prison population woes,⁷⁷ or could even reduce the prison population. In this respect, though, prudence certainly dictates caution.

Three factors greatly affect the impact of the model on prison populations. First, if the goal is to protect public safety by eliminating the discretionary and perceived premature release of violent offenders, truth in sentencing could be limited to violent crimes and offenders. Under such an approach, nonviolent offenders would remain eligible for discretionary release.⁷⁸ Only the more dangerous offenders would serve longer sentences and occupy limited prison space for longer periods.

Second, alternative punishment programs could be established or expanded to divert nonviolent offenders away from the prisons. The legislature has already endorsed this approach.⁷⁹ In this way, the characteristics of the prison population change, but the size remains controllable. If nonviolent offenders are directed to well-structured and appropriately funded community programs,⁸⁰ prison-population growth may be slowed,

million from 2006. *Id.*

76. See, e.g., Kevin R. Reitz, *Don't Blame Determinacy: U.S. Incarceration Growth Has Been Driven by Other Forces*, 84 TEX. L. REV. 1787, 1802 (2006) ("[N]o informed person should stand opposed to proposals for . . . the removal or restriction of the parole board's release discretion, on the ground that such determinate reforms have a proven association with high rates of prison growth. The facts are otherwise.").

77. For example, one of the "features" of North Carolina's expansive program of sentencing guidelines and elimination of parole included "no projected increase in the state's prison capacity." RANDALL W. DUNCAN ET. AL., *THE EFFECTS OF ADOPTING NORTH CAROLINA'S SENTENCING GUIDELINES IN GEORGIA* 4 (1999), available at http://www.gppf.org/pub/Crime/nc_sentencing.pdf.

78. Alternatively, the percentage of time to be served before release can be reduced for nonviolent offenders. Cf. WIS. STAT. ANN. § 973.195(1g) (West 2007) (fixing the time to be served at 85% for serious felonies and 75% for lesser felonies for "sentence adjustments").

79. E.g., ALA. CODE § 12-25-31(a), (a)(3) (2006) (finding, as "necessary to protect public safety by providing a fair, effective, and efficient criminal justice system . . . [t]he availability of a continuum of punishment options").

80. Drug courts, for example. Chief Justice Sue Bell Cobb has worked tirelessly to expand Alabama's drug courts to all regions of Alabama. See Susan Pace Hamill, *An Argument for Providing Drug Courts in all Alabama Counties Based on Judeo-Christian Ethics*, 59 ALA. L. REV. 1305 (2008). Moreover, a statutory definition of "intermediate punishment" lists many examples of community programs. ALA. CODE § 12-25-32(2)(b) (2006). Another example is program structuring. To promote programs and control costs, some thirty other states have consolidated their probation and community corrections programs into a single state agency. The need for community corrections has been stated a number of times, but presently community corrections remains a dream in many communities, and underfunded and underappreciated in others. Unless community corrections is prioritized and suitably funded, this essential component of a truth-in-sentencing model may defeat the scheme.

checked, or even reversed. Prisons could mainly house violent or repeat offenders.

The third way that truth-in-sentencing's impact on prison population can be lessened is through the release scheme. If truth-in-sentencing's *raison d'être* is to provide certainty rather than lengthen sentences, the percentage of sentence to be served can be reduced to a term commensurate with existing parole eligibility periods without losing sight of the objective. Virtually every state allows release after a set percentage of the sentence imposed. For example, the federal model requires a prisoner to serve 85% of the sentence imposed before release,⁸¹ and some states follow this approach.⁸² Other states require service of a lesser percentage such as 75%, 50%, or even 25% of the sentence before release.⁸³ Establishing shorter release periods addresses the goals of certainty and control of prison-population growth but may not adequately address public safety.

C. Alternative Sentencing

One way of reducing the impact of truth in sentencing on prison population is to provide adequate, responsible alternatives to prison incarceration. Even without truth in sentencing, but certainly with it, judges need alternatives to prison incarceration when sentencing nonviolent offenders. The bare choice between incarceration in a penal facility or probation does not give the sentencing judge sufficient options to tailor the punishment to the crime and the offender. A viable, adequately funded, statewide community corrections program is not only necessary,⁸⁴ it is also part of the legislative mandate.⁸⁵

Community corrections entails more than probation and community corrections supervision. Although (as used in this Essay) it embraces both, it also includes other programs such as drug courts, work release, controlled residential placements (such as house arrests or halfway houses), day reporting, electronic monitoring, intensive supervision, drug and alcohol treatment, GED and other educational programs, counseling, and community service.⁸⁶

81. See 18 U.S.C. § 3624(b)(1) (2000).

82. See, for example, Louisiana, Maine, and Washington. See WILLIAM J. SABOL ET AL., URBAN INST., THE INFLUENCES OF TRUTH-IN-SENTENCING REFORMS ON CHANGES IN STATES' SENTENCING PRACTICES AND PRISON POPULATIONS 8 (2002), available at http://www.urban.org/UploadedPDF/410470_FINALTISRpt.pdf.

83. *Id.* (Massachusetts (75%), Indiana (50%), and Montana (25%)).

84. TASK FORCE ON PRISON CROWDING 8 (2005), available at <http://sentencingcommission.alacourt.gov/Publication/Gov%20TF%20report.pdf> (stating as "beyond dispute" that a "state-wide network of community corrections" for nonviolent offenders is necessary).

85. ALA. CODE § 12-25-2 (2006) (recognizing the prevention of prison overcrowding and the establishment and enhancement of flexible options and judicial discretion in sentencing as appropriate aspects of Alabama's sentencing policies and practices).

86. The list can be extensive. See, e.g., ALA. CODE § 12-25-32(2)(b) (2006) (containing a com-

Community corrections provides several desirable benefits. First, justice. In many instances, prison incarceration is a disproportionate or unnecessary punishment for a specific offense by a particular offender, yet probation may not be an adequate alternative. Not all offenders need long or even short-term prison incarceration. Some can be punished adequately through probation, but others require appropriate, more intensive, community-based alternatives. Second, success. Two of the sometimes competing goals of sentencing are to punish the offender adequately for the crime and to deter future offenses, not only by the instant offender but also by other potential offenders. Frequently, prison incarceration is unnecessary to accomplish either goal. Both the punishment and deterrent objectives can be met through the imposition of a community-based alternative punishment. Third, costs. These programs serve as beneficial alternatives to costly prison incarceration. Fourth, accession. A properly structured and funded community corrections program can augment the usual alternative to incarceration, namely probation.

To date, Alabama has not adequately provided for or funded community corrections. Although we have community corrections programs in Alabama, generally they are inadequately supported. If we are to implement truth in sentencing successfully, a properly structured, funded, and staffed statewide community corrections program is essential.

D. Individualized Sentencing and Fairness

Critics of truth in sentencing also argue that it fails to address the diverse population of offenders. They reason that not all offenders are alike and that their sentences should fit not only their crimes but also the offenders. The legislature in 2000 agreed and stated as a consideration the importance of individualized sentencing and judicial discretion in utilizing mitigating and aggravating factors.⁸⁷ A properly designed determinate sentencing model could address the differences in crimes and offenders at the sentencing stage rather than having a parole board determine when the person is sufficiently rehabilitated to be released.

CONCLUSION

Alabama is moving—incrementally, perhaps—toward truth in sentencing. At this time it is vital that we do not succumb to oversimplifying a complicated process and accepting easy answers. In this complicated area of law, solutions that sound simple are invariably based upon limited information or faulty assumptions. Proceeding in such a manner cannot be

prehensive list of alternative punishments and programs).

87. ALA. CODE § 12-25-2(a)(2) (2006).

beneficial for our state. One earlier foray into determinate sentencing, the Habitual Felony Offender Act, has resulted in legislative modification due in part to prison population impact. To eliminate the possibility of unforeseen and devastating results, we must allow the sentencing commission the time and space required to properly fulfill its legislative mandate to design a truth-in-sentencing model for Alabama.

The effects of adopting truth in sentencing can be either anticipated or unanticipated. Through this Essay, I hope I have demonstrated that by proper study and planning, the potential effects can be identified, addressed, and even controlled. We can avoid the mistakes made by other jurisdictions and incorporate beneficial elements in our model that accomplish Alabama's objectives.

In designing our scheme, we can draw upon substantial Alabama historical data and the experiences of the various states that have been using truth in sentencing for a number of years. Truth in sentencing is no longer a new, untested model. Moreover, even if unforeseen effects surface, any remaining unexpected results can be dealt with through post-adoption legislative tweaking.⁸⁸ The point is that by properly designing the truth-in-sentencing model, its more undesirable features can be lessened or perhaps even eliminated.

The path to adoption of truth in sentencing has been, and will continue to be, challenging. Simply reviewing Alabama data and the experiences of other states is insufficient. Obviously, we must refine our sentencing policies and goals as well as our law and procedures. These policies and goals depend greatly on social, economic, and political considerations, and the resulting bouillabaisse presents complexity and numerous difficult choices not easily deciphered or resolved.

Perhaps the best case scenario is that the sentencing commission can design an acceptable model that the legislature can pass in one legislative session. Even the one-session scenario involves several years of work yet to come. Other states have worked for years on their sentencing models.⁸⁹ The model almost certainly will be opposed by some groups, individuals, or legislators, and the strength of the supporting and opposing forces is yet to be felt. Moreover, the commission has asked the legislature to postpone its submission of a plan until 2011. Thus, it is unlikely that Alabama courts will utilize truth in sentencing before 2012 (or later).

In sum, no truth-in-sentencing model for Alabama has been fully designed at this time, although the sentencing commission is working hard to

88. Although Alabama's lawmakers obviously have not had the occasion to tweak truth in sentencing, they have rethought and revised some of our mandatory, rather determinate, punishment statutes such as the Habitual Felony Offender Act. *See supra* text accompanying notes 49–51.

89. *See, e.g.*, DUNCAN ET AL., *supra* note 77, at 10 (noting that North Carolina and Virginia spent “many years” studying and crafting their sentencing schemes before implementing them).

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anticipate and resolve issues as it prepares a scheme for Alabama. For now, the legislature has asked for a truth-in-sentencing bill, and one is forthcoming. Its design—or whether it is even prudent to enact truth in sentencing—is, at present, an open question with no easy answer.