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## S.B. 199: Ohio Adopts a Mandatory Sentencing Measure

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## S.B. 199: OHIO ADOPTS A MANDATORY SENTENCING MEASURE

### I. INTRODUCTION

Senate Bill 199,<sup>1</sup> Ohio's new "get tough on crime" bill, was signed into law by Governor James A. Rhodes on October 6, 1982. The bill, which became effective in 1983, adds to or amends some ninety-five sections of the Ohio Revised Code<sup>2</sup> with the bulk of the changes coming in Title 29.<sup>3</sup>

With a few exceptions,<sup>4</sup> the thrust of S.B. 199 is the heightening of penalties for the commission of violent felonies. This is accomplished by increasing the penalties for first time commission of certain felonies,<sup>5</sup> imposing terms of actual incarceration for the repeated commission of these felonies,<sup>6</sup> imposing a mandatory term of actual incarceration for the commission of a felony while possessing a firearm<sup>7</sup> and modifying the formula used to compute the reduction of an inmate's sentence for his good behavior.<sup>8</sup> The bill, which was advanced in response to public outcry over rampant crime rates,<sup>9</sup> enjoyed widespread support in the legislature, passing the Senate by a 30 to 3 margin and the House unanimously.<sup>10</sup>

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1. Am. Sub. S.B. 199, 114th General Assembly (1982).

2. Senate Bill 199 adds seven sections to the Ohio Revised Code: Sections 2929.13; 2929.14; 2929.221; 2929.71; 2941.141, 2967.18 and 5120.161.

Further, the bill amends sections 1.05; 301.27; 307.93; 341.21; 731.99; 753.16; 959.99; 1125.99; 1129.99; 1155.99; 1321.99; 1333.99; 1707.99; 2901.01; 2901.02; 2903.03; 2903.04; 2903.11; 2903.12; 2905.01; 2905.02; 2905.11; 2907.02; 2907.12; 2909.02; 2909.03; 2909.05; 2909.11; 2911.01; 2911.02; 2911.11; 2911.12; 2913.02; 2913.11; 2913.21; 2913.43; 2913.51; 2913.61; 2915.05; 2917.02; 2923.01; 2925.01; 2929.01; 2929.11; 2929.12; 2929.31; 2929.41; 2929.51; 2929.61; 2947.051; 2947.061; 2949.02; 2949.12; 2953.09; 2967.01; 2967.05; 2967.13; 2967.19; 2967.191; 2967.26; 2967.31; 3504.06; 3599.01; 3599.12; 3599.15; 3599.16; 3599.21; 3599.26; 3599.27; 3599.28; 3599.29; 3599.33; 3599.34; 3761.99; 3769.99; 4399.99; 4903.99; 4905.99; 4907.99; 4909.99; 4931.99; 4933.99; 5113.99; 5120.16; 5143.05; 5143.07; 5143.10; 5143.21; 5143.23; 5145.01; 5145.02; 5703.99; 5747.99; 5749.99; 5915.99; and 6101.99. Senate Bill 199 also repeals sections 2907.10; 2947.06; and 5143.06.

3. Title 29 of the Revised Code is entitled "Crimes—Procedure: Rules of Criminal Procedure."

4. The bill also includes provisions authorizing the department of corrections to enter into contracts with local jails for the housing of certain inmates, the classification of certain heretofore unclassified offenses, the imposition of definite terms of sentence for certain felons and the modification of the formula used to calculate time off for good behavior.

5. See *infra* notes 12-20 and accompanying text.

6. See *infra* notes 22-29 and accompanying text.

7. See *infra* notes 34-45 and accompanying text.

8. See *infra* notes 46-55 and accompanying text.

9. Conversation with Mr. Jay Denton, Administrative Assistant to the Ohio Parole Board (Nov. 10, 1982) (on file with the University of Dayton Law Review).

10. *Id.*

This note will focus on four major changes brought about by S.B. 199 and it will attempt to analyze the interaction of those changes with Ohio's criminal laws.

## II. ANALYSIS

### A. *Aggravated Felonies*

Whenever society is confronted with a spiraling crime rate, its natural inclination is to impose longer jail sentences on the criminals who are convicted. The Ohio General Assembly's passage of a mandatory sentencing measure reflects such a tendency; S.B. 199 creates a new felony classification, the aggravated felony,<sup>11</sup> and provides for substantially increased penalties for its commission.

Aggravated felonies are divided into three degrees<sup>12</sup> and include thirteen crimes<sup>13</sup> which were formerly classified as simple felonies of the first through fourth degrees.<sup>14</sup> The most obvious effect of the new classification is to increase the terms of imprisonment for the first time commission of an aggravated felony. For offenses which were formerly classified as first degree felonies but which now qualify as aggravated felonies of the first degree,<sup>15</sup> terms of imprisonment have been increased from the original four, five, six or seven year to twenty-five year maximum up to a five, six, seven, eight, nine or ten year to twenty-five year maximum.<sup>16</sup> Second degree felonies currently carry terms of two, three, four or five years to a fifteen year maximum; the minimum sentence for second degree felonies which have been classi-

11. The new law creates aggravated felonies of the first, second and third degrees. OHIO REV. CODE ANN. § 2901.02(A) (Page Supp. 1983). The newly amended OHIO REV. CODE ANN. § 2929.11 prescribes the sentences for the commission of these crimes.

12. OHIO REV. CODE ANN. § 2901.02(A) (Page Supp. 1983).

13. Aggravated felonies of the first degree include: OHIO REV. CODE ANN. § 2903.03 (Page Supp. 1983), voluntary manslaughter; OHIO REV. CODE ANN. § 2903.04(C) (Page Supp. 1983), involuntary manslaughter; OHIO REV. CODE ANN. § 2905.01 (Page Supp. 1983), kidnapping without safe return; OHIO REV. CODE ANN. § 2907.12 (Page Supp. 1983), felonious sexual penetration; OHIO REV. CODE ANN. § 2909.02 (Page Supp. 1983), aggravated arson; OHIO REV. CODE ANN. § 2911.01 (Page Supp. 1983), aggravated robbery; and OHIO REV. CODE ANN. § 2911.11 (Page Supp. 1983), aggravated burglary.

Aggravated felonies of the second degree include: OHIO REV. CODE ANN. § 2903.11 (Page Supp. 1983), felonious assault; OHIO REV. CODE ANN. § 2905.01 (Page Supp. 1983), kidnapping with safe release of the victim; OHIO REV. CODE ANN. § 2911.02 (Page Supp. 1983), robbery; and OHIO REV. CODE ANN. § 2911.12 (Page Supp. 1983), burglary.

Aggravated felonies of the third degree include: OHIO REV. CODE ANN. § 2903.04(C) (Page Supp. 1983), involuntary manslaughter (misdemeanor manslaughter); OHIO REV. CODE ANN. § 2905.02 (Page Supp. 1983), abduction, and OHIO REV. CODE ANN. § 2905.11 (Page Supp. 1983), extortion.

14. OHIO REV. CODE ANN. § 2901.02 (Page 1982).

15. See *supra* note 13.

16. OHIO REV. CODE ANN. § 2929.11(B)(1)(a) (Page Supp. 1983).

fied as aggravated felonies of the second degree<sup>17</sup> has been increased for first time offenders to three, four, five, six, seven or eight years.<sup>18</sup> Finally, aggravated felonies of the third degree<sup>19</sup> carry sentences for first time offenders of two, three, four or five years up to the ten year maximum while simple third degree felonies have minimums of two, two and one half, three or four years.<sup>20</sup>

### *B. Actual Incarceration and Repeat Offender Provisions*

In addition to escalating the minimum term a judge may impose on a first time aggravated felon, S.B. 199 also gives the sentencing judge the discretion to impose the selected minimum as a term of actual incarceration.<sup>21</sup>

An offender sentenced to a term of actual incarceration<sup>22</sup> must serve the full term specified with no diminution for parole, probation, shock parole, shock probation or furlough.<sup>23</sup> The only reduction allowed

17. See *supra* note 13.

18. OHIO REV. CODE ANN. § 2929.11(B)(3)(a) (Page Supp. 1983).

19. See *supra* note 13.

20. OHIO REV. CODE ANN. §§ 2929.11(B)(5)(a); (B)(6) (Page Supp. 1983).

21. "Actual incarceration" means that an offender is required to be imprisoned for the stated period of time to which he is sentenced that is specified as a term of actual incarceration. If a person is sentenced to a term of actual incarceration, the court shall not suspend his term of actual incarceration, and shall not grant him probation or shock probation, pursuant to Sections 2929.51, 2947.061, 2951.02 or 2951.04 of the Revised Code, and the Department of Rehabilitation and Corrections or the Adult Parole Authority shall not, pursuant to Chapter 2967 of the Revised Code or its rules adopted pursuant to Chapters 2967., 5120., 5143. or 5149. of the Revised Code, grant him a furlough for being a trust-worthy prisoner other than a furlough pursuant to division (A) (1) or (2) of Section 2967.27 of the Revised Code, parole or shock parole until after expiration of his term of actual incarceration, diminished as provided in Section 2967.19 of the Revised Code.

An offender who is sentenced to a term of actual incarceration may be transferred from an institution operated by the Department of Rehabilitation and Corrections to the custody of the Department of Mental Health or the Department of Mental Retardation and Developmental Disabilities, as provided in Section 5120.17 of the Revised Code, and shall be credited with all time served in the custody of the Department of Mental Health or the Department of Mental Retardation and Developmental Disabilities against the term of actual incarceration.

*Id.* § 2929.01(C). OHIO REV. CODE ANN. §§ 2929.11(B)(1), (3), (5) (Page Supp. 1983) permits a judge to sentence a first time offender to a term of actual incarceration.

22. The Ohio Revised Code had made provisions for terms of actual incarceration before the enactment of S.B. 199. Actual incarceration had been reserved, however, for the crimes of corrupting another with drugs, OHIO REV. CODE ANN. § 2925.02 (Page 1982); trafficking in drugs, OHIO REV. CODE ANN. § 2925.03 (Page 1982); and, theft of drugs, OHIO REV. CODE ANN. § 2925.21 (Page 1982).

This former provision for actual incarceration, embodied in OHIO REV. CODE ANN. § 2925.01(D) (Page 1982) was substantially the same as the S.B. 199 provision with the exception that the former provision allowed furloughs for inmates confined for terms of actual incarceration.

for a period of actual incarceration is time off for good behavior<sup>24</sup> or deathbed or funeral furloughs.<sup>25</sup>

The provisions for heightened sentences and actual incarceration also come into play for those who have been previously convicted of, or have pled guilty to, an aggravated felony, aggravated murder or their equivalents.<sup>26</sup> In this situation, the judge loses his discretion and the term of imprisonment the judge selects as a minimum must be imposed as a term of actual incarceration. The minimum term which the judge must impose is significantly longer for repeat offenders as compared to first time offenders. For aggravated felonies of the first degree, the minimums balloon from the five, six, seven, eight, nine or ten years for first time offenders to minimums of ten, eleven, twelve, thirteen, fourteen or fifteen years.<sup>27</sup> Second degree aggravated felonies carry minimum terms of eight, nine, ten, eleven or twelve years<sup>28</sup> instead of the three, four, five, six, seven or eight years for first time offenders. Finally, third degree aggravated felonies carry minimums of five, six, seven or eight years,<sup>29</sup> while the first time offender faces only two, three, four or five year minimums.

### C. *Lengthier Sentences for Simple Felonies*

Minimum terms of imprisonment for simple felonies of the third and fourth degrees have also been increased significantly by S.B. 199. Under the previous Ohio Revised Code provisions, a third degree felon could be sentenced to minimums of one year, eighteen months, two years or three years<sup>30</sup> and a fourth degree felon faced a minimum term of six months, one year, eighteen months or two years.<sup>31</sup> Senate Bill 199 increases these minimums to two years, thirty months, three years or four years for a third degree felony<sup>32</sup> and to eighteen months, two years, thirty months or three years for the fourth degree felony.<sup>33</sup>

### D. *Crimes Committed With a Firearm*

Although not a specific lengthening of terms of imprisonment, S. B. 199 includes two additional provisions which nevertheless have the effect of increasing the inmate population of Ohio. These provisions are

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24. OHIO REV. CODE ANN. § 2967.19 (Page Supp. 1983).

25. *Id.* § 2967.27(A)(1), (2).

26. *See id.* §§ 2929.11(B)(1)(b), (3)(b), (5)(b).

27. *Id.* § 2929.11(B)(1)(b).

28. *Id.* § 2929.11(B)(3)(b).

29. *Id.* § 2929.11(B)(5)(b).

30. *Id.* § 2929.11(B)(3) (Page 1982).

31. *Id.* § 2929.11(B)(4) (Page 1982).

32. *Id.* § 2929.11(B)(6) (Page Supp. 1983).

33. *Id.* § 2929.11(B)(7).

the new section 2929.71<sup>34</sup> and the amended section 2967.19<sup>35</sup> of the Ohio Revised Code.

Under section 2929.71(A), an offender convicted of any felony<sup>36</sup> carrying an indeterminate or life sentence who is also convicted of a specification of possession of a firearm<sup>37</sup> must be sentenced to a three year term of actual incarceration. This three year term is required to be served prior to, and consecutive with, the life or indeterminate sentence levied for the commission of the crime<sup>38</sup> and it may not be diminished by a "good behavior" calculation.<sup>39</sup>

Further, subsection (B) of section 2929.71 provides for the same three year period of actual incarceration if an offender is convicted of felonious assault,<sup>40</sup> aggravated assault,<sup>41</sup> aggravated robbery,<sup>42</sup> aggravated burglary<sup>43</sup> or aggravated riot<sup>44</sup> where the possession of a firearm is an element of the crime. No separate specification of a firearm is required for imposition of the three year actual incarceration term under section 2929.71(B).<sup>45</sup>

34. *Id.* § 2929.71.

35. *Id.* § 2967.19.

36. *Id.* § 2929.71(A)(1). This section requires that for the actual incarceration term to apply, the offender must have been convicted of or plead guilty to "any felony other than a violation of section 2923.12 of the Revised Code [carrying a concealed weapon] or a felony for which a term of actual incarceration can be imposed pursuant to division (B) of this section." *Id.*

37. *Id.* § 2929.71(A)(2). This section requires that an offender be convicted of or plead guilty to a "specification charging him with having a firearm on or about his person or under his control while committing the felony." *Id.*

38. *Id.* § 2929.71(A)(2). This section provides in pertinent part:

The additional term of actual incarceration shall be served consecutively with, and prior to, the life sentence or the indefinite term of imprisonment. If an offender is convicted of, or pleads guilty to, two or more felonies for which a term of actual incarceration must be imposed under this division and of a separate specification for each felony charging him with having a firearm on or about his person or under his control while committing the felony, all of the terms of actual incarceration for all of the felonies shall be served consecutively and prior to any of the life sentences or indefinite terms of imprisonment imposed for the felonies.

*Id.*

39. *Id.* § 2929.71(D)(2). This section provides in pertinent part:

(2)"actual incarceration" has the same meaning as in division (C) of section 2929.01 of the Revised Code, except that a term of actual incarceration imposed pursuant to this section shall not be diminished pursuant to section 2967.19 of the Revised Code.

*Id.*

40. *Id.* § 2903.11(A)(2).

41. *Id.* § 2903.12(A)(2).

42. *Id.* § 2911.01(A)(1).

43. *Id.* § 2911.11(A)(2).

44. *Id.* § 2917.02(A)(3).

45. *Id.* § 2929.71(B).

### E. Time Off for Good Behavior

Finally S.B. 199 amends the method used to calculate time off for good behavior. Formerly, an inmate's sentence was reduced from five to eleven days per month served.<sup>46</sup> The number of days deducted per month served depended on the length of the sentence and was set forth in the former section 2967.19.<sup>47</sup> The amended section 2967.19<sup>48</sup> of the Ohio Revised Code extensively changes this "good behavior" calculation.

Under the new "good time" provisions, an inmate in a penal institution is entitled to a straight deduction of eight days for each month served.<sup>49</sup> An inmate in a reformatory earns a twelve day deduction for each month served.<sup>50</sup> At first blush, this amended provision appears to be a vehicle for lessening incarceration time rather than increasing it; but the benefits for inmates are, in reality, quite limited. Under the former "good time" statute, those who were sentenced to a minimum term of four, five, six or more years were entitled to a deduction of nine, ten and eleven days for each month served, and those sentenced to

46. Section 2967.19 (Page 1982) provided:

(A) A person confined in a state penal institution who is not eligible for parole before the expiration of a minimum sentence or term of imprisonment, or who was sentenced to under a general sentence, and who has faithfully observed the rules of the institution, is entitled to the diminution of his minimum sentence, as follows:

- (1) For a minimum term of one year, a deduction of five days from each of the twelve months of his minimum sentence;
- (2) For a minimum term of two years, a deduction of six days from each of the twenty-four months of his minimum sentence;
- (3) For a minimum term of three years, a deduction of eight days from each of the thirty-six months of his minimum sentence;
- (4) For a minimum term of four years, a deduction of nine days for [from] each of the forty-eight months of his minimum sentence;
- (5) For a minimum term of five years, a deduction of ten days from each of the sixty months of his minimum sentence;
- (6) For a minimum term of six or more years, a deduction of eleven days for [from] each of the months of his minimum sentence.

Although this statute provided for diminution of the inmate's sentence only if he had "faithfully observed the rules of said institution," it was treated as an automatic deduction. Conversation with Mr. Jay Denton, Administrative Assistant to the Ohio Parole Board (Nov. 10, 1982) (on file with the University of Dayton Law Review).

47. See *supra* note 46.

48. OHIO REV. CODE ANN. § 2967.19(A) (Page Supp. 1983) provides:

(A) A person who is confined in a state penal institution is entitled to a deduction of eight days from his minimum or definite sentence for each month of his sentence during which he has faithfully observed the rules of the institution, and a person who is confined in a state reformatory institution is entitled to a deduction of twelve days from his minimum or definite sentence for each month of his sentence during which he has faithfully observed the rules of the institution.

49. *Id.*

50. *Id.*

a minimum of three years were entitled to a deduction of eight days per month.<sup>51</sup> Therefore, only those offenders sentenced to a minimum of two years or less derive an advantage from the new "good time" calculation.<sup>52</sup> Insofar as S.B. 199 has increased minimum sentences for most offenses, very few offenders will be sentenced to a minimum term of two years or less.<sup>53</sup>

Further, the wording of the new section 2967.19 of the Ohio Revised Code makes it clear that the inmate does not automatically become entitled to his "good time" credit just because he completed one month of his term.<sup>54</sup> Under the new statute, the accumulation of days of credit is wholly dependent upon the inmate's good behavior during each month of incarceration. It is quite possible, therefore, that an offender could, by committing one rule infraction per month, serve an entire fifteen year sentence without earning one day's good behavior credit.<sup>55</sup>

#### F. Definite Sentences

The imposition of longer sentences, terms of actual incarceration for aggravated felonies and for felonies committed with a firearm and the change in "good time" calculation will result in substantial increases in inmate populations in Ohio. To alleviate this potential problem, the legislature adopted several provisions aimed at keeping prison rolls down. One of these provisions is subsection (D) of section 2929.11 of the Ohio Revised Code.<sup>56</sup>

51. See *supra* note 47.

52. Insofar as offenders sentenced to a minimum term of three years would be entitled to a deduction of eight days for each month under the old "good behavior" calculation, they would neither gain nor lose under the new calculation. See *supra* notes 46 and 48.

53. Under the new sentencing provisions, only those convicted of a simple felony of the second, third or fourth degree or those convicted of a first time offense of a third degree aggravated felony may be sentenced to a minimum sentence of two years or less. See *supra* notes 15-33 and accompanying text.

54. OHIO REV. CODE ANN. § 2967.19(A) (Page Supp. 1983) provides that an inmate is entitled to deductions for each month of his sentence during which he has faithfully observed the rules of the institution. See *supra* note 46.

55. See *supra* notes 46 and 54. See also *infra* note 110.

56. The legislature also included amendments to OHIO REV. CODE ANN. §§ 307.93 and 5120.16 (Page Supp. 1983) to help lessen the potential overcrowding of the state institutions. Under these new provisions, the Department of Rehabilitation and Corrections is authorized to contract with county, municipal, multi-county and municipal-county workhouses and jails to house third and fourth degree felons. To qualify for this special housing, the offender must be a first<sup>o</sup> commission, nonviolent offender. *Id.* Several problems, both inherent in and extraneous to S.B. 199 make this provision unworkable.

Primarily, although S.B. 199 authorizes the Department of Rehabilitation and Corrections to enter into these contracts and make per diem payments for the service, it makes no appropriations to enable the Department to pay the contracted for price.

Further, although the State of Ohio is currently able to house inmates in a state institution  
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Through section 2929.11(D),<sup>57</sup> the legislature introduced definite sentences to Ohio. A definite sentence provides for a fixed term of incarceration rather than an indefinite term expressed as a range from a minimum to a maximum term of imprisonment. Authorizing a judge to render a sentence of "two years" instead of "two to five years" does more than simply inform the inmate of the exact date he will be set free; it also takes the inmate's case out of the purview of the parole authority.<sup>58</sup>

When an offender is sentenced to an indefinite sentence, he most likely will be released before the maximum term of incarceration is served.<sup>59</sup> Unless the term of imprisonment was rendered as a term of actual incarceration, the amount of time an inmate actually serves is, by and large, determined by the Department of Rehabilitation and Corrections.<sup>60</sup> If the inmate meets the multi-factored criteria set forth by the Department of Rehabilitation and Corrections, he will usually be released before he serves the maximum time to which he was sentenced and the parole authority will hold the remainder of his term in reserve to assure that the parolee observes the terms of his parole.<sup>61</sup>

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for approximately \$18.00 per day, the average charge to the state by a local facility would be \$35.00 per day. Conversation with Mr. Jay Denton, Administrative Assistant to the Ohio Parole Board (Nov. 10, 1982) (on file with the University of Dayton Law Review).

Another problem with this scheme, apparently overlooked by the legislature, is that the counties have no place to put these inmates. The state is not permitted to contract with a substandard facility for the housing of state inmates and currently there is only one local facility in the entire state that meets the standards and has room for additional inmates. This facility, the Wayne County jail, has room for approximately 20 new inmates: if it attempts to house more inmates than it has capacity for it too will fail to be in compliance with facility standards. Conversation with Mr. George Farmer, Superintendent, Probation Development and Supervision Section, Adult Parole Authority and Mr. Jay Denton, Administrative Assistant to the Ohio Parole Board (Nov. 10, 1982) (on file with the University of Dayton Law Review).

57. OHIO REV. CODE ANN. § 2929.11(D) (Page Supp. 1983) provides:

Whoever is convicted of or pleads guilty to a felony of the third or fourth degree and did not, during the commission of that offense, cause physical harm to any person nor make an actual threat of physical harm to any person with a deadly weapon and who has not, during the commission of any previous offense, caused physical harm to any person with a deadly weapon shall be imprisoned for a definite term, and, in addition, may be fined or required to make restitution. The restitution shall be fixed by the court as provided in this section. The terms of imprisonment shall be imposed as follows:

- (1) for any felony of the third degree, the term shall be one, one and one-half or two years;
- (2) for any felony of the fourth degree, the term shall be six months, one year, or eighteen months.

58. Conversation with Mr. Jay Denton, Administrative Assistant to the Ohio Parole Board (Nov. 10, 1982) (on file with the University of Dayton Law Review). *But see* House Bill 269, which amends this section of S.B. 199 by making those sentenced to definite sentences eligible for shock parole.

59. *Id.*

60. *Id.*

61. *Id.*

The ability of both the Department of Rehabilitation and Corrections and the parole authority to alter an offender's period of incarceration serves as a powerful inducement for the offender to keep on his best behavior both while institutionalized and while on parole.<sup>62</sup>

When an offender is given a definite sentence, he serves his stated time and leaves. His term of incarceration cannot be lengthened by the Department of Rehabilitation and Corrections and he has no relationship with the parole authority when he is released. Therefore, he lacks all incentive to obey the rules of the institution and to observe the terms of his parole after release.

Since 1974, the greatest number of commitments to Ohio facilities have consisted of third and fourth degree felons.<sup>63</sup> By drafting subsection (D) of section 2929.11 of the Ohio Revised Code to entail most of these offenders, and by making the definite sentence shorter in duration than its indefinite sentence counterpart, the legislation may serve to keep inmate populations down by moving the offenders in and out of the corrections system quickly.

### III. POTENTIAL PROBLEMS WITH S.B. 199

Senate Bill 199 appears to be a timely measure for attacking Ohio's crime problem. All provisions appear to mesh perfectly with no contingency unprovided for. Upon closer scrutiny, however, the facade breaks down; legal, practical and economic problems will surely surface.

#### A. *Actual Incarceration*

The actual incarceration provisions of S.B. 199 will prove to be one of the major flaws in this mandatory sentencing measure. These provisions, especially the provisions concerning repeat offenders, remove all discretion from judges and penal authorities to mold the penalty to fit the offender. Some, particularly those who feel that these authorities have been too lenient in the past with offenders, applaud these changes; others, however, criticize the lack of flexibility inherent in a mandatory sentencing program.

The need for flexibility in sentencing becomes apparent when one considers the lack of homogeneity among offenders. First of all, the reasons for committing a crime are as varied as the number of offenders. It is arguable that the man who burglarizes for the sheer exhilaration of breaking the law deserves a more severe punishment than he who does so to feed his family. Secondly, once convicted, some offend-

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62. *Id.*

63. *Id.*  
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ers respond more positively to supervised probation than incarceration while others, however, should be temporarily or permanently jailed for society's protection. These situations demonstrate the need for individualized sentencing meted out by an experienced, sensitive judge.

Once imprisoned, every inmate responds differently to his institutional experience. The staff of the Department of Rehabilitation and Corrections has the opportunity and resources to detect who is, and who is not, responding favorably to the rehabilitation programs. Based on their observations and experience, the staff can determine if the ends of rehabilitation are best served by release with supervision or by continued incarceration.<sup>64</sup>

Despite the advantages of vesting the Department of Rehabilitation and Corrections with the authority to monitor an inmate's progress and adjust accordingly his period of incarceration, it is within the legislature's province to determine the extent of the Department's authority. Wide deference is given by the courts to legislative determinations and, insofar as the legislature is the body empowered to set the types and duration of criminal sanctions, the courts will not upset its decision unless it is clearly unconstitutional.<sup>65</sup>

Along the same lines, although there are many practical advantages in vesting a judge with the discretion to render individualized sentences, the courts have unanimously held that mandatory terms of actual incarceration are constitutional.<sup>66</sup> The courts reason that insofar as probation is a creature of statutes, the legislature's decision to deny probation does not infringe upon judicial authority.<sup>67</sup> Furthermore, mandatory actual incarceration has been upheld against constitutional attacks based on arguments of cruel and unusual punishment and equal protection.<sup>68</sup>

64. *Id.*

65. *See, e.g.,* *Nebbia v. New York*, 291 U.S. 502 (1934).

66. *State v. Taylor*, 82 Ariz. 289, 312 P.2d 162 (1957), *State v. Holmes*, 276 N.W.2d 823 (Iowa 1979); *State v. Floyd*, \_\_\_ Ohio App. 2d \_\_\_, 322 N.E.2d 894 (1974).

67. The Iowa Supreme Court characterized the matter most succinctly when it stated that, "our judiciary holds no inherent power to grant probation. . . . The power to grant probation is statutorily conferred; therefore, statutory preclusion of probation cannot infringe on judicial authority to exercise discretion in the matter." *State v. Holmes*, 276 N.W.2d 823, 830 (Iowa 1979). *See State v. Floyd*, \_\_\_ Ohio App. 2d \_\_\_, \_\_\_, 322 N.E.2d 894, 897 (1974).

68. For cases providing that actual incarceration is not cruel and unusual punishment, see *State v. Parle*, 110 Ariz. 517, 521 P.2d 604, *cert. denied*, 419 U.S. 1003 (1974); *People v. Westoby*, 63 Cal. App. 3d 790, 134 Cal. Rptr. 97 (1976); *McArthur v. State*, 351 So. 2d 972 (Fla. 1977); *Knight v. State*, 243 Ga. 770, 257 S.E.2d 182 (1979). *See also* Annot., 100 A.L.R. 3d 431, 446-52 (1980). For cases providing that actual incarceration is not violative of equal protection, see *State v. Taylor*, 82 Ariz. 289, 312 P.2d 162 (1957), *State v. Floyd*, \_\_\_ Ohio App. 2d \_\_\_, 322 N.E.2d 894 (1974).

### B. Repeat Offender Status

Potential problems with Ohio's mandatory actual incarceration provisions concern the necessity of notifying a defendant that he is charged with being a repeat offender and, as such, is facing an enhanced, mandatory sentence. Although S.B. 199 does not *per se* create an habitual offender statute,<sup>69</sup> the bill provides for enhanced sentences of mandatory actual incarceration for those who have been convicted of, or pled guilty to, aggravated felonies or their equivalents in the past.<sup>70</sup> Insofar as this has the same effect as the typical habitual offender statute,<sup>71</sup> the courts will undoubtedly treat it as such and hold it subject to the same due process standards.

No clear rule emerges from the cases as to whether a defendant is entitled to pretrial notification that the prosecutor is seeking repeat offender status.<sup>72</sup> It is clear, however, that due process requires that the defendant be afforded an opportunity to obtain counsel and refute the charge that he fits within the repeat offender provisions.<sup>73</sup> Whether a defendant has been convicted of, or has pled guilty to, an aggravated felony or its equivalent in the past is a question of fact and, as such, a defendant must have the opportunity<sup>74</sup> to put forth evidence that the

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69. Ohio had a true habitual offender law until 1974. These statutes provided, *inter alia*, that:

A person convicted of arson; burning property to defraud an insurer; robbery; pickpocketing; burglary; burglary of an inhabited dwelling; murder in the second degree; voluntary manslaughter; assault with intent to kill, rob, or rape; cutting, stabbing or shooting with intent to kill or wound; forcible rape or rape of a child under twelve years of age; incest; forgery; grand larceny; stealing a motor vehicle; receiving stolen goods of the value of more than [sixty] dollars; perjury; kidnapping; child-stealing; who has been two times previously convicted of any of these felonies separately prosecuted and tried therefor, either in this state or elsewhere, shall be adjudged an habitual criminal and shall be sentenced by the court to a term of imprisonment equal to the maximum statutory penalty for such offense. Any of such convictions which result from or are connected with the same transaction, or result from offenses committed at the same time, shall be counted for the purpose of this section as one conviction.

OHIO REV. CODE ANN. § 2961.11 (repealed 1974).

Further, these statutes prescribed the procedure under which an offender could be adjudicated an habitual offender. *Id.* § 2961.13.

70. See *supra* note 26 and accompanying text.

71. See *supra* note 69.

72. The Sixth Circuit Court of Appeals has held that an habitual offender statute violates due process when it fails to require pretrial notification of the intent to seek repeat offender status. *Edwards v. Rhea*, 238 F.2d 850 (6th Cir. 1956), *aff'g* 136 F. Supp. 671 (1955). See *Frost v. State*, 205 Tenn. 671, 330 S.W.2d 303 (1959). The Seventh Circuit however, allows the allegations of repeat offender status to be put forth for the first time just before sentencing. *United States v. Scales*, 249 F.2d 368 (7th Cir. 1957).

73. See *Chandler v. Freitag*, 348 U.S. 3 (1954); *United States v. Scales*, 249 F.2d 368 (7th Cir. 1957).

74. *Chandler v. Freitag*, 348 U.S. 3, 8 (1954).

alleged previous conviction does not exist or that it was obtained illegally.<sup>75</sup>

Ohio's repeat offender provisions<sup>76</sup> do not require the prosecutor to serve pretrial notice that he is seeking recidivist status. Further, insofar as the scheme sets forth no procedure for when or how the prosecutor is to allege the existence of a prior conviction, it provides no opportunity for the defendant to refute the allegation. Senate Bill 199 merely states that if an offender has been convicted of, or has pled guilty to, an aggravated felony or its equivalent in the past, he shall be sentenced to an enhanced minimum term of actual incarceration.<sup>77</sup>

The absence of any specified procedure implies that the court is to be informed of previous convictions by way of a presentence investigation (PSI) conducted during the period between conviction and sentencing. The PSI is a time-consuming and expensive procedure undertaken at the request of the court by the probation department.<sup>78</sup> Insofar as Federal Bureau of Investigation and Bureau of Criminal Investigation "rap sheets" list only arrests and not convictions, the PSI is the only tool by which the court can determine the existence of previous convictions.

Use of the PSI is discretionary with the court; only thirty to thirty-five percent of all offenders entering the Ohio institutions have had one conducted.<sup>79</sup> If all of the some 280 Ohio judges followed S.B. 199, they would be forced to order a PSI with respect to each offender. The resulting explosion in PSI work would undoubtedly require an increase in the size of probation department staff and, consequentially, an increase in the expenditure of tax dollars.

The current discretionary use of PSI's creates no due process problems; the sentencing judge merely reviews the report and uses it as a guide in determining the appropriate sentence to hand down. The judge can rely on the PSI or disregard it at his option and there is usually opportunity for the defendant to informally challenge any errors in the report. However, when the PSI is used as the deciding factor between mandatory actual incarceration and discretionary, individualized sentencing, the stakes increase and due process considerations come to the fore. Certainly, a defendant faced with alternatives of pro-

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75. The Supreme Court has ruled that when the first conviction was obtained in violation of the defendant's sixth amendment right to counsel, the conviction cannot be used as the foundation of an habitual offender charge. *Burgett v. Texas*, 389 U.S. 109 (1967).

76. *See supra* note 26 and accompanying text.

77. *Id.*

78. The average PSI takes three weeks for the Department of Probation to complete. Conversation with Mr. George Farmer, Superintendent, Probation Development and Supervision Section, Adult Parole Authority (Nov. 10, 1982) (on file with University of Dayton Law Review).

79. *Id.*

bation or an actual incarceration period of up to twelve years must have the right to challenge the accuracy of the PSI report which will be instrumental in deciding his fate.<sup>80</sup>

Two more problems with the wording of the S.B. 199 mandatory actual incarceration provisions have the potential of sparking litigation. The statutes provide that "[w]hoever is convicted of or pleads guilty to . . . an aggravated felony of the first, second or third degree and . . . has previously been convicted of or pled guilty to an aggravated felony of the first, second or third degree . . . shall be imposed a term of actual incarceration. . . ."<sup>81</sup> The problem that this language creates is that it fails to set a time frame in which the previous conviction, which will serve as the foundation for labeling the defendant a recidivistic offender, is to be used. By way of example, the questions are whether a sole previous conviction obtained fifty years ago will support the finding that the octogenarian offender is a repeat offender and whether a one night crime spree during which the defendant commits his first and second aggravated felony will cause him to be put under repeat offender status upon separate convictions for both crimes.

A Texas appellate court has ruled that the remoteness of the previous conviction is not material when considering the application of an habitual offender statute,<sup>82</sup> and a Pennsylvania court ruled that for the purposes of proving repeat offender status, the second criminal act must be committed after the first conviction.<sup>83</sup> Therefore, if the Ohio courts follow the reasoning of its two sister states, the octogenarian offender would face a mandatory prison term while the youthful and rambunctious offender would, in effect, have two first-time convictions.<sup>84</sup>

The new law's provisions for actual incarceration for committing a

80. See *supra* notes 72-76 and accompanying text.

81. See *supra* note 26 and accompanying text.

82. *Wesley v. State*, 149 Tex. Crim. 650, 198 S.W.2d 103 (1946). See also 39 AM. JUR. 2D *Habitual Criminals* § 6 (1968). To stave off the potential inequities caused by the lack of a cut-off period for previous offenses, the Ohio Parole Board lobbied unsuccessfully for the inclusion of a twenty-year limit on S.B. 199. Conversation with Mr. Jay Denton, Administrative Assistant to the Ohio Parole Board (Nov. 10, 1982) (on file with the University of Dayton Law Review).

83. *Commonwealth v. Calio*, 155 Pa. Super. 355, 357-58, 38 A.2d 351, 351-52 (1944).

84. The case of the 50 year-old conviction would be particularly susceptible to a charge of unconstitutionality as applied in the instant case. If the purpose of meting out terms of actual incarceration and enhanced sentences to repeat offenders is to isolate them from society on the theory that they cannot be rehabilitated, there is little doubt the courts would find the law constitutional on its face because there is a rational relationship between the means and the goal. Where a man has not committed a crime in fifty years, however, the purpose of the law is not advanced by applying it to him, since a period of fifty years between offenses is virtual *prima facie* evidence that rehabilitation has occurred.

crime with a firearm<sup>85</sup> are susceptible to many of the same arguments as discussed above for actual incarceration in general.<sup>86</sup> An additional problem, however, is the potential for an attack on equal protection grounds which would question the validity of the distinction made between a gun-wielding robber and the robber who carries a knife. Under section 2929.71 of the Ohio Revised Code, the robber with the firearm would receive a mandatory three-year sentence of actual incarceration in addition to the sentence for aggravated robbery. With the minimum standard of review used by the courts in equal protection cases, there is little doubt that section 2929.71 will be held constitutional.<sup>87</sup>

### C. *Definite Sentences*

The introduction of definite sentencing also brings with it a myriad of legal, practical and economic problems.<sup>88</sup> Primarily, section 2929.11(D) of the Ohio Revised Code prescribes the qualification requirements for definite sentencing. To be eligible, the offender must not have caused physical harm with a deadly weapon to any person during the commission of the current, or any previous offense.<sup>89</sup> The determination of whether the offender caused physical harm to anyone in the past will, just as in establishing prior convictions, necessitate a PSI.<sup>90</sup> Further, insofar as this statute uses the phrase "during the commission of any previous offense," it could be read to include both offenses for which no conviction was obtained<sup>91</sup> and offenses leading to an adjudication of juvenile delinquency.<sup>92</sup> In either case, due process problems may arise.<sup>93</sup>

Aside from the legal problems, definite sentencing causes many

85. OHIO REV. CODE ANN. § 2929.71 (Page Supp. 1983).

86. See *supra* notes 66-85 and accompanying text.

87. See *State v. Holmes*, 276 N.W.2d 823, 829 (Iowa 1979) holding: "Governmental interest in deterring use of firearms in commission of crimes would seem of . . . legitimate legislative concern. . . ."

88. OHIO REV. CODE ANN. § 2929.11(D) (Page Supp. 1983). See *supra* note 57 and accompanying text.

89. *Id.*

90. See *supra* notes 78-81 and accompanying text.

91. OHIO REV. CODE ANN. § 2929.11(D) (Page Supp. 1983). See *supra* note 84.

92. Insofar as juvenile offenders are not "convicted" but are "adjudicated a delinquent," the question of whether crimes committed while in minority can serve as the foundation for recidivistic status does not present itself. Here, however, the statute does not rely on past convictions, but rather on past offenses.

93. Due process requires, at a minimum, that a meaningful hearing be held to test the government's allegations. See, e.g., *Gideon v. Wainwright*, 372 U.S. 335 (1963). Selecting a sentence based on arrest records rather than conviction records by-passes this fundamental right by holding a defendant accountable for charges to which he may not have had an opportunity to respond. Much the same can be said for basing a sentencing decision on juvenile adjudications where the minor does not enjoy the full array of constitutional protections guaranteed to adults.

practical problems. When an offender is on parole from an indefinite sentence, he must see his parole officer on a regular basis or risk being returned to prison to complete his sentence. This supervision tends to dissuade the parolee from committing another offense, thus avoiding recommitment.<sup>94</sup> Without the supervision of a parole officer, the offender who has just completed a definite sentence is more apt to commit another offense.<sup>95</sup> When the lack of supervision inherent in a definite sentencing program is coupled with the fact that definite sentences are only administered to third and fourth degree non-violent felons<sup>96</sup> who statistically exhibit the highest recidivism rate,<sup>97</sup> a revolving door to the penitentiary is created.<sup>98</sup>

The economic problems caused by definite sentencing are common to virtually all of the S.B. 199 provisions. If the net result of these changes is the increase in Ohio's inmate populations through more frequent commitments and incarceration terms of longer duration, the cost to the Ohio taxpayer will increase dramatically. As of November 8, 1982 Ohio's inmate population stood at 17,085,<sup>99</sup> with an average increase of 200 inmates per month,<sup>100</sup> or, roughly, seven percent per year.<sup>101</sup> Although Ohio has passed a 650 million dollar bond issue to construct more prisons,<sup>102</sup> it will be five years before these facilities are ready to accept new inmates.<sup>103</sup> Even if the negative aspects of S.B. 199 do not materialize and the commitment rate maintains its rate of increase at seven percent per year, it is projected that Ohio will have an inmate population that exceeds its present number by 6500 individuals by the time the first new facility opens its doors.<sup>104</sup>

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94. Conversation with Mr. Jay Denton, Administrative Assistant to the Ohio Parole Board (Nov. 10, 1982) (on file with the University of Dayton Law Review).

95. States that have definite sentences show an average failure rate (recommitment rate) that is 13% greater than states with indefinite sentences coupled with parole. Maine's prison population increased 35% one year after definite sentences went into effect. *Id.*

96. OHIO REV. CODE ANN. § 2929.11(D) (Page Supp. 1983). Third and fourth degree non-violent felonies are basically property crimes.

97. Conversation with Jay Denton, Administrative Assistant to the Ohio Parole Board (Nov. 10, 1982) (on file with the University of Dayton Law Review).

98. "When you release the most recidivistic offender under circumstances which foster the most recidivism it naturally leads to a higher recurrence rate." *Id.*

99. Conversation with Mr. George Farmer, Superintendent, Probation Development and Supervision Section, Adult Parole Authority and Mr. Jay Denton, Administrative Assistant to the Ohio Parole Board (Nov. 10, 1982) (on file with the University of Dayton Law Review).

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

#### D. Economic Problems

The ill effects of S.B. 199 will surely be felt. Recommitments will increase dramatically because of the introduction of definite sentencing to property offenders;<sup>105</sup> commitment rates for second time offenders and those committing crimes with a firearm will increase because the judges have no choice but to incarcerate them;<sup>106</sup> and, once incarcerated an inmate will retain his bedspace for a longer time due to enhanced terms of sentencing and the introduction of actual incarceration.<sup>107</sup> It is impossible to predict with any accuracy the impact these changes will have on prisoner populations, but it is certain that before any new prisons are ready for occupation, the inmate population will drastically exceed the space available.<sup>108</sup>

#### IV. CONCLUSION

Senate Bill 199, Ohio's frontal assault on crime is a comprehensive, well-developed piece of legislation that will make a criminal conviction an expensive proposition for the criminal. By enhancing the terms of incarceration and limiting the use of probation and parole, the bill is expected to deter those who are contemplating committing a crime and separate from society those who already have.

In their preelection rush to establish reputations as crime fighters, the legislators have created a tough mandatory sentencing measure which the bench and bar will surely question. First, by stripping the judiciary of its ability to mete out individualized sentences, too many dolphins will be caught in the tuna net. Those who could be rehabilitated through probation or shock parole must now serve a long, non-probational prison sentence alongside those more deserving of the stay. Much litigation will surely be spawned by the failure of the legislature to provide for notice and a hearing on the repeat offender issue. Furthermore, Ohio's courts will have to determine whether juvenile offenses or offenses without convictions can keep a third or fourth degree felon from receiving a definite sentence.

Finally, the final economic price tag of S.B. 199 is not calculable, nor can an educated guess of the cost be made. Increases in inmate population, probation department staff and Department of Rehabilitation and Corrections personnel<sup>109</sup> will all go on the S.B. 199 tab. It is

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105. See *supra* notes 99-105 and accompanying text.

106. See *supra* notes 21-29, 34-35 and accompanying text.

107. See *supra* notes 12-33 and accompanying text.

108. OHIO REV. CODE ANN. § 2967.18 (Page Supp. 1983) provides for emergency release of certain inmates when overcrowding exists.

109. It is estimated that unless the computerization of Department of Rehabilitation and Corrections records is approved, the modification of good behavior calculations will result in a

an expensive proposition to fight crime, but whether the benefits of this legislative effort are worth the price is a question left for the future.

*Louie R. Kindell*

Code Sections Affected: 1.05; 301.27; 307.93; 341.21; 731.99; 753.16; 959.99; 1125.99; 1129.99; 1155.99; 1321.99; 1333.99; 1707.99; 2901.01-.02; 2903.03-.04, .11-.12; 2905.01-.02, .11; 2907.02, .10, .12; 2909.02-.03, .05, .11; 2911.01-.02, .11-.12; 2913.02, .11, .21, .43, .51, .61; 2915.05; 2917.02; 2923.01; 2925.01; 2929.01, .11-.14, .221, .31, .41, .51, .61, .71; 2941.141; 2947.051, .06, .061; 2949.02, .12; 2953.09; 2967.01, .05, .13, .18, .19, .191, .26, .31; 3504.06; 3599.01, .12, .15-.16, .21, .26-.29, .33-.34; 3761.99; 3769.99; 4399.99; 4903.99; 4905.99; 4907.99; 4909.99; 4931.99; 4933.99; 5113.99; 5120.16, .161; 5143.05, .06, .07, .10, .21, .23; 5145.01-.02; 5703.99; 5747.99; 5749.99; 5915.99; 6101.99.

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Judiciary and Criminal Justice (H)

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need for 36 additional staff members for the Department of Rehabilitation and Corrections at an annual cost of one-half a million dollars. This is due to the fact that 12,000 to 15,000 extra calculations per month will be required to determine if the inmate has "faithfully observed the rules of the institution." OHIO REV. CODE ANN. § 2967.19(A) (Page Supp. 1983). Conversation with Mr. George Farmer, Superintendent, Probation Development and Supervision Section, Adult Parole Authority and Mr. Jay Denton, Administrative Assistant to the Ohio Parole Board (Nov. 10, 1982) (on file with the University of Dayton Law Review).

