Appendix

Crime and Punishment in New York:

An Inquiry Into Sentencing And The Criminal Justice System

ORT TO GOVERNOR HUGH L. CAREY
PREPARED BY
IVE ADVISORY COMMITTEE ON SENTENCING

APPENDIX

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Report to Governor Hugh L. Carey
Prepared by
The Executive Advisory Committee on Sentencing

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APPENDIX A

Statistical Profile of New York's Criminal Justice System

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Summary

The tables contained in this Appendix present statistics relating to crime, punishment and the criminal justice process in New York during 1977. The information they convey is, for the most part, based on official data published by New York's criminal justice agencies. As we described in the final section of our report, because these sources maintain only aggregate statistics which do not permit tracking individual cases through the system, the description of what happens at each processing point is necessarily approximate rather than exact. Deficiencies in official data also limit the types of cases and the discrete stages of the criminal justice process which are described. No useful information, for example, is collected regarding misdemeanor dispositions; similarly, when and how felony arrests are disposed of prior to indictment is not reported, and of necessity is excluded from this Appendix.

Despite the substantial failings of official statistics, the data *is* sufficient to provide insight into the operation of the criminal justice process in New York. One of the most striking aspects of the portrait which can be drawn from available law enforcement statistics is the fact that few crimes lead to arrest or conviction. In 1977, 1,083,483 major offenses were reported to the police, but fewer than 150,000 of these complaints resulted in an arrest, and approximately 20,197 led to a felony conviction. Equally notable is the immense variation in the type and duration of punishments imposed following conviction in New York. Sentences for defendants convicted of Robbery 1°, for example, run from 3 to 25 years — the entire spectrum of permissible maximums — and are fairly evenly distributed at all points in between.

The tables which follow present, in as much detail as the data permits, what happened during 1977 at each stage of the criminal justice process in the state's three major regions — New York City (which accounts for the bulk of all felony prosecutions in the state), its suburban counties, and upstate New York. A brief commentary is provided with each table in order to highlight the information which is presented. Some of the major points are as follows:

1. *Crime in New York*

New Yorkers reported 1,083,483 major offenses in 1977. The bulk of reported crimes were property offenses; crimes of violence constitued only 13.7% of reported major offenses. Reported crime does

not, however, represent the total. Only about half of all criminal offenses — a higher percentage of the most serious offenses, a lower percentage of lesser offenses — are reported to the police.

2. *Arrests*

Most reported crimes were not solved; for only 16.5% of reported major offenses was a suspect arrested. The lowest clearance rates were for property offenses; only 8% of motor vehicle thefts and 13.9% of burglaries were solved. The highest rates — 63% for murder and 53.6% for assault — were for serious violent offenses.

3. *Indictments*

Most felony arrests were not prosecuted as felonies. Only 22.5% of defendants arrested for a felony offense were indicted on felony charges. There is considerable regional variation in indictment rates; 42.1% of felony arestees upstate were indicted, compared with 33.7% in suburban counties and 15.8% in New York City.

The types of offenses for which indictments were issued also varied regionally. Violent crimes constituted nearly 60% of New York City indictments, approximately twice the rate of upstate and suburban counties.

4. *Convictions*

Most defendants who were indicted for a felony offense were convicted; across the state 79.4% of indictments resulted in conviction. Unlike indictment rates, conviction rates did *not* show substantial regional variation. 76.5% of indicted defendants in New York City were convicted, compared with 80.3% of upstate and 87.6% of suburban defendants.

Most of the post indictment convictions were to felony charges; statewide only 19.5% of the convictions entered following indictment for a felony offense were to a misdemeanor or other charge. The highest felony conviction rate (89.1%) was in New York City, the lowest (70.2%) in the suburban counties.

5. *Plea-Bargaining*

Few cases went to trial. Statewide, more than 90% of convictions were the result of guilty pleas. The trial rate was highest in New York

City (11.5%) and lowest in suburban counties (6.1%). Charge reduction patterns were similar across the state; roughly two-thirds (66.6% in New York City, 62.9% in suburban counties and 73.9% upstate) of defendants convicted after indictment for a felony offense were convicted of a charge no more than one felony class lower than the top indictment charge.

6. *Dispositions*

Statewide 60% of defendants convicted after indictment on felony charges were sent to prison or jail, while 40% received probation or another non-incarcerative sanction. The proportion of defendants sent to state prison varied markedly by region; 52.2% of New York City defendants went to state prison, as compared with 29.3% and 24.4% of suburban and upstate defendants respectively.

7. *Maximum Sentences to State Prison*

There was widespread variation in the length of maximum terms of offenders convicted of the same offenses. Maximum terms of defendants convicted in upstate counties were consistently longer than those imposed by New York City or suburban judges, but there was also widespread variation *within* each region as well.

8. *Actual Time Served in State Prison*

Substantial variation also characterized the length of time offenders convicted of the same offense *actually served* in state prison. For offenders convicted of Manslaughter I, for example, time served ranged from 13.7 to 137.7 months. 21% served terms of 3 years or less, 10% terms of over 6 years. On the average, inmates in our sample generally served between ⅓ and ½ of their maximum sentences before they were released on parole.

Before proceeding to the tables and commentary, we emphasize again that because the data collection systems currently operated by criminal justice agencies in New York simply do not permit sophisticated or exact analysis, the figures presented are in some instances basically approximations. In 1927, the first New York Crime Commission reported that to answer the most basic questions about the criminal justice process "there is needed much more than the reports that are now made anywhere by our law enforcement agencies. Their records are for the most part poor, inadequately kept, [and] not uniform from one...county to another."

In the past 50 years, little has changed. Law enforcement agencies use different crime definitions* and employ different units of measure. Police and prison officials count individual arestees or inmates, while courts and prosecutors count indictments — of which any ten may represent one arrestee indicted ten times, or ten arrestees indicted once. Moreover, the reports published by each agency do not necessarily describe the same cases. The statistics thus provide no sense of case-flow and include anomalies such as the indication in one 1977 report that a suburban county had more convictions than indictments. In short, the data is sufficient only to provide rough *estimates* of how cases are processed, and offers little insight into the *reasons* for these results.

With these caveats in mind, what follows is a profile of the processing of major crimes in New York.

* Police statistics employ FBI Uniform Crime Report offense definitions which do not correspond to New York penal law classifications.

Section I: *The Scope of the Crime Problem*

Introduction

Many crimes are not reported. Therefore, official statistics on the nature and extent of criminal activities in New York State greatly underestimate the incidence of crime. The "victimization" survey is one technique which has been employed to obtain a more comprehensive view of the scope of the crime problem than is available from official statistics.* The following is a summary of the findings from a victimization survey conducted in 1975 by the National Crime Survey Program concerning victimizations of New York City residents and businesses in 1974.[1]

The survey was conducted in this fashion: New York City residents (age 12 and over) were interviewed concerning whether they had been the victim of a rape, robbery, assault, larceny, auto theft or residential burglary in 1974. Operators of commercial establishments were also surveyed concerning whether their business had been robbed or burglarized in 1974.**

Since this survey related to only a limited number of offenses, its findings underestimate the extent and variety of criminal activity; nevertheless, the data does provide some insight into the scope of the crime problem in New York City in 1974.[4]

1974 New York City Victimization Survey: An Overview

Diagram A presents the overall distribution of offenses reported in the 1974 victimization survey. Personal larceny without contact between the victim and the offender was the largest single offense category, constituting nearly one-fourth (23.8%) of all of the victimizations reported in the survey. The second largest category was residential burglary (15.4%) closely followed by burglary of a com-

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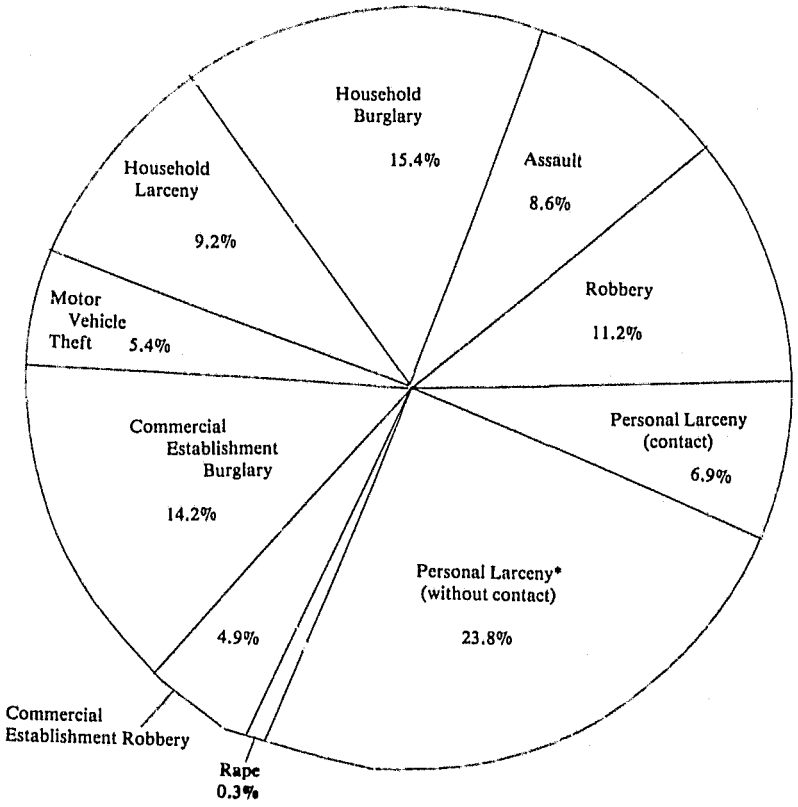
* The findings from a recent national victimization survey indicate that about half of all crimes of violence, and about a third of all thefts, were reported to the police. In general, crimes of violence were more likely to be reported than property crimes; nevertheless, there was considerable variation in the reporting rates within the broad categories.[2]

** Individuals from a representative sample of approximately 10,000 households and 3,200 business were interviewed. Based on the findings from the sample, the victimization rates per offense are calculated for the entire population age 12 and over.[3]

DIAGRAM A: Personal, Household, and Commercial Crimes: Percent Distribution of Victimizations, by Sector and Type of Crime for New York City, 1974



SOURCE: U.S. Department of Justice, Law Enforcement Assistance Administration, *A National Crime Survey Report: Criminal Victimization Surveys, A Comparison of 1972 and 1974 Findings*, Report No. SD-NCS-C-6 (November, 1976) at 61.

*Personal larceny without contact is defined as theft by stealth.

NOTE: Details do not add up 100% because of rounding.

mercial establishment (14.2%). Violent crime (rape, assault, and robbery) accounted for 25% of the offenses described in the survey.

An Overview of Victimizations

Table 1 shows the frequency of various offenses within three types of victim sectors: 1) personal, 2) households and 3) commercial establishments.

As the table indicates, half (50.7%) of the victimizations reported in the survey were personal crimes (e.g., assault, robbery), approximately one-third (30.2%) crimes against households, and about one-fifth (19.1%) crimes against commercial establishments.

The statistics reflected in this table concerning crimes *against persons* may be summarized as follows:

— Violent crimes constituted 39.5% of the crimes reported by individuals; property crimes, 60.4%.

— The largest single offense category reported was personal larceny without contact (46.8%).

— The second largest category was robbery (22.1%).

— More than half of the reported offenses involved direct contact between the victim and the perpetrator, although only a relatively small proportion (13.8%) of these confrontations resulted in physical injury to the victim.[5]

From the survey data, it appears that in 1974 about one out of every nine residents in New York was a victim of one of the four crimes listed. About one out of 23 residents was the victim of a violent crime; one out of 15 residents was the victim of theft.

Approximately 15% of the households surveyed reported that their homes had been burglarized, that property had been stolen from the home, or that their automobile had been stolen.

Crimes against business establishments or the commercial sector constituted about one-fifth (19.1%) of the offenses reported in the victimization survey. For the commercial sector, only data concerning the burglaries and robberies were collected. As indicated in Table 1, burglaries accounted for three-quarters (74.3%) of offenses against business establishments, robberies one-fourth (25.7%). An estimated four out of ten establishments were the victims of burglary or robbery; 29% of the businesses were burglarized, 10% were robbed.

TABLE 1 Personal, Household and Commercial Crimes: Number and Percent Distribution of Victimizations, by Sector and Type of Crime for New York City, 1974

	Number of crimes	% within sector	% of all crimes
All Crimes	1,311,200		
I. Personal Sector	665,400	100.0	50.7
A. Crimes of Violence	263,200	39.5	20.1
1) Rape	4,200	0.6	0.3
a) Completed rape	1,200	0.2	0.1
b) Attempted rape	3,100	0.4	0.2
2) Robbery	146,800	22.1	11.2
a) Robbery with injury	35,500	5.3	2.7
b) Robbery without injury	111,300	16.7	8.4
3) Assault	112,100	16.9	8.6
a) Aggravated assault	52,700	7.9	4.0
b) Simple assault	59,400	8.9	4.5
B. Crimes of Theft	402,300	60.4	30.7
1) Personal larceny with contact	90,800	13.6	6.9
2) Personal larceny without contact	311,400	46.8	23.8
Total Population Age 12 & over	6,151,400		
II. Household Sector	395,700	100.0	30.2
1) Burglary	202,700	51.2	15.4
2) Household larceny	120,900	30.6	9.2
3) Motor vehicle theft	72,100	18.2	5.4
Total Number of Households	2,618,200		
III. Commercial Sector	250,100	100.0	19.1
1) Burglary	185,800	74.3	14.2
2) Robbery	64,300	25.7	4.9
Total Number of Commercial Establishments	638,500		

SOURCE: U. S. Department of Justice, Law Enforcement Assistance Administration, *A National Crime Survey Report: Criminal Victimization Surveys, A Comparison of 1972 and 1974 Findings,* Report No. SD-NCS-C-6 (November, 1976) at 61.

NOTE: Details may not add up to total shown because of rounding.

Crimes of Violence

In the course of the survey, respondents were asked whether they had been the victim of rape, robbery, or assault, and whether they knew their assailant. Table 2 indicates that in the overwhelming majority (88.3%) of violent confrontations the victims did not know the perpetrator of the offense. There is some variation across offense categories: only 6% of robbery, and 7.1% of rape victims knew the offender. Assault victims were the most likely to have known their assailant (24.6%). The degree of physical injury resulting from the incident does not appear to be related to whether the perpetrator was an acquaintance or a stranger. From Table 3, it can be estimated that a New York City resident over the age of 12 had four chances out of a hundred of being the victim of a violent crime in 1974.

Family Income and Its Relationship to Victimizations

As Table 4 indicates, there appears to be *no* systematic relationship between annual family income and the probability of being a victim of a violent crime.

For crimes of violence there was very little reported variation in the victimization rate for different economic groups. For families reporting an annual income of less than $3,000, the victimization rate was 51.8 offenses per 1,000 residents (age 12 or over). This victimization rate is similar to the 48.8 reported for persons with an annual family income of $25,000 or more. In other words, approximately five out of every 100 people in both these income groups were the victims of a violent crime in 1974. Persons in the lowest income bracket, however, were slightly more likely to have been the victims of assault than were persons with higher incomes.

In sharp contrast to victimization patterns for violent crimes, there appeared to be direct relationship between annual family income and the probability of being a theft victim. As annual family income increased, the victimization rate increased dramatically. Persons at the lowest end of the income spectrum reported a 55.3 victimization rate, almost one-half the rate of persons in the highest income bracket (96.5). The lowest income respondents were, however, about twice as likely to have been the victims of a "personal larceny with contact" (29.3 to 14.8 respectively). For "personal larceny without contact," the relationship was reversed. High income respondents were two to three times as likely to have been the victims of this type of offense as low interviewees.

TABLE 2: Personal Crimes of Violence: Number of Victimizations for Persons Age 12 and Over, by Type of Crime and Victim-Offender Relationship for New York City, 1974

	TOTAL	Involving Strangers		Involving Non-Strangers	
		Number	%	Number	%
Rape	4,200	3,900	92.9	300	7.1
Robbery	146,900	138,600	94.3	8,300	5.7
With Injury	35,600	33,100	93.0	2,500	7.0
Without Injury	111,300	105,500	94.8	5,800	5.2
Assault	119,100	89,800	75.4	22,300	24.6
Aggravated Assault	52,700	40,900	77.6	11,800	22.4
Simple Assault	59,400	48,900	82.3	10,500	17.7
Totals	263,200	232,300	88.3	30,900	11.7

SOURCE: U. S. Department of Justice, Law Enforcement Assistance Administration, *A National Crime and Survey Report: Criminal Victimization Surveys, A Comparison of 1972 and 1974 Findings*, Report No. SD-NCS-C-6 (November, 1976) at 62.

TABLE 3: Personal Crimes of Violence: Number and Victimization Rates for Persons Age 12 and Over for New York City, 1974

Type of Crime	*Number*	*Rate*
Crimes - Violent	263,200	42.8
A. Rape	4,200	0.7
B. Robbery	146,800	23.9
C. Assault	112,100	18.2
1) Aggravated	52,700	8.6
2) Simple	59,400	9.7

SOURCE: U. S. Department of Justice, Law Enforcement Assistance Administration, *A National Crime Survey Report: Criminal Victimization Surveys, A Comparison of 1972 and 1974 Findings*, Report No. SD-NCS-C-6 (November, 1976) at 61 and 63.

TABLE 4: Personal Crimes: Victimization Rates for Persons Age 12 and Over, by Type of Crime and Annual Family Income for New York City, 1974

(Rate per 1,000 resident population age 12 and over)

Types of crime	Less than $3,000	$3,000-$7,499	$7,500-$9,999	$10,000-$14,999	$15,000-$24,999	$25,000- or more
	398,800[1]	1,455,600	610,000	1,339,300	1,045,000	415,300
Crimes of violence	1.8	45.6	38.3	44.4	43.8	48.8
Rape	0.7[2]	1.0[2]	0.5[2]	0.4[2]	0.3[2]	0.2[2]
Robbery	24.4	28.6	21.6	26.1	23.1	25.2
Robbery with injury	7.6	7.4	6.0	5.4	5.1	5.0[2]
Robbery without injury	16.8	21.1	15.6	20.6	17.9	20.2
Assault	26.6	15.9	16.2	17.9	20.4	22.9
Aggravated assault	17.5	7.7	6.0	8.4	8.8	10.8
Simple assault	9.1	8.2	10.3	9.6	11.7	12.2
Crimes of theft	55.3	49.0	64.5	66.9	87.9	96.5
Personal larceny with contact	29.3	17.4	14.8	12.7	9.4	14.8
Personal larceny without contact	26.1	31.6	49.7	54.2	78.4	81.7

SOURCE: U. S. Department of Justice, Law Enforcement Assistance Administration, *A National Crime Survey Report: Criminal Victimization Surveys, A Comparison of 1972 and 1974 Findings*, Report No. SD-NCS-C-6 (November, 1976) at 65.

[1]Estimation of the number of persons within each income bracket.

[2]These estimates were based on 10 or fewer sample cases; therefore the estimate may be unreliable.

Victimization According to Race of Victim

As Table 5 indicates, "blacks" reported a somewhat higher victimization rate (53.6) for crimes of violence than "whites" (40.2) or "others" (30.0). The higher overall victimization rate for blacks is due to the fact that blacks experienced a higher robbery victimization rate than whites. Whites were as likely to be the victims of theft or assault as were blacks.

Additional Findings

The following are some additional findings from the victimization survey:

— The victimization rate for crimes of violence was nearly twice as high for men as for women (56.7, and 31.5, respectively).[6] The victimization rates for crimes of theft were similar for men and women (69.0 and 62.5, respectively).

— The victimization rate for violent crimes decreased as age increased.[7] The victimization rate was slightly over 50 per 1,000 and remained relatively constant for persons ages 12 to 34. The rate steadily declined from 51.9 for persons aged 25 to 34, to 25.3 for persons over 65. Persons aged 12 to 15 had the highest victimization rate (58.1) for violent crimes.

— There was considerable variation in the victimization rate for violent crime according to marital status.[8] The lowest victimization rate was reported for widowed persons (20.0), followed by married persons (34.7), and persons who had never been married (56.2). The highest victimization rate was reported for divorced or separated persons (72.5); this rate was more than double that reported for married persons.

TABLE 5: Personal Crimes: Victimization Rates for Persons Age 12 and Over, by Type of Crime and Race of Victim for New York City, 1974

(Rate per 1,000 resident population age 12 and over)

Type of Crime	White 4,655,100[1]	Black 1,309,300	Other 187,000
Crimes of Violence	40.2	53.6	30.0
Rape	0.5[2]	1.4[2]	1.6[2]
Robbery	21.0	34.4	20.5
Robbery With Injury	4.7	10.3	1.5[2]
Robbery Without Injury	16.4	24.1	18.9
Assault	18.8	17.8	8.0[2]
Aggravated Assault	8.3	10.4	3.2[2]
Simple Assault	10.5	7.4	4.8[2]
Crime of Theft	65.7	65.7	56.6
Personal Larceny With Contact	14.0	16.7	19.1
Personal Larceny Without Contact	51.6	49.0	37.5

SOURCE: U. S. Department of Justice, Law Enforcement Assistance Administration, *A National Crime Survey Report: Criminal Victimization Surveys, A Comparison of 1972 and 1974 Findings*, Report No. SD-NCS-C-6 (November, 1976) at 64.

[1]Estimations of the number of persons within each racial category.

[2]These estimates were based on 10 or fewer sample cases, therefore the estimate may be unreliable.

Section II: *The Law Enforcement Process*

Complaint Data

This section describes reported crime as reflected in the statistics provided by New York law enforcement agencies in 1977.*

Law enforcement agencies in New York report crimes using the Uniform Crime Reporting ("UCR") offense classifications developed by the Federal Bureau of Investigation, which are designed to cut across regional differences in offense definitions. Part I index of offenses are divided into seven broad categories: 1) criminal homicide, 2) forcible rape, 3) robbery, 4) aggravated assault, 5) burglary, 6) larceny, and 7) motor vehicle theft. These definitions exclude a number of crime categories that are felonies in New York, including arson, kidnapping, and various drug offenses. Figures for Part I offenses therefore understate the extent of serious criminal behavior reported or known to the police.

In 1977, according to statistics published by the New York State Division of Criminal Justices Services ("DCJS"), 1,083,483 Part I index offenses were reported or known to the various law enforcement agencies.[9] In addition, a net total of 1,087,567 Part II offenses were known or reported to the police.[10] Part II offenses include a wide variety of offense behavior ranging from kidnapping and bribery, which are fairly rare but serious offenses, to more common but less serious offenses such as prostitution, forgery, loitering and disorderly conduct.**Due to the volume and complexity of the data, the following discussion will relate solely to Part I offenses.

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* Due to both the nature of the data collected in the victimization study, and the type of statistics compiled by New York City law enforcement agencies, it is *not* possible to determine the correspondence between *actual* criminal events, and the *reporting* of these incidents. The reader is cautioned *not* to try to compare the victimization rates to the complaint rates and arrest rates reported in this section. The data bases from which these statistics were derived *are not comparable* and therefore any conclusions that may be drawn would be misleading.

** Part II offenses encompass the following: Arson (commercial or residential), kidnapping, controlled substance, dangerous weapons, bribery, sex offenses, extortion, forgery and counterfeiting, prostitution and vice, stolen property, coercion, criminal mischief, fraud, gambling, (e.g., bookmaking, lottery), offenses against the public order, embezzlement, simple assault, offense against family, driving under the influence, unauthorized use of a vehicle, possession of burglar tools, liquor law violations, disorderly conduct, drug, public intoxication, loitering, and all other offenses."

In 1977, 1,148,758 Part II offenses were reported or known to the police; 61,191 were classified as "unfounded" complaints, reducing the number of complaints to 1,087,567.[12]

Table 6 presents the distribution of Part I offenses known or reported to New York State law enforcement agencies in 1977. Crimes of violence (murder, manslaughter by negligence, rape, robbery, and aggravated assault) collectively comprised a relatively small proportion (13.7%) of these offenses. The vast majority (86.3%) of the complaints concerned property crimes (burglary, larceny, and motor vehicle theft). Thus, although crimes of violence are of great public concern, they are relatively rare events, at least in terms of total crimes reported to the police.

Table 6 also includes the number of complaints made for the Part I offense categories, calculated per 100,000 residents in the State in 1977. As it shows, almost six Part I index offenses were reported for every 100 residents. The complaint rate per 100,000 varied across the offense categories from a low of 0.9 for negligent manslaughter to a high of 2,674.1 for larceny.

TABLE 6: Number and Complaint Rate Per 100,000 New York State Residents for Part I Offenses, 1977

	Number	Rate Per 100,000
Total Part I Offenses	1,083,483	5,874.2
Murder	1,913	10.4
Manslaughter by Negligence	171	0.9
Rape	5,260	28.5
Robbery	83,772	454.2
Aggravated Assault	57,030	309.2
Burglary	308.941	1,674.9
Larceny	493,237	2,674.1
Motor Vehicle Theft	133,159	721.9

SOURCE: New York State Division of Criminal Justice Services, *Crime and Justice, Annual Report: 1977* (1978) at 5.

Clearance Data

The "clearance" rate pertains to the percentage of reported offenses that are "cleared" by the arrest of a suspect. This does not mean that the case was "solved" or that the suspect actually commited the offense in question. It simply means that someone was arrested for committing a particular offense.[13]

Table 7 shows the distribution for the seven Part I offenses and their respective clearance rates.

For 1977, the overall clearance rate for Part I complaints was 16.5%; less than one in five complaints was cleared by the arrest of a suspect. There was, however, considerable variation in the clearance rates across these seven offense categories. For example, the clearance rates for property offenses — including burglary (13.9%), larceny (15.5%), and motor vehicle theft (8.0%) — were uniformly low. With the exception of robbery (17.5%) the clearance rates for crimes of personal violence were relatively high: for murder, 63.0%; rape, 41.9%; and assault, 53.6%. In addition, the Division of Criminal Justice Services reported a clearance rate of 61.9% for Part II offenses.[14] This relatively high clearance rate is explained by the fact that many of these crimes involved offenses against the public order such as drug possession, disorderly conduct, and loitering. In such instances, the arresting officer is often the complainant.[15]

TABLE 7: Number of Complaints, Number of Clearances, and Clearance Rate for Part I Offenses, New York State, 1977

OFFENSE	Number of Complaints	Number Cleared	Clearance Rate
Murder[1]	2,084	1,313	63.0%
Rape	5,260	2,203	43.9%
Robbery	83,772	14,620	17.5%
Aggravated Assault	57,030	30,572	53.6%
Burglary	308,941	43,015	13.9%
Larceny	493,237	76,561	15.5%
Motor Vehicle Theft	133,159	10,641	8.0%
TOTAL	1,083,483	178,925	16.5%

SOURCE: New York State Division of Criminal Justice Services, *Crime and Justice: Annual Report: 1977* (1978) at 15.

[1]Murder includes manslaughter by negligence.

Characteristics of Arrests and Arrestees

Table 8 indicates the age and sex of those arrested in 1977 for Part I and Part II offenses.* This data may be summarized as follows:

— 853,344 arrests for Part I and II offenses were reported in New York State in 1977.[16]

— 22% (186,880) of all arrests related to Part I offenses; 78% (666,464) concerned Part II offenses.

— 85.6% (730,626) of all arrestees were males; 14.4% (122,718) were females.

— 87.0% (737,508) of all arrestees were adults (persons 16 years of age or older at the time of the offense). 13.0% (115,836) were juveniles.

TABLE 8: Number and Percent Distribution of Adult and Juvenile Arrests for Part I and Part II Offenses by Sex or Arrestee - New York State, 1977

(N = 853,344)

OFFENSES	ADULT ARRESTS						JUVENILE ARRESTS					
	Male		Female		Adult Total		Male		Female		Juvenile Total	
	Number	%	Number	%	Number	%	Number	%	Number	%	Number	%
Grand Total Part I Offenses N = 186,880[1]	121,959	19.2	24,580	23.7	146,539	19.9	34,525	35.6	5,816	30.7	40,341	34.8
Grand Total Part II Offenses N = 666,464[1]	511,779	82.8	79,190	76.3	590,969	80.1	62,363	64.4	13,132	69.3	75,495	65.2
Total	633,738	100.0	103,770	100.0	737,508	100.0	96,888	100.0	18,948	100.0	115,836	100.0

SOURCE: New York State Division of Criminal Justice Services, *Crime and Justice: Annual Report - 1977* (1978) at 95-96.

[1]Number of cases in category.

* No comparable data is available concerning felony arrests.[17]

TABLE 9: Number and Percent Distribution of Part I Offenses by Sex of Arrestee and Offense Category — New York State, 1977

	ADULTS[1]			GRAND TOTAL[2]			
OFFENSE	MALE	FEMALE	TOTAL	MALE	FEMALE	ALL CASES	%
Murder	1,078	100	1,178	1,115	104	1,219	0.7
Non-Negligent Manslaughter	88	18	106	91	18	109	-[3]
Negligent Manslaughter	63	11	74	68	11	79	-
Forcible Rape	2,254	22	2,276	2,447	26	2,473	1.3
Robbery	15,695	1,142	16,837	20,190	1,512	21,702	11.6
Aggravated Assault	19,973	3,023	22,996	21,981	3,376	25,357	13.6
Burglary	32,284	1,647	33,931	44,690	2,309	46,999	25.1
Larceny/Theft	40,989	18,059	59,048	53,946	22,310	76,256	40.8
Motor Vehicle Theft	9,535	558	10,093	11,956	730	12,686	6.9
TOTAL	121,959	24,580	146,539	156,484	30,396	186,880	100.0

SOURCE: New York State Division of Criminal Justice Services; *Crime and Justice: Annual Report - 1977* (1978) at 98.

[1]Adult is defined as a person age 16 or over.

[2]Includes Juvenile and Adult Offenders.

[3]"—" indicates less than one-tenth of one percent.

Section III: *Indictment and Post-Indictment Patterns*

Introduction

There were 139,625 felony arrests in 1977.[18] During this same period, however, only 31,360 defendant-indictments were filed.* At present, given the quality of official data, it is generally impossible to determine when, where, or how felony arrests were disposed of in the pre-indictment stages. Thus, by necessity, the remaining sections of this chapter pertain only to indictment and post-indictment felony processing, including:

- The percentage of felony arrests that result in the filing of a defendant-indictment for each of the major regions of the state.
- The distribution of the indictments filed by offense category for the three regional areas.
- An overview of post-indictment disposition patterns.
- Regional variation in charge-change and charge-reduction patterns.
- Regional variations in post-indictment conviction patterns.

A. *Regional Variation in Indictment Patterns*

1. *An Overview*

As we have indicated above, only one in every 4.5 felony arrests resulted in an indictment in New York State in 1977.**

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* The unit of measurement employed by the court system and the Division of Criminal Justice Services is the "*defendant-indictment*". These statistics include every defendant named in every indictment. Thus, when several defendants are named in one indictment, each defendant is counted separately; when one defendant is named in multiple indictments arising from the same transaction, each indictment is also counted separately. As a result, if it were reported that there were ten defendant indictments for Robbery 1°, it would be impossible to determine from official statistics whether this referred to ten defendants who were each indicted once, or one defendant indicted ten times for the same transaction.[19]

For the remainder of this chapter, "defendant-indictments" will be referred to simply as "indictments".

** Because the police and court system use different offense units of count, offense definitions and time frames, it is not possible to make a direct transition from arrest to indictment data. Thus, the exact relationship between arrests and indictments filed cannot be determined; the ratios reported in this section are only rough approximations.

As Table 10 indicates, there was considerable variation across New York's three main geographical areas (New York City, suburban New York City, and upstate counties) with regard to the proportion of felony arrests that were followed by an indictment.[20] The highest indictment rate was in the upstate counties, where roughly two of every five arrestees were subsequently indicted. For New York City, fewer than one out of every five persons (16%) arrested for felonies were subsequently indicted. This rate was also considerably lower than the suburban rate. In those suburban areas, one out of three (33.7%) felony arrests resulted in an indictment.

Table 11* shows the offense distribution for all indictments filed statewide and for the three major regions. Crimes of violence, (including assault, homicide, robbery, rape, kidnapping, arson, or criminal possession of a weapon) constituted 43.2% (13,392) of the indictments statewide. The proportion of indictments filed for violent crimes varied considerably by region. 58.3% (9,109) of the New York City indictments were for violent crimes, which was more than double the rate for the upstate counties, 26.1 (2,837) and over one and a half times the rate for the suburban counties, 32.1% (1,446).

2. *Regional indictment patterns for six major offenses:*

Two-thirds of the indictments filed in each of the three regions of New York State fell into six offense categories: assault, homicide, rape, burglary, larceny and robbery.[21]

Table 12 describes the number and percentage of total indictments for these six major offense categories.** Statewide, the largest single offense category was burglary, which constituted 35.9% of the indictments in this group. Burglary and robbery indictments *together* constituted two-thirds (67.7%) of the total indictments. Crimes of violence (assault, 7.6%; homicide, 8.7%; rape, 5.8%; and robbery, 31.8%) constituted slightly more than half (53.9%) of the total indictments for these six offense categories statewide.

There were substantial regional differences in indictment patterns:

— Seventy percent of the New York City indictments for these six offense categories

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* No information is available from official publications concerning the specific Penal Law sections for which defendants were indicted. Indictment statistics merely reflect broad offense categories.

** The largest single category of crimes not represented are offenses involving the possession or sale of controlled substances, which comprised 12.2% of all indictments disposed of in 1977.[22]

TABLE 10: Number of Felony Arrests and Defendant-Indictments Filed by Region - 1977

Area	Number of Felony Arrests	Number of Defendant-Indictments Filed	%[1]
New York State	139,625	31,360[2]	22.5
New York City	100,103	15,837	15.8
Suburban New York City Counties	13,445	4,524	33.7
Upstate Counties	26,077	10,970	42.1

SOURCE New York State Division of Criminal Justice Services, *Crime and Justice: Annual Report, 1977*, at 135 and 143.

[1]% is the percentage of felony arrests resulting in indictment.

[2]Includes indictments initiated by Special Nursing Home prosecutors; therefore, regional indictments do not equal the statewide total.

NOTE: Because the police and court systems use different offense units of count, offense definitions and time frames, it is not possible to make a direct transition from felony arrests to indictment data. The exact relationship between the number of arrests and indictments filed cannot be determined. Thus, the ratios presented in this table represent rough approximations, and the results should be interpreted cautiously.

TABLE11: Number and Percent Distribution of Felony Indictments Filed by Penal Law Article and Region — 1977

INDICTMENT CHARGE		Statewide		New York City		Suburban Counties[1]		Upstate Counties[2]	
OFFENSE	Penal Law Article	Number	%	Number	%	Number	%	Number	%
Conspiracy	105	99	0.3	54	0.3	24	0.5	21	0.2
Assault	120	1,555	5.0	670	4.3	254	5.7	631	5.8
Homicide	125	1,777	5.7	1,348	8.6	137	3.0	292	2.7
Rape	130	1,177	3.8	548	3.5	153	3.4	476	4.4
Kidnapping	135	143	0.5	93	0.6	14	0.3	36	0.3
Burglary	140	7,323	23.6	2,335	14.9	1,259	28.0	3,729	34.3
Criminal Mischief	145	130	0.4	8	0.0	20	0.4	102	0.9
Arson	150	435	1.4	193	1.2	48	1.1	194	1.8
Larceny	155	2,057	6.6	744	4.8	409	9.1	882	8.1
Robbery	160	6,485	20.9	4,785	30.6	726	16.2	974	9.0
Other Theft	165	1,042	3.4	359	2.3	164	3.7	519	4.8
Forgery	170	865	2.8	145	0.9	175	3.9	545	5.0
Bribery	200	142	0.5	103	0.7	23	0.5	16	0.2
Hindering Prosecution	205	211	0.7	52	0.3	19	0.4	149	1.4
Bail Jumping	215	224	0.7	138	0.9	29	0.7	57	0.5
Drugs	220	3,722	12.0	2,323	14.9	519	11.6	880	8.1
Marijuana	221	57	0.2	18	0.2	9	0.1	30	0.3
Gambling	225	294	0.9	105	0.7	129	2.9	60	0.6
Weapons	265	1,820	5.9	1,472	9.4	114	2.5	234	2.2
Other Penal Law Felonies		245	0.8	90	0.6	52	1.2	96	0.9
Tax Felonies		27	0.1	25	0.2	2	0.0	—	—
VTL Felonies[3]		1,166	3.8	11	0.1	216	4.8	939	8.6
Other Felonies		5	0.0	5	0.0	—	—	—	—
TOTAL		31,001[4]	100.0	15,624	100.0	4,495	100.0	10,862	100.1

SOURCE: New York State Division of Criminal Justice Services, *New York State Felony Processing Quarterly Report: January - December, 1977*, (January, 1978) at 15.

[1]Suburban counties are defined as Suffolk, Nassau, Westchester and Rockland Counties.

[2]Upstate counties are defined as counties north of Westchester.

[3]Vehicle and Traffic Law Violations.

[4]Statewide totals includes data from special prosecutors which are not included in the area breakdown.

NOTE: Percentages in the columns do not total 100% due to rounding.

TABLE 12: Number and Percent Distribution of Felony Indictments Filed for Six Offense Categories, by Region - 1977

	STATEWIDE[1]		NEW YORK CITY		SUBURBAN COUNTIES		UPSTATE COUNTIES	
OFFENSE	Number	%	Number	%	Number	%	Number	%
Assault	1,555	7.6	670	6.4	254	8.6	631	9.0
Homicide	1,777	8.7	1,348	12.9	137	4.7	292	4.2
Rape	1,177	5.8	548	5.3	153	5.2	476	6.8
Burglary	7,323	35.9	2,335	22.4	1,259	42.9	3,729	53.4
Larceny	2,057	10.1	744	7.1	409	13.9	882	12.6
Robbery	6,485	31.8	4,785	45.9	726	24.7	974	14.0
Totals	20,374	99.9	10,430	100.0	2,938	100.0	6,984	100.0

SOURCE: New York Division of Criminal Justice Services, *New York State Felony Processing Quarterly Report: January - December, 1977* (January, 1978) at 15.

[1]Statewide totals include date from special prosecutors which are not included in the area breakdown.

NOTE: Percentages in the columns do not total 100% due to rounding.

involved violent crimes, as compared with 43.2% for suburban counties and 34.0% for upstate counties.

— The robbery indictment rates ranged from a low of 14.0% for upstate counties to 24.7% for suburban counties to a high of 45.9% for New York City. Thus, the suburban robbery indictment rate was almost twice the upstate rate and the robbery indictment rate for New York City was almost double the suburban rate.

— New York City has the lowest proportion of indictments for burglary and larceny. Together, these constituted only 29.5% of its indictments, a considerably lower proportion than for suburban and upstate counties (56.8% and 66.0% respectively).

— There was less of a difference in the regional indictment rates for assault, homicide and rape. Collectively, these offenses constituted 18.5% of the suburban indictments, 20.0% of the upstate indictments, and 24.6% of the New York City indictments.*

B. Post-Indictment Disposition Patterns

Column 1 of Table 13 presents statewide and regional disposition patterns for the 31,907 indictments disposed of in 1977.** Overall, dismissals accounted for 10.5% of all the dispositions; acquittals,

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* It should be noted, however, that the indictment rate for homicide (12.9%) for New York City is almost *triple* that of the suburban counties (4.7%) and the upstate counties (4.2%).

** 31,360 defendant-indictments were filed in 1977. The indictments filed figure differs from the indictments disposed figure because the latter total represents dispositions regardless of the year in which they were filed.

TABLE 13: Number and Percent Distribution of Post-Indictment Dispositions, by Region - 1977

	STATEWIDE[1]		NEW YORK CITY		SUBURBAN COUNTIES		UPSTATE COUNTIES	
DISPOSITIONS	Number	% [2]	Number	%	Number	%	Number	%
Dismissed	3,360	10.5	1,967	12.3	415	7.7	972	9.3
Acquitted	999	3.1	616	3.8	112	2.1	270	2.6
Other Court Action	2,204	6.9	1,187	7.4	152	2.8	860	8.2
Convicted[3]	25,344	79.4	12,266	76.5	4,724	87.4	8,333	79.9
Non-Incarceration[4]	9,628	30.2	3,707	23.2	1,839	34.1	4,066	39.0
Jail[5]	5,392	16.9	1,975	12.3	1,391	25.7	2,022	19.4
Prison[6]	9,820	30.8	6,402	39.9	1,385	25.6	2,032	19.5
Other	504	1.6	182	1.1	109	2.0	213	2.0
TOTAL	31,907		16,036		5,403		10,435	

SOURCE: New York State Division of Criminal Justice Services, *Crime and Justice: Annual Report - 1977* (1978) at 152 - 153.

[1]State total includes data from Special Nursing Home Prosecutor and Organized Crime Task Prosecutor which are not included in area breakdown.

[2]Percentages present proportions of total dispositions for each region, and therefore do not total to 100%.

[3]Convictions include both misdemeanors and felonies.

[4]Non-incarcerative sanctions include conditional or unconditional discharge, fines, restitution, or probation. Jail terms not exceeding 60 days which are followed by a period of probation supervision are not counted as non-incarcerative sanctions. These sentences are included in the jail term category.

[5]Jail terms refer to commitments to correctional facilities that are operated on a city or usually a county basis. A jail term may be imposed following a misdemeanor or felony conviction. The maximum term may not exceed one year.

[6]A state prison term refers to a commitment to a state correctional facility under the jurisdiction of the New York State Department of Correctional Services. All commitments are for felony convictions and the maximum term must be at least three years.

3.1%; and "other court action",* 6.9%. Eight out of 10 (79.4%) of all indictments resulted in felony or misdemeanor convictions.** Of those defendants convicted after indictment, 80.5% were convicted of felonies, and 19.5% were convicted of misdemeanors.***

A review of the disposition patterns in the three major regions of the state discloses a considerable variation in their post-indictment conviction rates.[23]

— The dismissal rate was highest in New York City (12.3%), followed by the upstate counties (9.3%). The lowest dismissal rate was obtained in the suburban New York City counties (7.7%).

— New York City also had the lowest conviction rate — 76.5%. The suburban counties had the highest post-indictment conviction rate (87.4%), followed by the upstate counties (79.9%).[26]

However, *sanctions* in New York City were generally more severe than in the rest of the state:

— Forty percent of all indictments in New York City resulted in state prison terms **** *double* the rate for upstate counties (19.5%). About one-fourth (25.6%) of the defendants indicted in suburban counties ultimately received state prison terms.

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* The Division of Criminal Justice Services defines "other court action" as a plea to another indictment, the consolidation of indictments, or other disposition. The number of net dispositions reported is equal to the total number of defendant-indictments disposed of, less the number of "other court actions."[24]

** See pp. 41 - 47 *infra* for a consideration of post-indictment charge and charge reduction patterns. As that section describes, 19.5% of the convictions that were obtained following indictment resulted in misdemeanor or "other" convictions.

*** Statewide, 91.5% of *post-indictment* convictions were the result of guilty pleas. There was little variation across the state in terms of the percentage of convictions obtained through guilty pleas: in New York City, 89.4% of all convictions were via guilty pleas; in suburban New York City counties, 93.9%; and for the upstate counties, 93.3%.[25]

**** A state prison term refers to a commitment to a state correctional facility under the jurisdiction of the New York State Department of Correctional Services. All commitments are for felony convictions and the maximum term must be at least three years.

— One-fourth (25.7%) of all indictments resulted in jail terms for suburban New York City defendants — twice the rate for New York City indictments (12.3%).*

— Non-incarcerative sanctions were the most frequent dispositions in upstate (39.0%) and suburban counties (34.1%). These sanctions were imposed in slightly less than one-fourth (23.2%) of the New York City cases.**

C. *Charge-Change and Charge Reduction Patterns*

1. *An Overview****

Table 14 presents statewide data relating to post-indictment charge reduction.[27] This information may be summarized as follows:****

— 31.3% of the defendants were convicted of of the most serious indictment charge.

— An additional 4.1% of these defendants were convicted of an offense within the same *felony class* as the most serious indictment charge, but *not* for the most serious indictment charge. For example, a

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* Jail terms refer to commitments to correctional facilities that are operated on a city or usually a county basis. A jail term may be imposed following a misdemeanor or felony conviction. The maximum term may not exceed one year.

** Non-incarcerative sanctions include conditional or unconditional discharge, fines, restitution, or probation. Jail terms not exceeding 60 days which are followed by a period of probation supervision are *not* counted as non-incarcerative sanctions. These sentences are included in the jail term category.

*** DCJS does not report the total number of post-indictment felony and misdemeanor convictions. Using the figures presented in Table 14, it appears that there were 20,179 felony convictions statewide plus 4,881 post-indictment misdemeanor or "other" convictions.

**** No information is available pertaining to charge-reduction patterns for specific offenses.

TABLE 14: Number and Percent Distribution of Post-Indictment Charge-Change and Charge-Reduction: Felony Class of the Indictment and Conviction Charge for New York State - 1977

Felony Class of Conviction[1] Offense	Felony Class of Indictment Offense[2]											
	Class A		Class B		Class C		Class D		Class E		Totals	
Same Offense	697	21.7%	1,294	27.3%	864	19.7%	3,050	32.4%	1,951	58.5%	7,856	31.3%
Same Article	2,016	62.8%	2,787	58.9%	2,779	63.5%	4,665	49.5%	1,033	31.0%	13,280	53.0%
Class A	659	20.5%									659	2.6%
Class B	412	12.8%	4	0.1%							416	1.7%
Class C	859	26.8%	1,147	24.2%	39	0.9%					2,045	8.2%
Class D	30	0.9%	1,275	26.9%	1,468	33.5%	79	0.8%			2,852	11.4%
Class E	22	0.7%	299	6.3%	807	18.4%	3,193	33.9%	37	1.1%	4,358	17.4%
Misdemeanor	34	1.1%	61	1.3%	449	10.3%	1,350	14.3%	984	29.5%	2,878	11.5%
Other			1	0.0%	16	0.4%	43	0.5%	12	0.4%	72	0.3%
Other Article	496	15.5%	652	13.8%	733	16.8%	1,710	18.1%	351	10.5%	3,942	15.7%
Class A											88	0.4%
Class B	53	1.7%	35	0.7%							318	1.3%
Class C	215	6.7%	75	1.6%	28	0.6%					583	2.3%
Class D	177	5.5%	162	3.4%	143	3.3%	101	1.1%			1,022	4.1%
Class E	37	1.2%	186	3.9%	250	5.7%	496	5.3%	53	1.6%	1,812	7.2%
Misdemeanor	14	0.4%	192	4.1%	287	6.6%	1,061	11.3%	258	7.7%	119	0.5%
Other			2	0.0%	25	0.6%	52	0.6%	40	1.2%		
Totals	3,209		4,733		4,376		9,425		3,335		25,078	

SOURCE: New York State Division of Criminal Justice Services, *New York State Felony Processing Quarterly Report January - December, 1977* (January, 1978) at 45.

[1]Refers to the felony class of the most serious conviction charge.

[2]Refers to the felony class of the most serious indictment charge.

NOTE: For instructions on how to read this table, see footnote 27.

defendant may have been indicted for Manslaughter 1 and convicted of Robbery 1.*

— 32.8% of the defendants were convicted of an offense that was *one* felony class lower than the most serious indictment offense.

— 31.8% were convicted of an offense that was *two or more* felony classes lower than the most serious indictment charge.

2. *Regional variation*

Charge-reduction patterns for the three major regions of New York State are presented in Tables 15 - 17.

Post-indictment charge-reduction appears to be somewhat more prevalent in New York City and its suburban counties than in the upstate counties. Approximately one out of three of the New York City (31.0%) and the suburban (29.2%) defendants were convicted of an offense within the same felony class as the most serious indictment charge, compared with 45.8% of the upstate defendants.

— Slightly more than one-third (35.6%) of the New York City defendants were convicted of an offense that was one felony class lower than the felony class of the most serious indictment charge. 33.7% of the suburban New York City and 28.1% of the upstate county convictions evidenced similar charge reductions.

— Approximately one-third of the New York City and suburban defendants were convicted of an offense that was *two or more* felony classes lower than the felony class of the top indictment charge (33.4% and 37.1% respectively), as compared to 26.2% of the upstate defendants.

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* The process of taking a plea to an offense within the same felony class but in a different penal law article is commonly referred to as horizontal or lateral plea-bargaining. These statistics indicate that this type of plea-bargaining is very rare in New York State.

TABLE 15: Number and Percent Distribution of Post-Indictment Charge-Change and Charge-Reduction: Felony Class of the Indictment and Conviction Charge for New York City - 1977

Felony Class of Conviction[1] Offense	Felony Class of Indictment Offense[2]											
	Class A		Class B		Class C		Class D		Class E		Totals	
Same Offense	472	20.4%	958	27.7%	457	20.0%	852	25.0%	371	50.5%	3,110	25.5%
Same Article	1,433	61.8%	2,038	59.0%	1,441	63.0%	2,048	60.1%	251	34.1%	7,211	59.1%
Class A	460	19.9%									460	3.8%
Class B	353	15.2%	1	0.0%							354	2.9%
Class C	561	24.2%	892	25.8%	23	1.0%					1,476	12.1%
Class D	21	0.9%	940	27.2%	849	37.1%	31	0.9%			1,841	15.1%
Class E	12	0.5%	169	4.9%	441	19.3%	1,564	45.9%	18	2.4%	2,204	18.1%
Misdemeanor	26	1.1%	35	1.0%	128	5.6%	450	13.2%	232	31.6%	871	7.1%
Other			1	0.0%			3	0.1%	1	0.1%	5	0.0%
Other Article	412	17.8%	460	13.3%	388	17.0%	508	14.9%	113	15.4%	1,881	15.4%
Class A												
Class B	43	1.9%	28	0.8%							71	0.6%
Class C	176	7.6%	52	1.5%	18	0.8%					246	2.0%
Class D	152	6.6%	129	3.7%	95	4.2%	62	1.8%			438	3.6%
Class E	31	1.3%	135	3.9%	170	7.4%	185	5.4%	27	3.7%	548	4.5%
Misdemeanor	10	0.4%	115	3.3%	102	4.5%	258	7.6%	84	11.4%	569	4.7%
Other			1	0.0%	3	0.1%	3	0.1%	2	0.3%	8	0.1%
Totals	2,317		3,456		2,286		3,408		735		12,202	

SOURCE: New York State Division of Criminal Justice Services, *New York State Felony Processing Quarterly Report January - December 1977*, (January, 1978) at 46.

[1] Refers to the felony class of the most serious conviction.

[2] Refers to the felony class of the most serious indictment charge.

NOTE: For instructions on how to read this table, see footnote 27.

TABLE 16: Number and Percent Distribution of Post-Indictment Charge-Change and Charge-Reduction: Felony Class of the Indictment and Conviction Charge for Suburban New York City Counties - 1977[1]

Felony Class of Conviction[2] Offense	Felony Class of Indictment Offense[3]											
	Class A		Class B		Class C		Class D		Class E		Totals	
Same Offense	79	16.4%	159	26.5%	92	12.1%	459	21.9%	380	50.3%	1,169	24.9%
Same Article	366	76.1%	351	58.6%	520	68.2%	1,151	54.9%	306	40.5%	2,694	57.4%
Class A	134	27.9%									134	2.9%
Class B	23	4.8%	1	0.2%							24	0.5%
Class C	200	41.6%	134	22.4%	4	0.5%					338	7.2%
Class D	2	0.4%	148	24.7%	223	29.2%	20	1.0%			393	8.4%
Class E	2	0.4%	56	9.3%	163	21.4%	766	36.5%	17	2.2%	1,004	21.4%
Misdemeanor	5	1.0%	12	2.0%	115	15.1%	329	15.7%	285	37.7%	746	15.9%
Other					15	2.0%	36	1.7%	4	0.5%	55	1.2%
Other Article	36	7.5%	89	14.9%	151	19.8%	487	23.2%	70	9.3%	833	17.7%
Class A												
Class B	3	0.6%	2	0.3%							5	0.1%
Class C	14	2.9%	6	1.0%	3	0.4%					23	0.5%
Class D	13	2.7%	10	1.7%	13	1.7%	12	0.6%			48	1.0%
Class E	4	0.8%	30	5.0%	29	3.8%	89	4.2%	8	1.1%	160	3.4%
Misdemeanor	2	0.4%	41	6.8%	91	11.9%	345	16.5%	42	5.6%	521	11.1%
Other					15	2.0%	41	2.0%	20	2.6%	76	1.6%
Totals	481		599		763		2,097		756		4,696	

SOURCE: New York State Division of Criminal Justice Services, *New York State Felony Processing Quarterly Report January - December 1977*, (January, 1978) at 47.

[1] Suburban New York City Counties include Westchester, Rockland, Suffolk and Nassau Counties.

[2] Refers to the felony class of the most serious conviction charge.

[3] Refers to the felony class of the most serious indictment charge.

NOTE: For instructions on how to read this table, see footnote 27.

TABLE 17: Number and Percent Distribution of Post-Indictment Charge-Change and Charge Reduction: Felony Class of the Indictment and Conviction Charge for Upstate Counties - 1977[1]

Felony Class of Conviction[2] Offense	Felony Class of Indictment Offense[3]											
	Class A		Class B		Class C		Class D		Class E		Totals	
Same Offense	146	35.5%	177	26.1%	315	23.7%	1,734	44.4%	1,197	65.1%	3,569	43.7%
Same Article	217	52.8%	398	58.7%	818	61.6%	1,461	37.4%	475	25.8%	3,369	41.3%
Class A	65	15.8%									65	0.8%
Class B	36	8.8%	2	0.3%							38	0.5%
Class C	98	23.8%	121	17.8%	12	0.9%					231	2.8%
Class D	7	1.7%	187	27.6%	396	29.8%	28	0.7%			618	7.6%
Class E	8	1.9%	74	10.9%	203	15.3%	860	22.0%	2	0.1%	1,147	14.1%
Misdemeanor	3	0.7%	14	2.1%	206	15.5%	569	14.6%	466	25.3%	1,258	15.4%
Other					1	0.1%	4	0.1%	7	0.4%	12	0.1%
Other Article	48	11.7%	103	15.2%	194	14.6%	712	18.2%	168	9.1%	1,225	15.0%
Class A												
Class B	7	1.7%	5	0.7%							12	0.1%
Class C	25	6.1%	17	2.5%	7	0.5%					49	0.6%
Class D	12	2.9%	23	3.4%	35	2.6%	27	0.7%			97	1.2%
Class E	2	0.5%	21	3.1%	51	3.8%	222	5.7%	18	1.0%	314	3.8%
Misdemeanor	2	0.5%	36	5.3%	94	7.1%	455	11.6%	132	7.2%	719	8.8%
Other			1	0.1%	7	0.5%	8	0.2%	18	1.0%	34	0.4%
Totals	411		678		1,327		3,907		1,840		8,163	

SOURCE: New York State Division of Criminal Justice Services, *New York State Felony Processing Quarterly January - December 1977*, (January, 1978) at 48.

[1] Upstate counties are defined as counties north of Westchester County.

[2] Refers to the felony class of the most serious conviction charge.

[3] Refers to the felony class of the most serious indictment charge.

NOTE: For instructions on how to read this table, see footnote 27.

In sum, the chances of a defendant being convicted of an offense which is no more than one felony class below the top charge of the indictment is about the same across all areas of the state. Roughly, two-thirds of the defendants in New York City and the suburban and upstate counties had their top indictment charge reduced by *no more* than one felony class (66.6%, 62.9% and 73.8%).

3. Comparison of indictment and charge-reduction patterns

New York City defendants were indicted for much higher charges than their counterparts in the suburban and upstate counties. Two-thirds (66.0%) of the New York City defendants were indicted for Class A, B or C felonies, compared with 39.2% of the suburban and 29.6% of the upstate defendants. Conversely, the proportion of the defendants indicted for Class D or E felonies ranged from 34.0% in New York City to 60.8% in the suburban counties and 70.4% in the upstate counties.

These regional differences in indictment charge level translate into differences in the offense of conviction and level of charge reduction:

— Over one-third (36.8%) of the New York City defendants were convicted of Class A, B, or C felonies, *double* the rate for the suburban counties (18.1%) and *triple* the rate for the upstate counties (12.7%).

— Only 11.9% of defendants indicted for a felony in New York City and who were subsequently convicted, were convicted of a misdemeanor or "other" offense short of a felony. Comparable figures for upstate and suburban defendants are 24.7% and 29.8%, respectively.

The relatively high proportion of cases in both the upstate and suburban New York City counties that resulted in post-indictment misdemeanor and "other" convictions appears to be a function of the seriousness of the felony indictments. Specifically, since indictments in these regions are heavily concentrated in the Class D and E range, if charges are reduced they are likely to be reduced to misdemeanor charges. Thus:

— Most of the defendants in the upstate and suburban counties who were convicted of misdemeanor or "other" offenses had been indicted for Class D or E felonies 82.0% and 78.8% respectively). For these two regions, approximately 20% had been indicted for A, B, or C felonies.

— 71.0% of the defendants who were convicted of misdemeanor or other offenses in New York City had been indicted for Class D or E felonies. Conversely, 29.0% had been indicted for Class A, B, or C felonies.

When indictment charge is held constant, it therefore appears that New York City defendants indicted for A, B, or C felonies have a slightly higher probability of being convicted of misdemeanor or "other" offenses than their upstate or suburban counterparts.

D. Offense of Conviction

1. An overview

Table 18 presents data regarding convictions obtained after indictments in 1977.*[28]

In 1977, 41.0% (10,279) of convictions after indictment were for violent crimes (including assault, homicide, kidnapping, rape, arson, robbery and criminal possession of a weapon). The proportion of violent crime convictions showed substantial regional variation; well over half (58.4%) of the New York City post-indictment convictions were for violent crimes — more than double the rate for the suburban and upstate counties (26.6% and 23.3%, respectively).

2. Regional variation for six offense categories

Convictions for robbery, homicide, assault, rape, burglary, and larceny accounted for nearly two-thirds of the post-indictment convictions in New York City, the suburban New York City counties, and the upstate counties.**[29]

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* These figures include an unknown number of misdemeanor convictions obtained after a felony indictment.

** The largest single crime category omitted pertains to convictions for "drug" or "marijuana" charges, which constituted 11.9% of the post-indictment convictions.

TABLE 18: Number and Percent Distribution of Post-Indictment Conviction Charges, by Penal Law Article and Region - 1977

CONVICTION CHARGE	PENAL LAW ARTICLE	STATEWIDE		NEW YORK CITY		SUBURBAN COUNTIES		UPSTATE COUNTIES	
OFFENSE		Number	%	Number	%	Number	%	Number	%
Conspiracy	105	141	0.6	64	0.6	41	0.9	36	0.4
Assault	120	1,492	6.0	786	6.4	260	5.5	446	5.5
Homicide	125	1,065	4.3	810	6.6	94	2.0	161	2.0
Rape	130	736	2.9	347	2.8	125	2.7	264	3.2
Kidnapping	135	62	0.2	21	0.2	9	0.2	32	0.4
Burglary	140	4,723	18.8	1,364	11.2	1,042	22.2	2,317	28.4
Criminal Mischief	145	189	0.8	36	0.3	44	0.9	109	1.3
Arson	150	300	1.2	99	0.8	63	1.3	138	1.7
Larceny	155	2,819	11.2	883	7.2	765	16.3	1,167	14.3
Robbery	160	5,017	20.0	3,747	30.7	575	12.2	695	8.5
Other Theft	165	994	4.0	407	3.3	191	4.1	396	4.9
Forgery	170	584	2.3	82	0.7	159	3.4	343	4.2
Bribery	200	164	0.7	134	1.1	20	0.4	10	0.1
Hindering Prosecution	205	195	0.8	50	0.4	45	1.0	100	1.2
Bail Jumping	215	136	0.5	90	0.7	21	0.5	23	0.3
Drugs	220	2,972	11.9	1,614	13.2	598	12.7	760	9.3
Marijuana	221	13	0.0	2	0.0	2	0.0	9	0.1
Gambling	225	233	0.9	102	0.8	104	2.2	27	0.3
Weapons	265	1,607	6.4	1,319	10.8	125	2.7	163	2.0
Other Penal Law Felonies		464	1.9	178	1.5	140	3.0	136	1.7
Tax Felonies		33	0.1	25	0.2	7	0.1	1	0.0
VTL Felonies[1]		1,077	4.3	37	0.3	250	5.3	790	9.7
Other Felonies		62	0.2	5	0.0	16	0.3	40	0.5
TOTAL		25,078	100.0	12,202	99.8	4,696	99.9	8,163	100.0

SOURCE: New York State Division of Criminal Justice Services, *New York State Felony Processing Quarterly Report: January - December, 1977* January, 1978) at 53 - 56.

[1] Vehicle and Traffic Law Felonies.

NOTE: Percentages in the columns do not total 100% due to rounding.

As Table 19 indicates, within these six major offense categories, 72.0% of the New York City convictions involved violent offenses, as compared with 36.8% for the suburban counties, and 31.1% for the upstate counties. There is also significant regional variation in the relative proportion of burglary, robbery, and larceny convictions:

— For New York City, robbery convictions constituted the largest single category. Nearly half (47.7%) of the defendants were convicted of this offense. Robbery convictions constituted 20.1% of the suburban convictions and 13.8% of the upstate convictions in these six offense categories.
— For the suburban and upstate counties, the largest single offense category was burglary, which constituted nearly half (45.9%) of the upstate convictions and over one-third (36.4%) of the suburban convictions. Burglary convictions comprised only 17.2% of the New York City convictions.
— A higher percentage of convictions were for larceny in suburban (26.7%) and upstate (23.1%) counties than in New York City (11.1%).

There is less regional variation in the distribution of convictions for rape and assault, although not for homicide:

— The percentage of rape and assault convictions is similar for all three geographical areas: 14.3% for New York City; 13.5% for the suburban New York City counties; and 14.0% for the upstate counties.
— The percentage of homicide convictions is almost identical for the suburban and upstate counties (3.3% and 3.2%, respectively). For New York City, 10.2% of all convictions for these six major offenses were for homicide, *triple* the rate for the

TABLE 19: Number and Percent Distribution of Post-Indictment Conviction Charges for Six Offenses Categories, by Region - 1977

	STATEWIDE		NEW YORK CITY		SUBURBAN COUNTIES		UPSTATE COUNTIES	
CONVICTION CHARGE	Number	%	Number	%	Number	%	Number	%
Assault	1,492	9.4	786	9.9	260	9.1	446	8.8
Homicide	1,065	6.7	810	10.2	94	3.3	161	3.2
Rape	736	4.6	347	4.4	125	4.4	264	5.2
Burglary	4,723	29.8	1,364	17.2	1,042	36.4	2,317	45.9
Larceny	2,819	17.8	883	11.1	765	26.7	1,167	23.1
Robbery	5,017	31.7	3,747	47.2	575	20.1	695	13.8
TOTAL	15,852	100.0	7,937	100.0	2,861	100.0	5,050	100.0

SOURCE: New York State Division of Criminal Justice Services, *New York State Felony Processing Quarterly Report: January - December, 1977* (January, 1978) at 53 - 56.

Section IV: *Post-Indictment Sentencing Patterns*

A. *Dispositions Following Convictions*

As Table 20 indicates, 25,344 defendants in New York State who were indicted for a felony were convicted of an offense in 1977. Sixty percent (15,212) of these convictions resulted in jail or prison terms (21.3% and 38.7%, respectively). Forty percent of the defendants received non-incarcerative sanctions.

1. *Regional patterns*

We earlier stated that the percentage of defendants who were sentenced to incarceration varied according to region. As Table 20 reveals:

— Over half (52.2%) of the defendants convicted in New York City after indictment were sentenced to state prison, compared with three out of ten (29.3%) of the suburban defendants, and only one out of four (24.4%) of the upstate defendants. Thus, New York City's rate of imprisonment was more than twice that of the upstate counties.

— Local jail was less frequently used as a sentencing option in New York City. Fewer than one out of six (16.1%) New York City defendants were sentenced to a local jail term, compared with 29.4% of the suburban and 24.3% of the upstate defendants.

— Thus, overall, 68.3% of the New York City defendants were sentenced to confinement, as compared with 58.8% of the suburban and 48.7% of the up-state defendants.

The proportion of the defendant population who received non-incarcerative sanctions also varied according to geography:

TABLE 20: Number and Percent Distribution of Post-Indictment Sanctions, by Region - 1977

	STATEWIDE[1]		NEW YORK CITY		SUBURBAN COUNTIES		UPSTATE COUNTIES	
	Number	%	Number	%	Number	%	Number	%
INCARCERATIVE SANCTIONS								
Prison	9,820	38.7	6,402	52.2	1,385	29.3	2,032	24.4
Jail	5,392	21.3	1,975	16.1	1,391	29.4	2,022	24.3
Subtotal	15,212	60.0	8,377	68.3	2,776	58.8	4,054	48.7
NON-INCARCERATIVE SANCTIONS								
Probation[2]	8,066	31.8	3,173	25.9	1,515	32.1	3,372	40.5
Conditional Discharge	1,363	5.4	486	4.0	230	4.9	638	7.6
Unconditional Discharge	199	0.8	48	0.4	94	2.0	56	0.7
Other	504	2.0	182	1.5	109	2.3	213	2.6
Subtotal	10,132	40.0	3,889	31.7	1,948	41.2	4,279	51.3
GRAND TOTAL	25,344	100.00	12,266	100.0	4,724	100.0	8,333	100.0

SOURCE: New York State Division of Criminal Justice Services, *Crime and Justice: Annual Report - 1977* (1978) at 152 - 153.

[1] State total includes data from Special Nursing Home Prosecutor and Organized Crime Task Prosecutor which are not included in area breakdown.

[2] Includes probation plus a commitment to a drug treatment facility.

NOTE: Percentages in the interior of the table may not total to 100 due to rounding.

— Statewide, the principal non-incarcerative sanction was probation.* One out of every four (25.9%) of the New York City defendants who was convicted after indictment was sentenced to probation, as compared with one out of three (32.1%) of the suburban defendants and two out of five (40.5%) of the upstate defendants.
— Conditional and unconditional discharge and "other sanctions" accounted for less than ten percent of all dispositions statewide. The use of these sanctions ranged from a low of 5.9% in New York City, to 9.2% in the suburban counties and 10.9% in the upstate counties.

2. *Variation in dispositions for six offense categories*

Tables 21 and 22 present the type and distribution of sentences imposed upon defendants convicted of assault, homicide, rape, robbery, larceny, and burglary.**[30]

As Table 21 illustrates, about one-third (34.9%) of these defendants, statewide, received probation or another non-incarcerative sanction; one-fifth (19.9%) were sentenced to jail, and nearly half (45.2%) were sentenced to state prison.

With regard to these six offense categories, the pattern of dispositions in New York City markedly differ from those of suburban and upstate counties:

— Overall, three out of five (59.8%) of the New York City defendants convicted after indictment for one of these six offenses were sentenced to state prison, compared with one out of three (33.6%) for the suburban and upstate (28.7%) defendants.

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* As the term is used here, probation does not include probation followed by a sentence to local jail.

** Tables 21 and 22 employ only broad offense categories, rather than particular penal law sections. No comprehensive data is published by penal law section for defendants convicted after indictment; thus, some of the regional variation may be explicable by variations in offense seriousness, which cannot be gleaned merely by looking at these broad offense categories.

TABLE 21: Number and Percent Distribution of Post-Indictment Conviction Charges for Six Offense Categories, by Sanction Type: New York State and New York City - 1977

Offenses	Non-Incarceration Number	%	Jail Number	%	Prison Number	%	TOTAL
Statewide							
Assault	602	40.3	430	28.8	460	30.8	1,492
Homicide	131	12.3	43	4.0	891	83.7	1,065
Rape	246	33.4	98	13.3	392	53.3	736
Burglary	1,948	41.2	1,209	25.6	1,566	33.2	4,723
Larceny	1,594	56.6	830	29.4	395	14.0	2,819
Robbery	1,014	20.2	544	10.8	3,459	69.0	5,017
	5,535	34.9	3,154	19.9	7,163	45.2	15,852
New York City							
Assault	301	38.3	187	23.8	298	37.9	786
Homicide	106	13.1	11	1.4	693	85.5	810
Rape	118	34.0	21	6.1	208	59.9	347
Burglary	385	28.2	298	21.9	681	49.9	1,364
Larceny	496	56.2	214	24.2	173	19.6	883
Robbery	745	19.8	307	8.2	2,697	72.0	3,747
TOTAL	2,149	27.1	1,038	13.1	4,750	59.8	7,937

SOURCE: New York State Division of Criminal Justice Services, *New York State Felony Processing Quarterly Report: January - December, 1977* (January, 1978) at 53 - 54.

TABLE 22: Number and Percent Distribution of Post-Indictment Conviction Charges for Six Offense Categories by Sanction Type: Suburban New York City and Upstate Counties - 1977

Offenses	Non-Incarceration		Jail		Prison		TOTAL
	Number	%	Number	%	Number	%	
Suburban New York City Counties							
Assault	112	43.1	95	36.5	53	20.4	260
Homicide	6	6.4	9	9.6	79	84.0	94
Rape	44	35.2	20	16.0	61	48.8	125
Burglary	381	36.6	331	31.8	330	31.7	1,042
Larceny	393	51.4	292	38.2	80	10.5	765
Robbery	108	18.8	108	18.8	359	62.4	575
	1,044	36.5	855	29.9	962	33.6	2,861
Upstate Counties							
Assault	189	42.4	148	33.2	109	24.4	446
Homicide	19	11.8	23	14.3	119	73.9	161
Rape	84	31.8	57	21.6	123	46.6	264
Burglary	1,182	51.0	580	25.0	555	24.0	2,317
Larceny	702	60.2	323	27.7	142	12.2	1,167
Robbery	163	23.5	129	18.6	403	28.7	695
	2,339	46.3	1,260	25.0	1,451	28.7	5,050

SOURCE: New York State Division of Criminal Justice Services, *New York State Felony Processing Quarterly Report: January - December, 1977* (January, 1978) at 55 - 56.

— Conversely, only one out of four (27.1%) of the New York City defendants was sentenced to probation or another non-incarcerative sanction. Approximately one-third (36.5%) of the suburban and nearly one-half (46.2%) of the upstate county defendants received non-incarcerative sanctions.

There were, however, some similarities — for example, the imprisonment rates were uniformly high for defendants convicted of homicide in the various geographical areas, ranging from a low of 73.9% for the upstate counties, to 84.0% for the suburban New York City counties, and a high of 85.5 for New York City.

It is *not* possible to determine from published data whether these variations in disposition patterns result from regional differences in the type and severity of crime, or the length and seriousness of defendants' prior criminal records, regional sentencing practices, or some other source.

3. *Disposition patterns by Penal Law offense*[31]

Since broad offense categories may include a wide variety of criminal conduct, ranging from the serious to the relatively trivial, Tables 23 to 25 present statewide data concerning the type and distribution of sentences imposed in 1977 for defendants convicted of specific *degrees* of robbery, assault, burglary, rape and grand larceny.*

Imprisonment rates were uniformly high for defendants convicted of Class B or C felonies, ranging from 89.7% for Robbery 2° to 96.7% for Robbery 1° and 99.2% for Rape 1° — with the sole exception of defendants convicted of Burglary 2°. In sum, the vast majority (91.6%) of the defendants convicted of Class B or C felonies were sentenced to the state prison terms; a small minority (2.5%) received a local jail term and 5.9% were given a non-incarcerative sanction.

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* Tables 23 to 25 include offense categories for which at least 60 people were convicted. Manslaughter convictions were excluded because DCJS does not publish any conviction data for this offense. Since a maximum term of life imprisonment is mandated for Murder 1° and Murder 2° convictions, these offenses have also been excluded from this discussion.[32]

TABLE 23: Number and Percent Distribution of Selected Robbery Convictions, by Type of Sanction: New York State - 1977

(N = 4,621)[1]

SENTENCE TYPES

			NON-INCARCERATION[2]		LOCAL JAIL		STATE PRISON	
CONVICTION OFFENSE	Felony Class	Total Number	Number	%	Number	%	Number	%
Robbery 1°	B	1,028	28	2.9%	5	0.4%	995	96.7%
Attempted Robbery 1°	C	234	13	5.6%	2	0.9%	219	93.5%
Robbery 2°	C	1,106	73	6.6%	41	3.7%	992	39.7%
Attempted Robbery 2°	D	387	113	29.2%	62	16.0%	212	54.8%
Robbery 3°	D	1,327	434	32.7%	262	19.7%	631	47.6%
Attempted Robbery 3°	E	539	192	35.6%	143	26.5%	204	37.9%
Totals		4,621	853	18.5%	515	11.1%	3,253	70.4

SOURCE: New York State Division of Criminal Justice Services, *Crime and Justice: Annual Report - 1977* (1978) at 178.

[1] Includes fourteen sentences categorized as "other."

[2] Non-Incarceration includes unconditional discharge, conditional discharge, probation and commitment to a drug treatment facility.

NOTE: Table limited to offense categories for which there were at least 60 convictions in 1977.

TABLE 24: Number and Percent Distribution of Selected Burglary and Grand Larceny Convictions, by Type of Sanction: New York State - 1977

(N = 5,410)[1]

SENTENCE TYPES

CONVICTION OFFENSE	Felony Class	Total Number	NON INCARCERATION[2]		LOCAL JAIL		STATE PRISON	
			Number	%	Number	%	Number	%
Burglary 2°	C	178	45	25.3	18	10.1	115	64.6
Burglary 3°	D	2,081	815	39.2	509	24.4	757	36.4
Attempted Burglary 3°	E	1,791	651	36.3	548	30.6	592	33.1
Grand Larceny 2°	D	213	92	43.2	62	29.1	59	27.7
Grand Larceny 3°	E	1,147	536	46.7	339	29.6	272	23.7
Totals		5,410	2,139	39.5	1,476	27.3	1,795	33.2

SOURCE: New York State Division of Criminal Justice Services, *Crime and Justice: Annual Report - 1977* (1978) at 79.

[1] Includes 27 sentences categorized as "other."

[2] Non-Incarceration includes unconditional discharge, conditional discharge, probation and commitment to a drug treatment facility.

NOTE: Table limited to offense categories for which there were at least 60 convictions in 1977.

TABLE 25: Number and Percent Distributon of Selected Assault and Rape Convictions by Type of Sanction: New York State - 1977

(Number = 1,042)[1]

SENTENCE TYPES

			NON INCARCERATION[2]		LOCAL JAIL		STATE PRISON	
CONVICTION OFFENSE	Felony Class	Total Number	Number	%	Number	%	Number	%
Assault 1°	C	164	8	4.9	6	3.7	150	91.4
Assault 2°	D	340	44	12.9	122	15.9	174	51.2
Attempted Assault 2°	E	349	178	51.0	99	28.4	72	20.6
Rape 1°	B	128	1	0.8	0	0.0	127	99.2
Attempted Rape 1°	C	61	2	3.3	1	1.6	58	95.1
Totals		1,042	233	22.4	228	21.9	581	55.8

SOURCE: New York State Division of Criminal Justice Services, *Crime and Justice: Annual Report - 1977* (1978) at 178 - 179.

[1] Includes three sentences categorized as "other."

[2] Non-Incarceration includes unconditional discharge, conditional discharge, probation and commitment to a drug treatment facility.

NOTE: Table limited to offense categories for which there were at least 60 convictions in 1977.

For Class D and E felony convictions, there was more variation in the type of sanction imposed on defendants convicted of the same offense.** For example, roughly one out of three (32.7%) defendants convicted of Robbery 3° received a non-incarcerative sanction; one out of five (19.7%) received local jail sentences; and half (47.6%) were sentenced to state prison. The sentencing patterns for other D and E felonies reflect a similar lack of uniformity.

4. New commitments to state prison

As Table 26 indicates, 8,441 new court commitments were received at a State Department of Correctional Services facility in 1977.*** The data may be summarized as follows:

— 96% of the new court commitments were men; only 4% were women.

— 56.8% of the defendants had been convicted of a violent crime (rape, murder, manslaughter, robbery, assault, arson, kidnapping, or criminal possession of a weapon).

— Overall, 13.2% were convicted of criminal possession or sale of a controlled substance (drugs). Nearly one-third (31.1%) of the women admissions were convicted of a drug law violation.

— Overall, Robbery was the largest single offense category, constituting one-third of all the commitment offenses (33.7%).

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* The high degree of consistency in sentencing for these categories may be more apparent than real. A state prison term is statutorily mandated for a conviction for all Class B and C felonies listed in Tables 23 to 25, except for Youthful Offenders, who may receive a probation or local jail term in lieu of a state prison term.

** Except for defendants who have previous felony convictions, for whom imprisonment is statutorily mandated (New York Penal Law §70.02) (McKinney Supp. 1978), the court had discretion to impose an incarcerative or non-incarcerative sanction on these defendants.

*** This does not include all persons actually *received* at a Department of Correctional Services facility in 1977. For example, it excludes persons returned to a Department facility for a technical violation of the conditions of parole, and persons transferred to the Department from the Department of Mental Hygiene.

TABLE 26: Number and Percent Distribution of New Court Commitments to the New York State Department of Correctional Services, by Sex and Conviction Charge - 1977

OFFENSE	MEN		WOMEN		TOTAL	
	Number	%	Number	%	Number	%
Murder	259	3.2	4	1.3	263	3.1
Manslaughter	538	6.7	48	16.1	586	6.9
Criminally Negligent Homicide	18	0.2	5	1.7	23	0.3
Robbery	2,789	34.7	59	19.7	2,848	33.7
Burglary	1,133	14.1	12	4.0	1,145	13.6
Assault	362	4.5	18	6.0	380	4.5
Grand Larceny	246	3.1	18	6.0	264	3.1
Rape	207	2.6	1	0.3	208	2.5
Other Sex Offenses	134	1.7	0	-	134	1.6
Drugs	1,017	12.7	93	31.1	1,110	13.2
Forgery	89	1.1	9	3.0	98	1.2
Arson	90	1.1	3	1.0	93	1.1
Criminal Possession of Stolen Property	141	1.8	3	1.0	144	1.7
Kidnapping	14	0.2	1	0.3	15	0.2
Criminal Possession of a Weapon	394	4.9	7	2.3	401	4.8
Other Felonies	112	1.4	9	3.0	121	1.4
Youthful Offenders	482	6.0	9	3.0	491	5.8
Juvenile Delinquents	4	-	-	-	4	-
TOTAL	8,029	100.0	299	99.8	8,328	98.7
Missing Cases					113	1.3
					8,441	100.0

SOURCE: Unpublished New York State Department of Correctional Services data.

NOTE: Percentages in the columns do not total 100% due to rounding.

— Robbery and burglary convictions collectively constituted nearly *half* (47.3%) of the conviction offenses.

B. Sentence Length

1. Sentencing variation in New York State

As Tables 27 to 32 illustrate, there was wide variation in the length of prison terms imposed on defendant who were convicted of the *same* offense.[33]

This variation was particularly pronounced for Class B felonies. For example, the sentences for defendants convicted of Robbery 1° ranged from the statutory minimum term of three years to the statutory maximum of 25 years — and spanned the entire spectrum without clustering at any point. While twenty percent of the defendants received maximum terms of five years or less, forty percent (40.4%) were sentenced to maximum terms of over ten years. The variation was nearly as wide with regard to Assault 1°, a Class C felony. There, 18.8% of convicted defendants received a maximum sentence of 3 years, while 18.1% received a maximum of from 10 to 15 years, with various intermediate sentences being given to nearly equal proportions of defendants. The same pattern of wide variation was repeated for Assault 2°, a Class D felony.

Sentences for Class E felonies exhibit much less variation. The relative uniformity in this group is due to the fact that, by statute, the maximum term must be at least three years and may not exceed four years — thus, severely restricting the possible range of sentences.

In general, as offense seriousness (measured by the felony class of the conviction offense) increased, the length of the maximum term also increased: hence, only 34.9% prison sentences for Robbery 1° had maximum terms of 7 years or less, compared with 74.6% of the prison sentences for Robbery 2°, and 99.0% for Robbery 3°. These figures suggest that there was some proportionality in the length of the prison terms among felony classes, but *not* that there was consistency in sentencing — for as we have indicated, within each offense category, there was substantial variation.

2. Regional variation in sentence length

Statistics which compare the length of prison terms imposed on defendants sentenced in New York City, suburban New York City

TABLE 27: Number, Percent, and Cumulative Percent Distribution of Maximum Terms for Defendants Convicted of Selected Robbery Charges and Committed to the New York State Department of Correctional Services - 1977

	ROBBERY-1, B Felony Number = 992			ATTEMPTED ROBBERY-1, C. Felony Number = 219			ROBBERY-2, C Felony Number = 992		
MAXIMUM SENTENCE	Number	%	C%[1]	Number	%	C%	Number	%	C%
3 years	60	6.0%	6.0%	18	8.2%	8.2%	148	14.9%	14.9%
3+ to 4 years	65	6.5%	12.5%	40	18.3%	26.5%	143	14.4%	29.3%
4+ to 5 years	76	7.7%	20.2%	25	11.4%	37.9%	140	14.1%	43.4%
5+ to 7 years	146	14.7%	34.9%	67	30.6%	68.5%	309	31.2%	74.6%
7+ to 10 years	245	24.7%	59.6%	48	21.9%	90.4%	172	17.3%	91.9%
10+ to 15 years	239	24.1%	83.7%	20	9.1%	99.5%	75	7.6%	99.5%
15+ to 20 years	102	10.3%	94.0%	1	0.5%	100.0%	5	0.5%	100.0%
20+ to 25 years	59	6.0%	100.0%	-	-	-	-	-	-

SOURCE: New York State Division of Criminal Justice Services, *Crime and Justice: Annual Report - 1977* (1978) at 180.

[1] C% refers to cumulative percent.

NOTE: Tables 27 to 32 are limited to charge categories for which there were at least 50 prison commitments in 1977.

TABLE 28: Number, Percent, and Cumulative Percent Distribution of Maximum Terms for Defendants Convicted of Selected Robbery Charges and Committed to the New York State Department of Correctional Services - 1977

	ATTEMPTED ROBBERY-2 D Felony Number = 208			ROBBERY-3 D Felony Number = 623			ATTEMPTED ROBBERY-3 E Felony Number = 202		
MAXIMUM SENTENCE	Number	%	C%[1]	Number	%	C%	Number	%	C%
3 years	56	26.9	26.9	136	21.8	21.8	132	65.3	65.3
3+ to 4 years	80	38.5	65.4	278	44.6	66.4	67	33.2	98.5
4+ to 5 years	32	15.4	80.8	95	15.3	81.7	2	1.0	99.5
5+ to 7 years	40	19.2	100.0	108	17.3	99.0	1	0.5	100.0
7+ to 10 years	-	-	-	5	0.8	99.8	-	-	-
10+ to 15 years	-	-	-	1	0.2	100.0	-	-	-

SOURCE: New York State Division of Criminal Justice Services, *Crime and Justice: Annual Report - 1977* (1978) at 181.

[1] C% refers to cumulative percent

TABLE 29: **Number, Percent, and Cumulative Percent Distribution of Maximum Terms for Defendants Convicted of Selected Assault Charges and Committed to the New York State Department of Correctional Services - 1977**

	Assault 1° C Felony Number = 149[1]			Assault 2° D Felony Number = 174			Attempted Assault 2° E Felony Number = 71		
MAXIMUM SENTENCE	Number	%	C%[2]	Number	%	C%	Number	%	C%
3 years	28	18.8	18.8	42	24.1	24.1	53	74.6	74.6
3+ to 4 years	14	9.4	28.2	62	35.6	59.7	18	25.4	100.0
4+ to 5 years	21	14.1	42.3	25	14.1	74.1	-	-	-
5+ to 7 years	32	21.5	63.8	42	24.1	98.2	-	-	-
7+ to 10 years	27	18.1	81.9	1	0.6	98.3	-	-	-
10+ to 15 years	27	18.1	100.0	2	1.2	100.0	-	-	-

SOURCE: New York State Division of Criminal Justice Services, *Crime and Justice: Annual Report - 1977* (1978) at 181.

[1] Excludes one life sentence. Life sentences are permissible for persistent felony offenders.
[2] C% refers to cumulative percent.

TABLE 30: Number, Percent, and Cumulative Percent Distribution of Maximum Terms for Defendants Convicted of Selected Burglary Charges and Committed to the New York State Department of Correctional Services - 1977

	BURGLARY-2 C Felony Number = 114			BURGLARY-3 D Felony Number = 752		
MAXIMUM SENTENCE	Number	%	C%[1]	Number	%	C%
3 years	19	16.7	16.7	166	22.1	22.1
3+ to 4 years	16	14.0	30.7	353	46.9	69.0
4+ to 5 years	12	10.5	41.2	103	13.7	82.7
5+ to 7 years	35	30.7	71.9	126	16.8	99.5
7+ to 10 years	21	18.4	90.3	4	0.5	100.0
10+ to 15 years	10	8.8	99.1	-	-	-
15+ to 20 years	0	0.0	99.1	-	-	-
20+ to 25 years	1	0.9	100.0	-	-	-

SOURCE: New York State Division of Criminal Justice Services, *Crime and Justice: Annual Report - 1977* (1978) at 181.

[1] C% refers to cumulative percent.

TABLE 31: Number, Percent, and Cumulative Percent Distribution of Maximum Terms for Defendants Convicted of Selected Burglary and Grand Larceny Charges and Committed to the New York State Department of Correctional Services - 1977

	Attempted Burglary 3° E Felony Number = 590			Grand Larceny 2° D Felony Number = 58			Grand Larceny 3° E Felony Number = 267		
MAXIMUM SENTENCE[1]	Number	%	C%[2]	Number	%	C%	Number	%	C%
3 years	408	69.1	69.1	25	43.1	43.1	177	66.3	66.3
3+ to 4 years	177	30.0	99.1	19	32.8	75.9	87	32.6	98.9
4+ to 5 years	1	0.2	99.3	10	17.2	93.1	1	0.4	99.3
5+ to 7 years	4	0.7	100.0	4	6.9	100.0	2	0.7	100.0

SOURCE: New York State Division of Criminal Justice Services, *Crime and Justice: Annual Report - 1977* (1978) at 181.

[1] Sentences above seven years are not possible.

[2] C% refers to cumulative percent.

TABLE 32: Number, Percent, and Cumulative Percent Distribution of Maximum Terms for Defendants Convicted of Selected Rape Charges and Committed to the New York State Department of Correctional Services - 1977

	Rape 1° B Felony Number = 126[1]			Attempted Rape 1° C Felony Number = 58		
MAXIMUM SENTENCE	Number	%	C%[2]	Number	%	C%
3 years	4	3.2	3.2	6	10.3	10.3
3+ to 4 years	4	3.2	6.4	4	6.9	17.2
4+ to 5 years	4	3.2	9.6	5	8.6	25.8
5+ to 7 years	15	11.9	21.5	11	19.0	44.8
7+ to 10 years	23	18.2	39.7	13	22.4	67.2
10+ to 15 years	34	27.0	66.7	17	29.3	96.5
15+ to 20 years	17	13.5	80.2	2	3.5	100.0
20+ to 25 years	25	19.8				
100.0 -	-	-				

SOURCE: New York State Division of Criminal Justice Services, *Crime and Justice, Annual Report - 1977* (1978) at 180.

[1] Excludes one life sentence. Life sentences are permissible for persistent felony offenders.

[2] C% refers to cumulative percent.

counties, and upstate counties,* indicate that there was considerable variation in the length of the prison terms imposed on defendants convicted of the same offense, both *among* and *within* regions of the state.

Tables 33 to 38 present the distribution of maximum terms for men who were received at a New York State Department of Correctional Services facility during 1976, and were convicted of Manslaughter 1°, Robbery 1°, Robbery 2°, Robbery 3°, Assault 2° and Burglary 3°.**

a. Manslaughter 1°

Table 33 presents the distribution of maximum terms for defendants convicted in either New York City or the upstate counties for Manslaughter 1°, a Class B felony.***

By statute, a state prison term is mandated for a Manslaughter 1° conviction. The length of the maximum term may range from three to twenty-five years.

Maximum sentences imposed in New York City spanned the entire range permitted by statute — three to twenty-five years. There was also considerable, but slightly less, variation in the maximum terms imposed in the upstate counties.

In the aggregate, the sentences imposed in the upstate counties were substantially longer than those meted out in New York City. For example, more than half (53.7%) of the defendants sentenced in the upstate counties received maximum terms of twenty years or more. Only one in every six (16.7%) New York City defendants received sentences of this length. Conversely, almost half (49.6%) of the New York City defendants were sentenced to ten or fewer years imprisonment. Only one out of five (20.4%) of the upstate defendants received prison terms which did not exceed ten years.

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* This data was provided for the year 1976 for male offenders by the Department of Correctional Services, at the request of the Executive Advisory Committee on Sentencing. Since the Department was unable to provide data relating to the prior criminal records of inmates, we cannot gauge the effect of prior criminal record on sentencing variation.[34]

** With the exception of Manslaughter 1°, statistics are presented for only those offenses for which data was available concerning at least 50 cases for each of the regional areas. Additionally, sentences for defendants convicted of possession or sale of a controlled substance were excluded from this analysis because 90% of the defendants were convicted of Class A felonies and sentenced to maximum terms of life imprisonment.

*** There were only 23 cases from the suburban New York City counties. This number of cases was too small to permit meaningful analysis.

TABLE 33: Number, Percent, and Cumulative Percent Distribution of Maximum Terms for Male New Commitments to the New York State Department of Correctional Services, by Region: *Manslaughter 1° Convictions*, 1976

	NEW YORK CITY Number = 365			UPSTATE COUNTIES[1] Number = 54		
MAXIMUM SENTENCE (in months)	Number	%	C%[2]	Number	%	C%
36	10	2.7	2.7	-	-	-
37 - 48	5	1.4	4.1	-	-	-
49 - 60	23	6.3	10.4	2	3.7	3.7
61 - 84	39	10.7	21.1	2	3.7	7.4
85 - 120	104	28.5	49.6	7	13.0	20.4
121 - 239	123	33.7	83.3	14	25.9	46.3
240 - 300	61	16.7	100.0	29	53.7	100.0

SOURCE: Unpublished data provided by the New York State Department of Correctional Services to the Executive Advisory Committee on Sentencing.

[1] Upstate counties are defined as counties north of Westchester.

[2] C% refers to cumulative percent.

NOTE: Tables 33 to 38 are limited to charge categories for which there were at least 50 prison commitments from each region. No data is presented for the Suburban New York City counties in Table 33 because there were only 23 convictions for Manslaughter.

TABLE 34: Number, Percent, and Cumulative Percent Distribution of Maximum Terms for New Male Commitments to the New York State Department of Correctional Services, by Region: *Robbery 1° Convictions*, 1976[1]

	NEW YORK CITY Number = 685			SUBURBAN COUNTIES[2] Number = 92			UPSTATE COUNTIES Number = 102		
MAXIMUM SENTENCE (in months)	Number	%	C%[3]	Number	%	C%	Number	%	C%
36	56	8.2	8.2	6	6.5	6.5	5	4.9	4.9
37 - 48	46	6.7	14.9	5	5.4	11.9	4	3.9	9.9
49 - 60	65	9.4	24.3	9	9.8	21.7	6	5.9	14.7
61 - 84	122	17.8	42.1	12	13.0	34.7	12	11.8	26.5
85 - 120	172	25.1	67.2	33	35.9	70.6	22	21.5	48.0
121 - 239	174	25.4	92.6	23	25.0	95.6	32	31.4	79.4
240 - 300	50	7.3	99.9	4	4.3	99.9	21	20.6	100.0

SOURCE: Unpublished data provided by the New York State Department of Correctional Services.

[1] Includes convictions for Attempted Robbery 1°.

[2] Suburban counties are defined as Suffolk, Nassau, Westchester and Rockland Counties.

[3] C% refers to cumulative percent.

NOTE: Percentages in the columns do not total 100% due to rounding.

TABLE 35: Number, Percent, and Cumulative Percent Distribution of Maximum Terms for New Male Commitments to the New York State Department of Correctional Services, by Region: *Robbery 2° Convictions*, 1976[1]

	NEW YORK CITY Number = 776			SUBURBAN COUNTIES Number = 61			UPSTATE COUNTIES Number = 135		
MAXIMUM SENTENCE (in months)	Number	%	C%[2]	Number	%	C%	Number	%	C%
36	136	17.5	17.5	9	14.8	14.8	18	13.3	13.3
37 - 48	146	18.8	36.3	9	14.8	39.6	18	13.3	26.6
49 - 60	89	11.5	47.8	13	21.3	50.9	19	14.1	40.7
61 - 84	235	30.3	78.1	16	26.2	77.1	36	26.6	67.3
85 - 120	127	16.3	94.4	10	16.4	93.5	27	20.0	87.3
121 - 239	43	5.5	99.9	4	6.6	200.2	16	11.9	99.2
240 - 300	-	-	-	-	-		1	0.7	99.9

SOURCE: Unpublished data provided by the New York State Department of Correctional Services.

[1]Includes convictions for Atempted Robbery 2°.

[2]C% refers to cumulative percent.

NOTE: Percentages in the columns do not total 100% due to rounding.

TABLE 36: Number, Percent, and Cumulative Percent Distribution of Maximum Terms for New Male Commitments to the New York State Department of Correctional Services, by Region: *Robbery 3° Convictions*, 1976[1]

	NEW YORK CITY Number = 582			SUBURBAN COUNTIES Number = 65			UPSTATE COUNTIES Number = 138		
MAXIMUM SENTENCE (in months)	Number	%	C%[2]	Number	%	C%	Number	%	C%
36	254	43.6	43.6	22	33.8	33.8	36	25.9	25.9
37 - 48	229	39.3	82.9	26	40.0	73.8	57	41.0	66.9
49 - 60	69	11.9	94.8	13	20.0	93.8	13	9.4	76.3
61 - 83	19	3.3	98.1	0	0.0	93.8	1	0.7	77.0
84	11	1.9	100.0	4	6.2	100.0	32	23.0	100.0

SOURCE: Unpublished data provided by the New York State Department of Correctional Services.

[1] Includes convictions for Attempted Robbery 3°.

[2] C% refers to cumulative percent.

TABLE 37: Number, Percent, and Cumulative Percent Distribution of Maximum Terms for New Male Commitments to the New York State Department of Correctional Services, by Region: *Assault 2° Convictions*, 1976[1]

	NEW YORK CITY Number = 126			SUBURBAN COUNTIES Number = 28			UPSTATE COUNTIES Number = 51		
MAXIMUM SENTENCE (in months)	Number	%	C%[2]	Number	%	C%	Number	%	C%
36	58	46.0	46.0	13	46.4	46.4	13	25.5	25.2
37 - 48	38	30.2	76.2	7	25.0	71.4	22	43.2	68.7
49 - 60	18	14.3	90.5	5	17.0	89.3	5	9.8	78.5
61 - 83	4	3.2	93.7	1	3.6	92.9	3	5.9	84.4
84	8	6.3	100.0	1	3.6	96.5	8	15.7	100.1
85 - 120	-	-	-	1	3.6	100.1	-	-	-

SOURCE: Unpublished data provided by the New York State Department of Correctional Services.

[1] Includes convictions for Attempted Assault 2°.

[2] C% refers to cumulative percent.

TABLE 38: Number, Percent, and Cumulative Percent Distribution of Maximum Terms for New Male Commitments to the New York State Department of Correctional Services, by Region: *Burglary 3° Convictions*, 1976[1]

MAXIMUM SENTENCE (in months)	Number	%	C%[2]	Number	%	C%	Number	%	C%
36	175	51.2	51.2	68	50.7	50.7	110	34.8	34.8
37 - 48	123	36.0	87.2	48	35.8	86.5	140	44.3	79.1
49 - 60	31	9.1	96.3	9	6.7	93.2	36	11.4	90.5
61 - 83	5	1.5	97.8	3	2.2	95.4	10	3.1	93.6
84	8	2.3	100.1	5	3.7	99.1	20	6.3	99.9
121 - 240	-	-	-	1	0.7	99.8	-	-	-

SOURCE: Unpublished data provided by the New York State Department of Correctional Services.

[1] Includes convictions for Attempted Burglary 3°.

[2] C% refers to cumulative percent.

NOTE: Percentages in the columns do not total 100% due to rounding.

b. *Robbery 1°*

Sentences for Robbery 1°, which is also a Class B felony, reveal less dramatic cross-regional differences. While there was considerable sentencing variation *within* each region, maximum terms imposed on defendants in New York City and suburban counties were roughly comparable. These terms were, on the whole, somewhat shorter than those meted out in the upstate counties. Specifically, while less than one-third (29.4%) of the defendants sentenced in suburban counties received sentences exceeding ten years, slightly over half (52.0%) of those sentenced in the upstate counties received maximum terms of this length. The regional variation is particularly pronounced when the distribution of prison terms equal to or exceeding twenty years is considered. One out of every five (20.6%) upstate defendants received a prison term of 20 years or more, compared with only 4.4% of the suburban defendants. A similar, though far less striking pattern, was revealed for Robbery 2° and Robbery 3° convictions.

c. *Assault and Burglary*

While upstate sentences tended to be slightly longer than sentences in New York City or suburban counties for Assault 2° and Burglary 3° convictions (both of which are Class D felonies) there was only mild variation in sentencing patterns for these offenses among the regions in the state.* Again, as Tables 37 and 38 indicate, maximum sentences in New York City and suburban counties were substantially similar. Sentencing variation *within* regions was also present — for example, 25.5% of defendants convicted of Assault 2° in upstate counties received maximum sentences of 3 years, while 15.7% were given maximum terms of 7 years.

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* These degrees of offenses were selected for analysis because there were an insufficient number of convictions for Assault 1° and Burglary 1° or 2° to permit meaningful inter-regional comparisons.

Section V: *Parole: Time Served Before Release*

Introduction

The maximum term set by the court at the time of sentencing provides the upper limit on the length of the prison term that an inmate *may* serve. Within the confines of the maximum imposed by the court, the Parole Board determines how much time an inmate *will* serve before release on parole.

During the first six months of 1977, 4,032 inmates were released from state prison in New York. The vast majority (73.4%) of these inmates were granted parole release; 22.0% were conditionally released, and 4.6% were released at the expiration of their maximum sentences.**

In this section, we compare the maximum terms and the actual time served by 1,193 inmates released on parole between January 1, and June 30, 1977.***

Maximum Sentences and Time Served

As Table 39 illustrates, there was substantial variation in the maximum terms imposed on defendants in this sample who were convicted of the same offense. For example, maximum sentences for offenders convicted of Manslaughter 1° ranged from 36 to 300 months; about two-thirds of the inmates had maximum terms of anywhere from 81.4 months to 221.8 months. This pattern of wide variation is repeated for all offenses — although, of course, the less serious the offense, the lower will be the statutory minimum, and thus the range of possible variation will be reduced.

Table 40 indicates the time actually served by these offenders.**** While parole release substantially reduced judge-imposed

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* No statewide statistics are available concerning the actual amount of time served by defendants who are convicted of either felonies or misdemeanors, and sentenced to local correctional facilities.

** By statute, an inmate must be released on supervision when he has served his maximum term minus credit for "good time".

*** This data is based upon research conducted by the Committee staff, with the aid of a sample of cases of inmates released on parole between January 1 and June 30, 1977. The sample was obtained from the Parole Board and the Vera Institute of Justice. Length of time served does not include time served after re-incarceration for parole or other violations.[35]

**** Time served is defined as the total amount of time spent in incarceration. It is equal to pre- and post- trial detention time plus the time an inmate served from the date of his reception at a State Department of Correctional Services facility to the date of his release on parole.[36]

TABLE 39: Maximum Sentence (In Months) of Inmates Released on Parole for the First Time on Their Present Sentence between January 1, 1977 and June 30, 1977

(Number = 1,193)

CONVICTION OFFENSE	NUMBER	MEDIAN	MEAN[1]	S. D.[2]	RANGE[3]
Manslaughter 1°	77	140.6	151.6	70.2	36 - 300
Manslaughter 2°	76	84.2	87.5	30.9	36 - 180
Rape 1°	16	120.0	116.6	54.9	36 - 240
Robbery 1°	177	107.6	121.0	72.2	36 - 300
Attempted Robbery 1°	47	71.3	77.2	34.7	36 - 180
Robbery 2°	236	60.7	72.2	30.5	36 - 180
Attempted Robbery 2°	33	47.2	49.8	16.5	36 - 120
Robbery 3°	162	48.2	50.8	13.1	36 - 84
Attempted Robbery 3°	40	38.9	39.9	5.7	36 - 48
Assault 1°	30	82.0	83.2	34.7	36 - 180
Assault 2°	43	49.9	54.4	17.0	36 - 84
Attempted Assault 2°	14	38.4	39.4	5.6	36 - 48
Burglary 3°	93	47.9	49.0	11.7	36 - 84
Attempted Burglary 3°	75	38.2	39.7	7.4	36 - 84
Grand Larceny 3°	38	38.2	40.9	5.9	36 - 48
Criminal Possession of Weapon 3°	36	49.1	54.8	15.4	36 - 84

SOURCE: The New York State Executive Advisory Committee on Sentencing, from data provided by the New York State Division of Parole and the Vera Institute of Justice.

[1] The mean is equivalent to the average maximum term.

[2] S. D. refers to the standard deviation from the mean.

[3] Range refers to the upper and lower limits of the maximum terms actually imposed.

TABLE 40: Time Served (In Months) by Inmates Released on Parole for the First Time on Their Present Sentence between January 1, 1977 and June 30, 1977

(Number = 1,193)

CONVICTION OFFENSE	NUMBER	MEDIAN	MEAN[1]	S. D.[2]	RANGE
Manslaughter 1°	77	49.6	53.5	22.7	13.7 - 137.7
Manslaughter 2°	76	37.9	39.1	12.2	12.2 - 73.0
Rape 1°	16	43.8	44.9	30.7	18.4 - 147.7
Robbery 1°	177	36.5	42.1	33.8	12.0 - 172.2
Attempted Robbery 1°	47	29.8	33.1	13.6	15.1 - 72.5
Robbery 2°	236	29.1	30.4	11.4	12.4 - 67.9
Attempted Robbery 2°	33	22.8	23.2	5.9	15.3 - 39.0
Robbery 3°	162	23.3	24.4	8.3	7.9 - 51.6
Attempted Robbery 3°	40	20.2	21.0	6.0	12.2 - 46.4
Assault 1°	30	33.6	35.8	14.3	15.3 - 65.0
Assault 2°	43	25.6	25.9	9.6	12.2 - 52.0
Attempted Assault 2°	14	18.8	19.1	4.0	14.5 - 30.2
Burglary 3°	93	23.3	22.7	6.5	12.1 - 39.4
Attempted Burglary 3°	75	18.4	20.1	4.6	14.4 - 36.4
Grand Larceny 3°	38	18.4	19.6	4.3	13.0 - 30.3
Criminal Possession of Weapon 3°	36	24.1	26.0	9.4	14.9 - 48.7

SOURCE: The New York State Executive Advisory Committee on Sentencing, from data provided by the New York State Division of Parole and the Vera Institute of Justice.

[1] The mean is equivalent to the average maximum term.

[2] S. D. refers to the standard deviation from the mean.

maximum sentences, variation in the time served by offenders convicted of the same crime continued to be substantial. Thus, for offenders convicted of Manslaughter 1°, the time served ranged from 13.7 to 137.7 months; two-thirds of these offenders served between two and half and six years.

Tables 41 to 43 detail the considerable variation in the period of incarceration served by offenders who were released on parole. Of those convicted for Manslaughter 1°, 21% served terms of 3 years or less, and 19% served terms of over 6 years. For Robbery 1°, equal percentages (8%) served terms of 1.5 years and over 6 years; 10% served 18.1 - 24.0 months, 15% served 24.1 - 30 months; 15% served 30.1 - 36.0 months; 17% served 36.1 - 42.0 months; 10% served 42.1 - 48.0 months; 11% served 48.1 - 54.0 months — in short, the variation was wide, and nearly evenly distributed along the entire spectrum. This pattern was repeated for other offenses included in the sample (again, with the qualification that the less serious the offense the narrower is the permissible sentencing range, and hence the more restricted the possibilities for variation).

A *rough estimate* of the relationship between the length of the maximum sentence and the actual amount of time served can be obtained by comparing the average time served with the average maximum term for each offense category.* Inmates released on parole generally served between one-third and one-half of their maximum sentences. Specifically, for Class C, D and E felonies, the inmates in this sample generally served approximately one-half of their maximum terms for Class B felonies, the inmates served approximately one-third of their maximum terms.**

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* These findings are limited to this sample; therefore, no conclusions should be drawn concerning the overall relationship between the time served and the length of the maximum terms for all categories of releasees.

** One indication of the length of time that an inmate will probably serve is the length of the minimum term ("MPI") set by the Parole Board. Table 44 presents the average Minimum Period of Imprisonment ("MPI") and the average maximum term for 21 offense categories (categories with fewer than 50 cases were excluded). These MPI's were set between January 1 and June 30, 1977. Generally, for crime categories where the average length of the maximum term was less than 6 years (72 months), the average MPI was equal to one-half of the average maximum term. For Robbery 1° and Manslaughter 1°, both Class B felonies, the average length of the MPI was somewhat less than half the length of the average maximum term (38% and 43% respectively). The reader is advised against comparing these MPI statistics with the time-served statistics presented in Table 40. These tables involved data bases which are *not* comparable; therefore, any conclusions which might be drawn would be misleading.[11]

TABLE 41: Number, Percent, and Cumulative Percent Distribution of Time Serve (In Months) for Defendants Convicted of Selected Manslaughter or Robbery Charges and Released on Parole for the First Time on Their Present Sentence between January 1, 1977 and June 30, 1977

	MANSLAUGHTER 1° Number = 77			MANSLAUGHTER 2° Number = 76			ROBBERY 1° Number = 177		
TIME SERVED (in months)	Number	%	C%[1]	Number	%	C%	Number	%	C%
12.0 - 18.0	2	3	3	4	5	5	14	8	8
18.1 - 24.0	2	3	6	5	7	12	18	10	18
24.1 - 30.0	5	6	12	7	9	21	27	15	33
30.1 - 36.0	7	9	21	18	24	45	26	15	48
36.1 - 42.0	13	17	38	11	14	59	30	17	65
42.1 - 48.0	8	10	48	14	19	78	18	10	75
48.1 - 54.0	8	10	58	10	13	91	20	11	86
54.1 - 60.0	6	8	66	4	5	96	6	3	89
60.1 - 72.0	11	15	81	2	3	99	5	3	92
72.1 - 84.0	7	9	90	1	1	100	7	4	96
84.1 - 120.0	7	9	99	-	-	-	3	2	98
120.1 or over	1	1	100	-	-	-	3	2	100

SOURCE: The New York State Executive Advisory Committee on Sentencing from data provided by the New York State Division of Parole and the Vera Institute of Justice.

[1] C% refers to cumulative percent.

NOTE: Tables 41 to 43 are limited to charge categories for which at least 45 persons were released on parole.

TABLE 42: Number, Percent, and Cumulative Percent Distribution of Time Served (In Months) for Defendants Convicted of Selected Robbery Charges and Released on Parole for the First Time on Their Present Sentence between January 1, 1977 and June 30, 1977

	ATTEMPTED ROBBERY 1° Number = 47			ROBBERY 2° Number = 236			ROBBERY 3° Number = 162		
TIME SERVED (in months)	Number	%	C%[1]	Number	%	C%	Number	%	C%
12.0 - 18.0	8	17	17	36	15	15	44	28	28
18.1 - 24.0	5	11	28	51	22	37	53	32	60
24.1 - 30.0	11	23	51	41	17	54	33	20	80
30.1 - 36.0	8	17	68	43	18	72	16	10	90
36.1 - 42.0	4	9	77	31	14	86	9	6	96
42.1 - 48.0	5	10	87	15	6	92	4	2	98
48.1 - 54.0	2	4	91	10	4	96	3	2	100
54.1 - 60.0	1	3	94	6	3	99	-	-	-
60.1 - 72.0	2	4	98	3	1	100	-	-	-
72.1 or over	1	2	100	-	-	-	-	-	-

SOURCE: The New York State Executive Advisory Committee on Sentencing from data provided by the New York State Division of Parole and the Vera Institute of Justice.

[1] C% refers to cumulative percent.

TABLE 43: Number, Percent, and Cumulative Percent Distribution of Time Served (In Months) for Defendants Convicted of Selected Burglary Charges and Released on Parole for the First Time on Their Present Sentence between January 1, 1977 and June 30, 1977

	BURGLARY 3° Number = 93			ATTEMPTED BURGLARY 3° Number = 75		
TIME SERVED (in months)	Number	%	C%[1]	Number	%	C%
12.0 - 18.0	27	29	29	42	56	56
18.1 - 24.0	30	32	61	22	29	85
24.1 - 30.0	27	29	90	7	10	95
30.1 - 36.0	5	6	96	4	5	100
36.1 - 42.0	4	4	100	-	-	-

SOURCE: New York State Executive Advisory Committee on Sentencing, from data provided by the New York State Division of Parole and the Vera Institute of Justice.

[1] C% refers to cumulative percent.

TABLE 44: Number, Average Minimum Period of Imprisonment, Average Maximum Term, by Conviction Charge: Minimum Periods of Imprisonment Set by the New York State Board of Parole between January 1, 1978 and June 30, 1978

OFFENSE	FELONY CLASS	N[1]	AVERAGE MINIMUM PERIOD OF IMPRISONMENT	AVERAGE MAXIMUM TERM	AVERAGE % OF MAXIMUM TERM[2]
Manslaughter 1°	B	82	55	128	43
Manslaughter 2°	C	63	44	90	49
Robbery 1°	B	180	35	91	38
Attempt. Robbery 1°	C	66	34	74	46
Robbery 2°	C	307	31	71	44
Attempt. Robbery 2°	D	74	25	46	54
Robbery 3°	D	142	28	53	53
Assault 1°	C	56	34	68	50
Assault 2°	D	58	29	53	55
Burglary 3°	D	110	25	50	50
Attempt. Burglary 3°	E	88	24	42	57
Grand Larceny 3°	E	72	23	43	53

SOURCE: New York State Division of Parole, Guidelines Research Staff, *Statistics on MPI Sample: January to June, 1978* (undated).

[1] N refers to the number of cases in a category.

[2] Average Percent of Maximum Term is equivalent to the average minimum period of imprisonment divided by the average maximum term.

NOTE: This table is limited to charge categories for which there were at least 50 minimum periods of incarceration set.

REFERENCE NOTES TO APPENDIX A - Statistical Profile of New York's Criminal Justice System

1. United States Department of Justice, Law Enforcement Assistance Administration, *A Comparison of 1972 and 1974 Findings*, Report No. SD-NCS-C-6 at 1-4 and 115-126 (November, 1976) [hereinafter cited as *Survey*].

No information for New York State as a whole is available; however, the National Crime Panel Survey conducted a victimization survey in Buffalo in 1974. *See* United States Department of Justice, Law Enforcement Assistance Administration, *Criminal Victimization Survey in 13 American Cities*, Report No. SD-NCP-C-4, at 27-44 (June, 1975).

2. United States Department of Justice, Law Enforcement Assistance Administration, *A Comparison of 1972 and 1974 Findings*, at 40 (May, 1976), *cited in* Wolfgang & Singer, "Victim Categories of Crime," 60 J. Crim. Law & Criminology 379, 381 (1978).

3. There are a number of methodological and definitional problems which limit the reliability of the vicimization rates computed on the basis of this survey. For a detailed consideration of these issues, see *Survey*, *supra* note 1, at iii-iv.

4. *Survey*, *supra* note 1, at iii-iv.

5. Confrontations which resulted in physical injury to the victim reflect the totals for aggravated assault, rape and robbery with injury.

6. *Survey*, *supra* note 1, at 63.

7. *Id.* at 64.

8. *Id.* at 65.

9. Total includes 171 offenses concerning manslaughter by negligence. New York State Division of Criminal Justice Services, *Crime and Justice: Ann. Rep. - 1977* (1978) at 5 [hereinafter cited as *DCJS: Annual Report - 1977*].

10. *Id.* at 4.

11. *Id.* at iii-iv.

12. *Id.* at 75. The number of net complaints is equal to the total number of reported complaints minus the number classified as "unfounded." DCJS does not publish any statistics about the number of unfounded Part I complaints.

13. The arrest of one suspect may clear more than one crime complaint. As a recent Rand Corporation study notes:

> "With a suspect in custody, police investigators are often able to 'clear,' or solve, previous crimes by linking them to the suspect through confession, similarity of MO, fingerprint matches, and the like.... In one extreme case, twenty robberies were cleared by the arrest of one offender."

J. Petersilia, P. Greenwood & M. Lavin, *Criminal Careers of Habitual Felons*, R-2144-DOJ, at 120 (August, 1977).

14. *DCJS: Annual Report - 1977, supra* note 9, at 4.

15. *Id.*

16. New York State Division of Criminal Justice Services, *Crime and Justice: Ann., Rep. - 1977*, at 97 (1978) (amended version) [hereinafter cited as *DCJS: Amended Annual Report - 1977*].

17. DCJS does not publish felony arrest data according to New York State Penal Law Articles. Felony arrest data is grouped into two categories - "drug" and "non-drug." *DCJS: Annual Report - 1977, supra* note 9, at 135-138.

18. *DCJS: Amended Annual Report - 1977, supra* note 16, at 96. (DCJS felony arrest data is generated from information provided to the Division by the 615 police agencies within the state, pursuant to Section 160.20 of the Criminal Procedure Law). The New York State Division of Criminal Justice Services states that there were 138,831 felony arrest reported for calendar year 1977. DCJS explained the discrepancy between the figure and their Annual Report as follows:

> "Since fingerprint cards reach DCJS by mail from most upstate counties, there is a lag of perhaps several weeks before the fingerprint data base is complete for the prior month. Consequently, the data for the present period may be lower than the actual count because some of the December arrests may not have been posted to the data base."

New York State Division of Criminal Justice Services, *New York State Felony Processing Quarterly Rep: January - December 1977*, at 5 (Jan. 7, 1978) [hereinafter cited as *Felony Processing Report*].

19. *DCJS: Annual Report - 1977, supra* note 9, at 139.

20. In a different report, DCJS states that 31,001 defendant-indictments were filed in 1977. *Felony Processing Report, supra* note 18, at 15.

The discrepancy between the figures reported in these two volumes is due to the fact that the data base used for the annual report is more complete. The discrepancy is less than one percent and therefore the statistics provided in the *Felony Processing Report* may be used with confidence.

21. New York City - 66.7%; Suburban New York City counties - 65.4%; Upstate counties - 63.4%. *Id.*

22. The drug category was excluded from the analysis because DCJS devotes considerable attention to presenting processing patterns for these offenses. Additionally, since imprisonment is mandated for conviction for most of these offenses, a review of these statistics provides little insight into sentencing variation. For example, see *Id.* at 36-43, 50-51, 57-60 & 66-77.

23. The suburban dismissal rate includes cases diverted from the criminal justice system through Operation Midway, a Nassau County diversionary program. The inclusion of these cases in the computation of the dismissal rates serves to deflate the conviction rate for the suburban counties. *DCJS: Annual Report - 1977, supra* note 9, at 140.

24. *Felony Processing Report, supra* note 18, at 17.

25. *DCJS: Annual Report - 1977, supra* note 9, at 152.

26. *Id.*

27. Instructions for reading Tables 14 - 17. Refer to Table 14.

The felony class of the most serious offense is listed horizontally at the top of the page. The felony class of the most serious conviction offense is listed vertically. The conviction classifications are subdivided into three categories.

1) Same Offense - the defendant was convicted of the most serious indictment charge,

2) Same article - the defendant was convicted of a charge within the same penal law article, but not the most serious indictment charge,

3) Different article - the defendant was convicted of an offense in the same or a different felony class from the most serious indictment charge and an offense in a different penal law article from the most serious indictment charge.

Table 14 indicates that 1,294 or 27.3% of the defendants who were convicted following an indictment for a B felony, were convicted of the most serious indictment charge. To determine the number and percent of the defendants whose top indictment charge was a B felony but who were convicted of a D felony within the *same* penal law article, read down the column labeled Class B, refer to the conviction felony classes listed on the left-hand side of the page under "same article." The intersection of this row and column indicates that 1,275, or 26.9% of the defendants charged with B felonies were convicted of a D felony within the same penal law section. By reading further down the Class B indictment column, and referring to the conviction offenses, you will observe that 35 or 0.7% of the defendants whose top charge was a B felony were convicted of a B felony, contained within a different penal law article.

28. The data in Table 18 in derived from *Felony Processing Report, supra* note 18. *DCJS: Annual Report - 1977, supra* note 9, at 140 indicates that there were 25,344 post-indictment convictions; that is, 266 more than are reflected in Table 18. Since there is only a 1% discrepancy, the statistics presented in Table 18 may be used with confidence.

29. New York City - 65.0%, suburban New York City counties - 60.9%, and upstate counties - 61.9%. *Felony Processing Report, supra* note 18, at 46-48.

30. The statistics presented in Tables 21 and 22 were derived from the *Felony Processing Report*, which uses a slightly smaller data base than the *DCJS: Annual*

Report - 1977. Nevertheless, the relative proportion of incarcerative versus non-incarcerative sanctions remains essentially unchanged. The sanctioning patterns for these six offense categories are *not* representative of the patterns for offense categories omitted from this analysis. *See Felony Processing Report, supra* note 18, at 53-56 (which provides sentencing data for all categories of offenses).

31. For offenses other than "drugs," DCJS in the annual reports, publishes three sets of conviction data using New York State Penal Law articles and sections.

— A breakdown for six offense categories: Murder (excluding Manslaughter), Rape, Robbery, Assault, Burglary and Larceny. This data pertains to felony convictions and includes the type of sanction (i.e., conditional discharge, state prison) *See DCJS: Annual Report - 1977, supra* note 9, at 178-179.

— For these same offense categories, information describing the length of prison terms, with the length of maximum terms grouped into 12 categories (e.g., maximum terms, more than 5 but less than 7 years) is provided.

— Again, for these six categories, the length of the sentence to probation is also provided.

— No information is published by DCJS concerning the number of felony convictions, the number of felony convictions which result in jail terms, the number of defendants who are convicted of felonies and sentenced as Youthful Offenders, or the number of post-indictment misdemeanor convictions.

32. *Id.* at 178.

33. Because DCJS publishes information concerning the length of sentence in grouped form, it is not possible to accurately calculate the mean and median maximum term.

34. Data pertaining to female New Commitments were omitted from this analysis because Department of Correctional Services statistics reveal that only 281 women were received as New Court Commitments in 1976. This number is far too small for analytical purposes.

35. There are a number of serious limitations in the sample used for this research; therefore, the reader must interpret this data with caution. Some of the limitations include:

1) The data base that was used for this analysis was developed by the Vera Institute of Justice under contract #125234 with the New York State Department of Correctional Services.

The data presented in these tables was generated by the Executive Advisory Committee on Sentencing by merging the Vera Institute data base with social statistics card information provided by the New York State Division of Parole. The social statistics card is completed for every inmate conditionally released or released by action of the Parole Board. In merging the computer tapes for these two data bases, overall 156 or 11.6% of the Vera sample cases were lost. This means that it was not possible to match the Vera data with the social statistics data using NYSID and/or Department of Correctional Services identification numbers. This shrinkage in the sample may bias the time served statistics.

2) This sample is limited to 29.3% of all inmates released from a state correctional facility between January 1 and June 30, 1977. Moreover, the figures pertain to only 40.3% of all inmates released on parole during this time period. 59.7% of the parole release population is not represented in this sample. Three large groups have been excluded:

— "re-parolees," that is, inmates who were paroled on their present sentence, revoked, and subsequently restored to parole supervision by an action of the Parole Board;

— youthful offenders; and

— inmates who were convicted of Criminal Possession or Sale of a Controlled Substance (drug offenders).

3) The data pertains to inmates released on parole during a six month time period and may therefore reflect seasonal biases.

4) The sample time frame of January 1 to June 30, 1977 refers to actual dates on which the inmates were released from a correctional facility. It therefore includes inmates granted parole in 1976 and released in the spring of 1977, and excludes inmates granted parole during the spring of 1977, and released after June 30, 1977.

Due to the limitations described above, the data presented in Table 40, while the best presently available, may not be a comprehensive measure of time served.

36. No information concerning "jail credit" accumulated by conditional releasees or re-parolees is collected by either the New York State Division of Parole or the New York State Department of Correctional Services. These agencies define time served as the total amount of time served from the date of reception at a prison until the first date of release. These time served figures, by omitting jail credit, underestimate the actual amount of time served by parolees or conditional releasees.

37. Unfortunately, no information is available concerning the median MPI, the median maximum term, or the actual range of MPI's and maximum terms.

APPENDIX B

Sentencing Abstract

In New York State a felony is defined as an offense for which a sentence to a term of imprisonment in excess of one year may be imposed. The Penal Law contains five (5) felony categories (A, B, C, D, and E), and three (3) subclassifications within the A felony class (A-I, A-II and A-III).

The range of sentences for felonies is as follows:

*FELONY CLASSIFICATION**	*MINIMUM*	*MAXIMUM*
A-I FELONY	The death sentence is statutorily mandated.	
MURDER-1°		
A-I FELONY[1]	At least 15 years	Life
ARSON-1°, ATTEMPTED MURDER-1°, ATTEMPTED CRIMINAL POSSESSION OF DRUGS-1°, ATTEMPTED CRIMINAL SALE OF DRUGS-1°, CONSPIRACY-1°, KIDNAPPING-1°, MURDER-2°	At most 25	
—Imprisonment is mandatory for all A-I Felonies except Murder-1, where the death sentence is mandatory.		
A-II FELONY[1]	At least 6 years	Life
ATTEMPTED A-II FELONY, CRIMINAL POSSESSION OF DRUGS-2°, CRIMINAL SALE OF DRUGS-2°	At most 8 ⅓	
—Imprisonment is mandatory for all A-II Felonies.		
A-III FELONY[1]	At least 1 year	Life
ATTEMPTED A-III FELONY, CRIMINAL POSSESSION OF	At most 8 ⅓	

* Those felonies in which imprisonment is mandatory are in capital letters. In all felony classifications, even where imprisonment is mandatory and no alternative dispositions are permitted, a fine to $5,000 or double the profit from the crime may be imposed in addition to the prison term.

[1] A definite term of impirsonment is not permitted.

*FELONY CLASSIFICATION**	*MINIMUM*	*MAXIMUM*
DRUGS-3°, CRIMINAL SALE OF DRUGS-3° —Imprisonment is mandatory for all A-III Felonies, except that lifetime probation is permitted in return for defendant's material assistance in connection with a drug felony.		
CLASS B VIOLENT FELONY[1] ARSON-2°, BURGLARY-1°, KIDNAPPING-2°, MANSLAUGHTER-1°, RAPE-1° ROBBERY-1°, SODOMY-1°, CRIMINAL POSSESSION OF A WEAPON-1°, ATTEMPTED ARSON-1°, ATTEMPTED KIDNAPPING-1°, ATTEMPTED MURDER-2° —Imprisonment is mandatory for all Class B Violent Felonies.	A minimum must be fixed by the Court at ⅓ of the maximum term imposed.	At least 6 At most 25
CLASS B (NON-VIOLENT) FELONY[1] ATTEMPTED A-I FELONY, BRIBERY-1°, BRIBE RECEIVING-1°, CONSPIRACY-2°, CRIMINAL FACILITATION-1°, CRIMINAL MISCHIEF-1°, CRIMINAL POSSESSION OF DRUGS-4°, CRIMINAL SALE OF DRUGS-4°, PROMOTING PROSTITUTION-1°, AGGRAVATED SEXUAL ABUSE —Imprisonment is mandatory for all Class B Non-Violent Felonies.	At least 1 At most 8 ⅓ -If the Court sets a minimum, it cannot exceed ⅓ of the maximum.	At least 3 At most 25

* Those felonies in which imprisonment is mandatory are in capital letters. In all felony classifications, even where imprisonment is mandatory and no alternative dispositions are permitted, a fine to $5,000 or double the profit from the crime may be imposed in addition to the prison term.

[1] A definite term of imprisonment is not permitted.

*FELONY CLASSIFICATION**	*MINIMUM*	*MAXIMUM*
CLASS C VIOLENT FELONY[1]	The minimum must be fixed by the	At least 4 ½
ASSAULT-1°, BURGLARY-2°, ROBBERY-2°, CRIMINAL POSSESSION OF A WEAPON-2°, ATTEMPT OF ANY CLASS B VIOLENT FELONY	Court at ⅓ of the maximum term imposed.	At most 15
—Imprisonment is mandatory for all Class C Violent Felonies.		
CLASS C (NON-VIOLENT) FELONY[2,3]	At least 1	At least 3
Arson-3°, ATTEMPTED CONSPIRACY-1°, Attempted B Felony,[4] Use of Child in Sex Performance, Criminal Facilitation-2°, Criminal Solicitation-1°, CRIMINAL POSSESSION OF DRUGS-5°, CRIMINAL SALE OF DRUGS-5°, Forgery-1°, Criminal Possession of Forged Instrument-1°,	At most 5 If the Court sets a minimum, it cannot exceed ⅓ of the maximum.	At most 15

* Those felonies in which impirosnment is mandatory are in capital letters. In all felony classifications, even where imprisonment is mandatory and no alternative dispositions are permitted, a fine to $5,000 or double the profit from the crime may be imposed in addition to the prison term.

[1] A definite term of imprisonment is not permitted.

[2] The following dispositions are permitted for C, D, and E felonies which do not carry mandatory imprisonment:

Unconditional Discharge, Conditional Discharge (3 years), Fine to $5,000 or to double profit from crime, Conditional Discharge plus Fine, Fine plus Imprisonment, Probation (5 years), Probation plus Fine. If jail term is 60 days or less, probation or conditional discharge plus imprisonment are also permitted.

[3] A definite sentence of imprisonment is not permitted except for Possession or Sale of Drugs-5°, where a definite term of one year or less may be imposed.

[4] The following "attempts" involve mandatory imprisonment: Bribe Receiving or Bribery-1°, Criminal Mischief-1°, Promoting Prostitution-1°.

*FELONY CLASSIFICATION**	*MINIMUM*	*MAXIMUM*
Grand Larceny-1°, Manslaughter-2°, Criminal Possession of Marijuana-1°, Criminal Sale of Marijuana-1°, RECEIVING AWARD FOR OFFICIAL MISCONDUCT-1°, REWARDING OFFICIAL MISCONDUCT-1°, PROMOTING PROSTITUTION-2°, CRIMINAL USURY-1°		
CLASS D VIOLENT FELONY[2] [4]	At least 1	At least 3
ASSAULT-2°, Sexual Abuse-1°, Attempt of any Class C Violent Felony,[5] [6]	At most 2 ⅓ -If the Court sets a minimum, it cannot exceed ⅓ of the maximum.	At most 7

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* Those felonies in which imprisonment is mandatory are in capital letters. In all felony classifications, even where imprisonment is mandatory and no alternative dispositions are permitted, a fine to $5,000 or double the profit from the crime may be imposed in addition to the prison term.

[2] The following dispositions are permitted for C, D, and E felonies which do not carry mandatory imprisonment:

> Unconditional Discharge, Conditional Discharge (3 years), Fine to $5,000 or to double profit from crime, Conditional Discharge plus Fine, Fine plus Imprisonment, Probation (5 years), Probation plus Fine. If jail term is 60 days or less, probation or conditional discharge plus imprisonment are also permitted.

[4] A definite or intermittent sentence of imprisonment to 1 year or less may be imposed.

[5] Imprisonment is mandatory for Attempted Assault-1°.

[6] If the defendant pleads down to a Class D Violent Felony in any case where the indictment contains an "Armed Felony" count, then imprisonment in state prison for an indeterminate term is mandatory, unless specified mitigating factors are demonstrated.

FELONY CLASSIFICATION	*MINIMUM*	*MAXIMUM*
CLASS D (NON-VIOLENT) FELONY[2,4,7]	At least 1	At least 3
Attempted C. Felony,[6] Burglary-3°, Criminal Possession of Stolen Property-1°, Criminal Trespass-1°, Criminal Possession of Drugs-6°, Criminal Sale of Drugs-6°, Forgery-2°, Criminal Possession Forged Instruments-2°, Grand Larceny-2°, Criminal Possession Marijuana-2°, Criminal Sale Marijuana-2°, Rape-2°, Reckless Endangerment-1°, Robbery-3°, Sodomy-2°	At most 2 ⅓	At most 7
CLASS E FELONY[2,4,7]	At least 1	At least 3
Arson-4°, Attempted D Felony, Criminal Possession Stolen Property-2°, Criminal Possession of Drugs-7°, Grand Larceny-3°, Criminally Negligent Homicide, Rape-3°, Sodomy-3°		

[2] The following dispositions are permitted for C, D, and E felonies which do not carry mandatory imprisonment:

> Unconditional Discharge, Conditional Discharge (3 years), Fine to $5,000 or to double profit from crime, Conditional Discharge plus Fine, Fine plus Imprisonment, Probation (5 years), Probation plus Fine. If prison term is 60 days or less, probation or conditional discharge plus imprisonment are also permitted.

[4] A definite or intermittent sentence of imprisonment to 1 year or less may be imposed.

[7] Listed are common felony crimes which upon conviction are likely to produce prison terms.

[6] Imprisonment is mandatory for Attempted Promoting Prostitution-2°.

CONTINUED

1 OF 4

In addition, under New York law there are provisions for increased penalties for second and third felony offenders, depending upon whether prior convictions were for violent or non-violent felonies.

A second felony offender is a person, other than a second violent felony offender, who stands convicted of a felony other than a Class A felony, after having previously been subjected to one or more predicate felony convictions. A second violent felony offender is a person who stands convicted of a violent felony offense after having previously been subjected to a predicate violent felony conviction.

The new 1978 violent felony offender sentencing structure parallels the second felony offender provisions that have been in effect since 1973. While the criteria are similar for both statutes[9] the distinction between them lies in the mandated sentence. The sentence for a second violent felony offender is more severe than for a second felony offender. The minimum maximum for a Class B or C second violent felony offender is one-third higher than for a regular second felony offender, while the mandated increase in the Class D felony category is one-fourth higher if the predicate felony was violent.

A persistent felony offender is a person, other than a persistent violent felony offender, who stands convicted of a felony after having previously been convicted of two or more felonies. Similarly, a persistent violent felony offender is a person who stands convicted of a violent felony offense after having previously been subjected to two or more predicate violent felony convictions.

There is, however, a major difference between the statutes dealing with violent or regular persistent felonies. The imposition of the persistent violent felony offender sentence is mandatory if the defendant has previously been convicted of two or more violent felony offenses, while the imposition of the persistent felony offender sentence, which provides for between 15-25 years and life in prison, is discretionary with the Court. In the case of regular persistent felony cases, if the Court does not sentence the person as a persistent felony offender, he will then receive a second felony offender sentence.

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[9] The main provision in determining whether a prior conviction is either a predicate felony conviction or a predicate violent felony conviction, is that the sentence must have been imposed not more than ten years before commission of the felony of which the defendant presently stands convicted. In calculating the ten year period, any period of time during which the person was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony shall be excluded and such ten year period shall be extended by a period equal to the time served under such incarceration.

However, while the prior conviction must have been of a Class A felony or of a violent felony conviction for it to be considered a predicate violent felony conviction, the prior conviction need only to have been of a felony for it to qualify as a predicate felony conviction.

FELONY CLASSIFICATION	*MINIMUM*	*MAXIMUM*
Class B 2nd Violent Felony Offender*	½ Maximum (Fixed by Court)	At least 12 At most 25
Class B 2nd (Non-Violent) Felony Offender*	½ Maximum (Fixed by Court)	At least 9 At most 25
Class C 2nd Violent Felony Offender*	½ Maximum (Fixed by Court)	At least 8 At most 15
Class C 2nd (Non-Violent) Felony Offender*	½ Maximum (Fixed by Court)	At least 6 At most 15
Class D 2nd Violent Felony Offender*	½ Maximum (Fixed by Court)	At least 5 At most 7
Class D 2nd (Non-Violent) Felony Offender*	½ Maximum (Fixed by Court)	At least 4 At most 7
Class E (Non-Violent) Felony Offender*	½ Maximum (Fixed by Court)	At least 3 At most 4
Class B Persistent Violent Felony Offender*	At least 10 At most 25	Life
Class C Persistent Violent Felony Offender*	At least 8 At most 25	Life
Class D Persistent Violent Felony Offender*	At least 6 At most 25	Life
Persistent (Non-Violent) Felony Offender	The Court has discretionary authority to impose a sentence consisting of a minimum of 15-25 years and maximum of life imprisonment upon a person who commits a felony (any class) after having previously been convicted of two or more felonies. If the Court elects not to impose this sentence, then the Second (Non-Violent) Felony Offender provisions apply.	

* A definite term of imprisonment is not permitted and imprisonment is mandatory within the stated range. Also, the sentencing court must impose the minimum period of imprisonment.

a The information contained in this abstract is derived from Articles 60, 65, 70, 75 and 80 of the N. Y. Penal Law (McKinney's, 1978) and *Sentencing Charts*, Schwartz (McKinney's, 1978). B. Elison, *New York Penal Law Felony Sentences September 1978* (1978) (unpublished manuscript). Not all offense categories are included in this abstract.

Appendix C

Sentencing Simulation Study

APPENDIX C

Sentencing Simulation Study

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PREFACE

by

Leslie T. Wilkins

The report on the Sentencing Simulation Study performed for the Executive Advisory Committee on Sentencing is a good example of the use of simulation methods for the purpose of examining issues in sentencing which could not be explored by any other means. Comparisons of actual decisions concerning the "real life" dispositions given to offenders by the courts cannot be made with any degree of precision because each case is unique. However, when we consider the problem of equity in the allocation of punishments, we work with the idea of similar persons, guilty of similar crimes, being similarly dealt with. Simulation methods present no difficulty in standardizing the information about the "case" and providing the same material in the same form to all decision-makers.

Simulation and "gaming" methods have been widely and frequently used in the study of business, industrial and military problems, but their application to issues in criminal justice is still rather rare. This may be because simulation (or "gaming") does not seem quite appropriate when the outcomes of decisions are of such heavy consequences for the accused, offender or suspect.

It is doubtful whether many persons would wish to object to the application of such methods on moral grounds at this time. The major doubts about the use of these "decision games" is that they may not be taken seriously. It is argued that since the decision-makers are aware that there are no "real life" consequences for the subjects of the decisions, they will not give the "gamed" decision the same degree of consideration as they would if it had actual consequences. Although this may seem to be a plausible objection, there are no grounds for believing that decision games are not valid methods for exploring "real life" situations: games are also serious matters! Consider for example, what a large proportion of any news bulletin consists of reports of games! People play games very seriously, and the same attitude seems to apply in general to "gaming" or simulation methods when these are used for research purposes.

In the "real life" situation, the judge sees the accused, and may, by asking further questions, obtain additional information about the offense or the offender. Moreover, the offender is usually before him when the judge pronounces his sentence. It may be thought that this

fact renders the simulation "unrealistic". It does, to some degree, but that does not mean that the *results* are invalid. Where it has been possible to check simulated decisions about offenders with actual case decisions, the nature of the decision-making processes, the information considered and the qualities of the decisions have been found to be very similar.

With regard to the present study, it will be noted that the actual case decision was, in all instances, within range of the simulated decisions. However, it will also be noted that the actual decision was, without exception, less severe than the median level of severity of the simulated case decisions. In one case the simulated decision median sentence was quite close to the sentence actually awarded in the case, but even in this case, the actual sentence was slightly less severe.

The fact that (a) the actual sentences given were within the range of sentences allocated in the simulation, and (b) actual sentences were less severe, lends great support to the data obtained in this simulation. It is observed that when a decision is made about a person which is "unpleasant", the presence of the individual concerned tends to "soften" the determination. Evidence of this is available from parole decisions which are sometimes made "on paper" and sometimes with the offender present. The same decision-makers, in the latter case, tend to be more lenient in their determinations. It has also been demonstrated by simulation techniques that where the method of presenting information to decision-makers (including parole board members) is in a "de-personalized" format, the determinations are more risk aversive — that is to say, more severe, in that the petitioner is more likely to be refused parole.

There is, of course, one other possibility which might give rise to the bias towards more severe penalties in the simulation situation than that which applied when the case was disposed of in "real life". There has been a general trend towards more severe penalties being demanded by the public. The cases were, of course, disposed of in actuality, at a time prior to the simulated sentencing. The trend towards greater severity might be due to the general trend with time. This seems unlikely to explain all of the difference, although it might account for some proportion of the difference.

It is important to consider whether the difference between the actual and the simulated sentences with its consistent bias could prejudice any of the inferences drawn from the study. Specifically, would disparity in "real life" sentences be likely to be very much less than that shown by the simulated sentences? The fact that the actual determinations were within the range of the simulated decisions makes it

very unlikely that the "real life" disparity would be much less than that observed in simulation. The extension of the range towards the high severity penalties in the simulation might increase slightly the range available for disparity to become visible. However, the differences are so large that the fact of disparity must be accepted, as must the fact that it is not of trivial proportions.

This study of the Executive Advisory Committee on Sentencing is a very welcome addition to the small collection of research studies of sentencing using simulation methods. The data are given in some detail, and it is likely that further analyses by research workers will reveal additional interesting and valuable results. In particular, this is the first published study to have attempted to relate the sentencing decision to the philosophy of sentencing. The initial analysis reveals that concepts of retribution, rehabilitation, general and special deterrence do not seem to influence the nature of the disposition selected for the offender. It may be that there are more complex factors at work which obscure the relationship between the purpose sought in the disposal and the nature of that disposition. Perhaps not. There is more that we need to know about decision-making in the criminal justice field, and this study is a very valuable contribution to our increasing information.

INTRODUCTION

This report presents the findings from a "sentencing simulation exercise" conducted by the Executive Advisory Committee on Sentencing in collaboration with 41 Supreme and County Court judges in New York State.

Our research was designed to achieve two objectives: to determine the extent to which judges who were evaluating the *same* case would impose different sentences; and to identify factors which may contribute to sentencing disparity.

The results of this study support the conclusion that sentence disparity is a widespread phenomenon in New York State. In particular, we have found that:

1. Judges presented with identical pre-sentence reports containing precisely the same information concerning an offense and offender, differ widely in both the type and length of sentence they would impose. Thus, in one of the sample cases we provided to judges, the judges imposed sentences ranging from a low of 0 - 3 years imprisonment to the statutory maximum of 8 1/3 - 25 years imprisonment. Furthermore, practically every possible intermediate sentence was imposed — the range of sentences covered the entire spectrum. This same pattern was repeated in all eight cases used in the study.

2. Not only is there little uniformity in sentencing among judges; there is little consistency in the manner in which a *single* judge makes sentencing decisions. Specifically, disparity in sentences does not seem to be explained by the fact that some judges are generally more lenient than others. Our findings indicate that with very few exceptions, there are no judges who are consistently "lenient" or "severe".

3. Disparity revealed in our study does not appear to be primarily due to whether the judge presides in an upstate or downstate county. For example, New York City judges are reputed to be lenient sentencers; however, in this study some of the most severe sentences were imposed by them. Similarly, some of the most lenient sentences were imposed by judges from upstate counties.

Having thus summarized the results, we turn now to a brief description of the methodology of our study.

The Design of the Study

This study involves the use of "simulation exercises" which attempt to approximate actual decision-making conditions.

Anthony Partridge and William Eldridge, in the research they conducted in collaboration with federal district court judges in the Second Circuit, found that simulation techniques provided a useful tool for determining the existence of sentencing disparity.[1] Partridge and Eldridge asked a random sample of judges to review actual presentence reports and to indicate the decision that they probably would have imposed in the cases. This approach has two major advantages. First, the cases are real, and are presented to the judges in the familiar and true-to-life format of a presentence report ("PSR"). Second, the judges are all reviewing the same case and are sentencing on the basis of the same information; any variation in the sentences imposed can only be attributed to differences among *judges*, rather than to differences in the *cases* before them.

Case Selection

A simulation approach using actual presentence reports was therefore chosen as a technique to study sentencing disparity. Probation reports were obtained from the New York City Department of Probation, which was asked to provide reports relating to "typical defendants" convicted of "typical felonies". Once the PSR's were received, the Committee staff chose the sample cases. A number of the reports examined by the staff were rejected for one or more of the following reasons:

— the offenses concerned a statistically rare conviction for arson, or for criminally negligent homicide arising from child abuse;

— the nature and circumstances of the offense were very complicated, involving a number of principal actors;

— the description of the offense was incoherent;

— the defendant had a very serious history of mental illness, or his/her competency to stand trial had been open to question; or

— the defendant had to be sentenced as a second felony offender (for which imprisonment is mandatory and minimum sentence must be set at one-half of the maximum imposed).[2]

Eight cases were finally selected for inclusion in the study. These cases involved a wide variety of criminal activities ranging from drug sales and burglary to armed robbery and homicide. Similarly, there was substantial variation in the length, type, and seriousness of the prior criminal records of the defendants. At one extreme was a case which involved a defendant with no prior juvenile or adult arrests. At the other extreme, one case concerned a defendant with fifteen prior arrests and eight misdemeanor convictions, who had also received six jail terms.

Although these cases may not be representative in a statistical sense, there is a certain amount of "ordinariness" about them. They reflect common factual, almost stereotypical, situations, and raise a number of common sentencing problems. Four of the cases required the imposition of prison terms. In the remaining cases, the judges had a variety of sentencing alternatives available to them, including probation, jail, and state prison.

Since all of these cases concerned New York City defendants, it was necessary to alter the presentence report slightly to give the impression that the offense could have occurred anywhere in the State. The modifications merely involved changing the names of the parties involved, and their street addresses.

Judge Sample

Judges were selected by using stratified, cluster sampling.[3] Forty-one judges from all parts of the State agreed to participate in this study.[4] Twenty-three were from downstate counties, that is New York City, Suffolk, Nassau or Westchester Counties. Seventeen preside in upstate counties. We have no indication of where one judge in our sample presides.[5]

Completion of the Exercise

During the first week of September, 1978, participating judges were sent copies of the eight presentence reports, plus a general instruction sheet and a decision form for each case. (See Figures 1 and 2.) The

judges were asked to perform three tasks:

1) review each presentence report and record on the decision form the sentence that he/she would probably have imposed in the case;

2) indicate the reason(s) for the sentence; and

3) distribute 100 points across five major sentencing objectives (e.g. retribution, rehabilitation, general deterance, special deterrence, and incapacitation).[6]

The judges were directed to assume that the defendant was *not* eligible for sentencing under the recently enacted Violent Felony Offender Statute which went into effect on September 1, 1978.[7]

The Sentencing Decision-Making Process

In interpreting the findings, four well-accepted assumptions have been made about the sentencing decision-making process:

1) The judge in reading the PSR must sift through the wealth of facts, evaluations, and irrelevancies contained in the file. Although volumes of "information" are available to him, the final decision, the sentence, reflects *inferences* drawn from a *few* very specific pieces of information.[8]

2) On the basis of this information, the judge draws conclusions and identifies the objectives to be served by the sentence (retribution, general deterrence, etc.).

3) He then reviews the dispositional alternatives available, and selects the alter-

native which he believes is most likely to achieve these goals.

44) The reasons given for the decisions are *determinants* rather than *rationalizations* for the decision. In other words, the judge does not decide on imprisonment and then search for facts or objectives to justify this sentence.[9]

The findings indicate that judges who reviewed the same PSR imposed vastly different sentences. It appears that the sentencing decision-making process is extremely complex, and the variations in sentences observed in this study may be attributable to interactions among a number of factors.

The following sections describe the findings from this research.

CASE 1: Thomas Smith

Conviction Offense: Attempted Robbery 2°

Thomas Smith, a seventeen year old youth with no prior juvenile or adult record, was indicted* for Attempted Robbery 2°, a Class D felony, and convicted on a plea of guilty to the same charge.

Offense Description

Thomas Smith and a juvenile accomplice, who brandished an imitation pistol, accosted 54 year old Nathaniel Loft in the vestibule of an apartment building at 1520 Main Street and attempted to rob him. According to the PSR:

> "On January 7, 1978, at about 9:00 p.m., Police Officer Leroy Anderson, who was off-duty at the time, was walking down Main Street and saw the defendant and the defendant's juvenile accomplice walking in front of him. Police Officer Anderson overheard the juvenile say to the defendant, 'Gonna get some money, gonna rob that man.' Police Officer Anderson then saw the defendant and his juvenile accomplice break into a run. Police Officer Anderson followed close on their heels. The defendant and his juvenile accomplice entered the hallway of 1520 Main Street. The complainant was already inside this hallway. The defendant grabbed the complainant around the neck and started to rifle through his pockets while the juvenile accomplice held the gun on the complainant and announced a stick up. Immediately, Police Officer Anderson arrived on the scene, drew out his gun and placed the defendant and his accomplice under arrest."

The complainant was not injured during the commission of the offense, and nothing was actually taken from him.

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* In cases of multiple indictment charges relating to the same offense, we describe only the most serious charge. In the presentence reports reviewed by the judges, all charges were listed.

Defendant's Statement

The defendant maintained his innocence of any wrong-doing. In explaining his presence at the scene of the crime, Smith indicated that he and the codefendant had entered the vestibule of the 1520 Main Street apartment building in the belief that it was the address of a girl whom they planned to visit.

Complainant's Statement

The complainant indicated that he had just entered the vestibule of the apartment building at 1520 Main Street to visit his brother-in-law when the defendant and his accomplice came up behind him and tried to rob him:

> "Complainant Loft recalled that the defendant grabbed him around the neck and held him while the juvenile accomplice put a gun to his head, threatening to 'Blow his brains out'."

The complainant further stated that he received a disability pension due to a heart condition and high blood pressure, adding that the attempted robbery was a "traumatic" experience and that he had felt "shook up ever since".

In terms of sentencing, the complainant indicated that he felt very strongly that the defendant should "get some time".

Prior Criminal Record

The defendant had no prior criminal record.

Social History

At the time of the offense, defendant Smith resided with his parents and younger brother at a local housing project where the family had lived for fourteen years. He had a ninth grade education and had held only one job, as a maintenance worker through the Neighborhood Youth Corps during the summer of 1977. The defendant had no known history of drug or alcohol abuse.

The defendant's mother described him as having been "a physically restless, hyperactive boy even as a young child", and stated that even in elementary school "he was in constant difficulty with his teachers

and peers." Smith had also been a persistent truant. School authorities had referred the mother to the Bureau of Social Service, where she and the defendant went for counselling from the time he was nine through fifteen years of age. The last evaluation of the defendant by this agency in 1975 characterized him as a youth with "severe learning disabilities which contributed to his behavior problems in school," and noted that his behavior could be "aggressive and sometimes explosive." His father's disinterest in family life was also noted and Smith was described as being in need of "a male figure with whom he could identify."

Dispositional Options

The following sentencing alternatives were available to the judges:

1) Conditional or unconditional discharge;

2) Fine up to $5,000;

3) Probation for five years, with or without special conditions;

4) Commitment to a local jail for up to sixty days, plus five years probation;*

5) Commitment to a local jail for a term up to one year;**

6) Commitment to state prison for a maximum term up to seven years, with or out a minimum term equivalent to one-third the maximum.

Additionally, because Smith was 17 years old at the time of the offense, he was eligible for "Youthful Offender" status.***

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* Sixty days is the maximum term that may be imposed with a sentence of probation. N. Y. Penal Law §60.01 (McKinney, 1978).

** The maximum period of incarceration permissible in a local facility is one year. A term of more than one year must be served in state prison.

*** Youthful Offender status to an "eligible youth" charged with a crime alleged to have been committed when he was at least sixteen and less than nineteen years old.

Probation Department Evaulation and Recommendation

In evaluating the defendant, the investigating probation officer concluded that:

> "[T]he defendant appears to be an immature youth who is not doing anything constructive with his time at this point. At the same time, it should be noted that he has demonstrated a willingness and ability to get involved and stay involved in a helping relationship and he may very well benefit from a period of counselling and guidance. It is also noted that [a] job training program or some type of vocational program may be more appropriate for him at this point."

The Probation Department's sentencing recommendation was five years probation, with a suggestion that the defendant "might be considered for Youthful Offender Status."

Actual Sentence

The sentence actually imposed in this case was five years probation with Youthful Offender Status.*

Judicial Response

As Table 1 indicates, sentences imposed by the judges ran the gamut from probation to a prison term of 2 - 6 years. The most frequently imposed disposition was probation. Twenty-three of the judges (56%) imposed a probationary term, fourteen with special conditions. Fourteen judges (34%) imposed a 60 day jail term to be followed by

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Eligibility is limited by past record and type of current offense. The effect of a Youthful Offender adjudication is to substitute a "Youthful Offender finding" for a conviction. Such a finding may not be treated as a felony conviction for purposes of sentencing as a second felony offender, and limits the term of permissible incarceration in a state prison to four years. N.Y. Crim. Proc. Law §720.10 (McKinney, 1978).

*Participating judges had no knowledge of the actual sentence.

probation,* and four judges (10%) imposed prison terms.

Twenty-five judges (60%) granted Youthful Offender status. The decision to grant Youthful Offender status does not appear to be related to the type of sentence the judge selected; 60% of the judges who imposed sentences of probation, 64% of the judges who imposed sixty day jail terms plus probation, and two of the four judges (50%) who imposed prison terms granted Youthful Offender status.

1. *Sentencing Objectives*

This is the only case in the series for which the dominant and most frequently mentioned sentencing objective was rehabilitation. Thirty-four (83%) of the judges indicated that rehabilitation was a major goal of the sentence they imposed.** None of the judges who imposed prison terms, however, identified rehabilitation as their primary sentencing goal. These judges emphasized deterrence, retribution or incapacitation.

2. *Reasons for the Sentencing Decision*

In justifying their sentencing decisions, the judges often drew different inferences about the defendant and the offense from the facts with which they had been presented.***

The judges who imposed sentences of probation only tended to stress the defendant's lack of a criminal history and potential for rehabilitation. The following statements are representative of the responses of these judges:

Judge 41: "Defendant has no prior record. He is young enough to be rehabilitated. This appears to be an isolated incident. No injury; pistol was imitation." (probation)

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* The seemingly high degree of consensus concerning the appropriate length of the jail term to be imposed with probation is more apparent than real. Sixty days is the statutory limit on the length of a jail commitment to be accompanied by a probationary sentence.

** A sentencing objective was considered "major" if it was awarded the highest number of points. If two objectives received the highest number of points, each was considered a major objective.

*** All statements by the judges included in the text are presented in their entirety. The quotations include statements made in the comment section of the decision form.

Judge 12: "Defendant comes from a fairly good family structure, without the advantage of a strong male image. It does not appear that he had deep-seated criminal tendencies and under the guidance of a strong male presents a very good possibility of becoming a good productive citizen in some vocational trade." (probation)

Judges who imposed a 60 day jail sentence plus probation also mentioned the defendant's lack of a prior record but often stressed the "shock value" of a short period of incarcertaion.

Judge 6: "Defendant's lack of a prior record and is deserving of some small taste of imprisonment and will benefit from probation." (60 days jail plus probation)

Judge 28: "Age of defendant, use of false weapon, condition of victim, defendant's background and prior non-criminal record. The sixty days in jail is for shock value." (60 days jail plus probation)

Judge 10: "Crime involved the use of force and violence against an innocent victim and a weapon was used. In addition, the defendant denies involvement even though he was caught in the act of committing the crime and he shows no remorse. Since he was a first offender, he was treated as a Youthful Offender, as no injury resulted to the victim." (60 days jail plus probation)

The four judges who imposed prison terms consistently portray the defendant in very negative terms. Judge 14, for example, who sentenced Smith to 0 - 4 years imprisonment with Youthful Offender status made the following statement:

Judge 14: "Nature of the crime - attack upon elderly or sick; history of contempt for authority and placing his hedonistic impulses above all else. It is observed that this defendant will probably secure early parole and the maximum sentence *may* have some restraining influence." (0-4 years)

Judge 17, who imposed a 2 - 6 year term of imprisonment without Youthful Offender status, gave these reasons for the sentence:

Judge 17: "While defendant has no prior history of conflicts with the law, his record in school and with the Bureau of Social Services shows him to be 'very aggressive and sometimes explosive.' Attempts at therapy over many years have been nonproductive. The use of a weapon, imitation or otherwise, demands stern treatment. The fact that the victim, the defendant, and the 15 year old accomplice are all from the same community strongly suggests that the community be placed on notice that its law abiding citizens will be protected, and that its criminals will be punished." (2-6 years)

In sum, judges drew different inferences about the offense and the offender from the information they had been given. Although most of the judges agreed that some type of probation was the appropriate disposition, there was little agreement as to whether special conditions or a 60 day jail term should additionally be imposed.

CASE I: Thomas Smith

CONVICTION OFFENSE: Attempted Robbery 2° (D Felony) ACTUAL SENTENCE: 5 Year Probation
Y.O. Granted

JUDGE NUMBER	YOUTHFUL OFFENDER YES	NO	N/A[1]	JAIL[2]	PRISON MIN/MAX	PROBATION GRANTED	SPECIAL CONDITIONS	SENTENCING OBJECTIVE[3]
	x					5 years		Rehabilitation 100
39	x					5 years		Rehabilitation 75
40	x					5 years		Rehabilitation 80
41	x					5 years		Rehabilitation 75
3	x					5 years		G. Deterrence 50 Sp Deterrence 50
1	x					5 years	Counseling	Rehabilitation 80
2	x					5 years	Psych Counseling	Rehabilitation 90
5	x					5 years	Vocational Training	Rehabilitation 80
11	x					5 years	Psych Counseling & Vocational Training	Rehabilitation 80
12	x					5 years	Vocational Training	Rehabilitation 80
15	x					5 years	Finish High School	Rehabilitation 90
16	x					5 years	Finish High School	Rehabilitation 65
22	x					5 years	Finish High School	Rehabilitation 90
38	x					5 years	Vocational Training	Retribution 50 Sp Deterrence 50
4			x			5 years		Rehabilitation 100
8			x			5 years		Rehabilitation 90
25			x			5 years		Rehabilitation 85
13			x			5 years		Rehabilitation 100
21		x				5 years	Vocational Training	Rehabilitation 100
23			x			5 years	Counseling	Rehabilitation 100
32			x			5 years	Vocational Training	Rehabilitation 80
34			x			5 years	Vocational Training	Rehabilitation 90
27			x			5 years	Psych Counseling Vocational Training	Rehabilitation 100
36	x			60 days		5 years	Vocational Training	Rehabilitation 70
10	x			60 days		5 years	Finish High School	Rehabilitation 60
18	x			60 days		5 years	Vocational Training	Rehabilitation 75
20	x			60 days		5 years		Rehabilitation 60
29	x			60 days		5 years		Rehabilitation 75
31	x			60 days		5 years	Vocational Training	Rehabilitation 50 Sp Deterrence 50
33	x			60 days		5 years		Rehabilitation 90
37	x			60 days		5 years	No association with co-defendant	Rehabilitation 60
19	x			60 days		5 years	Vocational Training	Rehabilitation 80
6			x	60 days		5 years		Sp Deterrence 80
7		x		60 days		5 years	Finish High School	Rehabilitation 70
28			x	60 days		5 years	Finish High School	Rehabilitation 40
30		x		60 days		5 years	Psych Counseling Finish High School	Rehabilitation 50
35			x	60 days		5 years		Rehabilitation 50
14			x		0 - 4			Retribution 40
24	x				0 - 4			Sp Deterrence 50
17			x		2 - 6			G. Deterrence 50
26			x		2 - 6			Incapacitation 60
TOTALS	25	3	12	14	4	--	23	

[1] N/A (Not Available) was the code used for cases where the judge did not specifically indicate whether Youthful Offender Status was conferred.

[2] JAIL refers to incarcerative sentences not exceeding one year.

[3] Sentencing Objectives refers to the category to which the largest number of points were assigned. Where two categories were designated as a "primary" objective, both classifications are listed.

CASE 2: John Clark

Conviction Offense: Robbery 1°

John Clark, a twenty-three year old male with two prior drug related arrests, was indicted for Robbery 1°, a Class B felony, and convicted after trial of the same offense.

Offense Description

The defendant was accused of the knifepoint robbery of an elderly man. According to the PSR:

> "[The complainant Saul Owens] was returning home on the evening of August 4, 1976 from his community club. At about 11:00 P.M. he was in front of his home at 2165 Bolton Street. He had his wife's diamond studded watch, valued at over $1,000 with him. He was going to have it repaired earlier but the jeweler was closed. While in the street, in front of his home, he heard a noise behind him, turned and saw the defendant facing him with a knife in his right hand. Defendant said, 'put up your hands!' Seventy year old Saul Owens, a retired men-swear salesman with a history of heart attacks did not wish to have any confrontation. He readily complied saying 'don't hurt me!', as he raised his hands. Defendant said, 'give me your money or I'll cut you up!'"

The defendant then took $75 in cash, a wallet containing several credit cards, and two watches, including the watch valued at over $1,000 belonging to the complainant's wife. He fled the scene on foot.

The crime was witnessed by a teenage girl who later identified the defendant from police photos. The complainant also positively identified the defendant from police mug shots. Clark was arrested four days after the robbery on an unrelated marijuana charge. At the time of his arrest, he possessed a switchblade, a hypodermic syringe, marijuana, and three credit cards and three blank checks belonging to the complainant Saul Owens. The watches were not recovered.

Clark absconded while on bail and was rearrested after having been traced to a new residence.

Defendant's Statement

John Clark maintained his innocence and was convicted of Robbery 1° after trial. After his conviction, however, he admitted to the investigating probation officer that he had committed the robbery, although he continued to deny stealing the complainant's wife's watch. He also reported that the offense was instigated by one "John Wilson", who drove the "get-away" car:

> "After committing the robbery, he [Clark] ran to get in the car, but his friend assertedly drove slowly away and allowed him to get in only after the car turned the corner.
>
> "When asked why he didn't tell authorities before, he explained that he knew Wilson a long time. They were both in the Navy together and Wilson has helped him and defendant's wife. Wilson posted bail for him to remain out until he was convicted."

In describing his motivation, the defendant indicated that he needed money because he was unemployed and his wife was pregnant. He also admitted having reverted to heroin usage.

Complainant's Statement

The seventy year old victim urged that the defendant be incarcerated. According to the PSR:

> "After the instant robbery, he was so shaken up that he had to take Nitro pills for his heart before calling [the] police. He is very upset that his wife's valuable watch, owned for over thirty years that additionally held sentimental value was stolen and not recovered. He states [that the] defendant is a liar and definitely took the watch and other items, and further, he feels that defendant probably has committed similar robberies against the elderly and 'certainly belongs in jail'."

Prior Criminal Record

The defendant had two prior arrests, both in 1972, and both for possession of a hypodermic instrument. Both charges were dismissed.

At the time of his arrest for the instant offense, Clark was also charged with weapons and drug possession, both A misdemeanors, to which he pleaded guilty and received a conditional discharge.

Social History

At the time of his arrest, the defendant was married and resided with his pregnant wife. He was unemployed and had reverted to drug use.

Clark is described as having had an "uneventful childhood within an intact home." He dropped out of school in 1972 at the age of sixteen because he had become addicted to heroin and enlisted in the Navy, in which he reportedly served for two years as a jet engine mechanic. He stated that he was honorably discharged in the fall of 1974. Although Clark began studies for a high school equivalency diploma at this time, he dropped out before completion. He claimed to have been previously employed as a machine shop helper, security guard, and pizza parlour employee.

Dispositional Options

Incarceration in state prison is the mandatory disposition following conviction of Robbery 1°. The judge must impose a maximum term of from three to 25 years, and may impose a minimum term equivalent to one-third of the maximum.*

Probation Department Evaluation and Recommendation

The investigating probation officer indicated that "there is no pattern of offenses similar to [the] present robbery." No sentencing recommendation was made.

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* For a defendant with a prior felony conviction a minimum term must be imposed by the sentencing judge. N.Y. Penal Law §70.06 (McKinney). Additionally, pursuant to the New York Violent Felony Offender Law effective September 1, 1978, the sentencing court must impose a minimum term equal to one-third of the maximum sentence for a first offender. Judges in our sample were instructed to ignore this change in the law, which had just gone into effect at the time the study was conducted.

Actual Sentence

The sentence actually imposed was imprisonment for a maximum term of five years. A minimum term was not imposed.

Judicial Response

As Table 2 indicates, maximum sentences imposed by the judges in the sample ran from 3 to 25 years — the entire spectrum of permissible terms — and practically every possible sentence in-between was imposed as well. Within this enormous span, maximum terms clustered at five (17.1%), seven (12.2%), ten (12.2%), fifteen (24.4%) and eighteen (12.2%) years. Thirty-two (78%) of the judges imposed maximum terms that exceeded the actual maximum sentence.

There was also substantial variation in the imposition of minimum terms. About half (46.3%) of the judges imposed a minimum term; judges who imposed maximum terms exceeding ten years were, however, much more likely to impose a minimum than judges who imposed maximum terms of 10 years or less (75% and 19% respectively). Moreover, some judges imposed a *minimum* term that exceeded the *maximum* terms imposed by others. For example, fourteen judges imposed maximum terms of 7 years or less while two judges imposed terms of 8 1/3 - 25 years.

1. *Sentencing Objectives*

As the vast majority of the judges in this case distributed the sentencing objective points over a number of categories, it was difficult to identify a primary sentencing objective for either individual judges or the group as a whole. Nor was there any apparent relationship between the stated sentencing objective and the sentence which was imposed. For example, in imposing a sentence of 8 1/3 - 25 years, Judge 8 gave 50 points to incapacitation as an objective and 50 to general deterrence. In imposing the *same* sentence, Judge 24 gave 75 points to retribution, and 25 to general deterrence. In imposing a sentence of 0 - 5 years, Judge 1 gave 50 points to retribution as a sentencing objective and 50 to special deterrence, while Judges 23 and 25 gave 100 points to general deterrence in imposing exactly the same term.

2. *Reasons for the Sentencing Decision*

While there was a very high degree of consensus concerning the im-

portant facts in the case, there was often disagreement concerning the seriousness of the offense and offender. The judges who imposed lenient sentences tended to identify one or another mitigating factor in the case to justify their sentencing decision:

Judge 5: "Mandatory imprisonment. No record. Complainant uninjured." (0-3 years)

Judge 7: "Arrest record, use of knife, age of victim and effect of crime on health, drug use. Most difficult of eight cases to decide. Nature and circumstances of crime demand incarceration, yet one gets the impression that defendant has basic good elements to make a valuable citizen." (0-4 years)

Judge 39: "Crime generated by addiction and economic circumstances. Crime aggravated by age of victim. Defendant's attitude reflected by trial conviction - then admission of guilt. Sentence while mandated is not unduly protracted in the limited hope that is, removing dependence upon drugs - he might turn the corner." (0-5 years)

Judges who imposed more severe sentences, on the other hand, mentioned many of the same facts but frequently characterized the offense and offender in more serious terms:

Judge 6: "Defendant's persistently deteriorating behavior pattern and the fact that some of the offenses suggest an aggressive and violent potential; and the fact that defendant used a knife in connection with robbery." (5-15 years)

Judge 15: "Presence in the community in the near future poses a danger. Will not hesitate to put self-interest above that of society. This Court would hope that correctional authorities can provide this defendant with meaningful psychological treatment." (6-18 years)

Judge 29: "The only reasons I would not give 8 1/3 to 25 years is that the victim was not hurt and the defendant has no

criminal record. Knife point robberies with drug involvement mandates a maximum sentence. This coupled with the age of the victim leads me to believe that society would best be served by a substantial sentence." (6-18 years)

Even those judges who characterized the offense and offender in virtually *identical* terms, however, often imposed widely different sentences:

Judge 23: "nature of the crime and use of a dangerous weapon." (0-5 years)

Judge 34: "This was a crime of violence against an elderly man in which a knife was used - effect on victim." (0-10 years)

Judge 26: "Use of knife in hold-up. Attack upon aged person." (5-15 years)

Judge 9: "Nature of crime (robbery of elderly person), use of weapon." (6-18 years)

Judge 24: "Violent crime against person with a weapon. I feel this type of crime regardless of defendant's lack of prior record, should receive maximum term." (8 1/3-25 years)

These judges used substantially the same reasons to justify sentences ranging from 0 - 5 to 8 1/3 - 25 years.

In sum, although there appeared to be a high degree of consensus concerning the relevant facts in the case, this agreement was not translated into a consensus concerning the appropriate sentencing goals, nor did it result in similar sentences.

CASE 2: John Clark

CONVICTION OFFENSE: Robbery I° (B Felony) ACTUAL SENTENCE: 0 - 5 years

JUDGE NUMBER	JAIL	PRISON MIN-MAX	PROBATION GRANTED	SPECIAL CONDITIONS	SENTENCING OBJECTIVES			
5		0 - 3			Rehabilitation	40		
7		0 - 4			Rehabilitation	40		
1		0 - 5			Retribution	50	Sp Deterrence	50
11		0 - 5			Incapacitation	30	G. Deterrence	30
20		0 - 5			Sp Deterrence	60		
23		0 - 5			G. Deterrence	100		
25		0 - 5			G. Deterrence	100		
27		0 - 5			Retribution	45	Sp Deterrence	45
39		0 - 5			Incapacitation	40	Sp Deterrence	40
4		0 - 7			Retribution	25	Incapacitation	25
16		0 - 7			G. Deterrence	50		
19		0 - 7			Incapacitation	50		
37		0 - 7			Incapacitation	70		
40		2.3 - 7			Retribution	60		
21		3 - 9			Sp Deterrence	50		
22		3 - 9			Sp Deterrence	40		
2		0 - 10			Retribution	100		
34		0 - 10			Retribution	85		
35		0 - 10			Retribution	30		
38		0 - 10			Retribution	60		
36		3 - 10			Incapacitation	60		
41		0 - 12			Retribution	60		
3		4 - 12			****			
14		0 - 15			****			
28		0 - 15			****			
30		0 - 15			Rehabilitation	50		
10		3 - 15			Rehabilitation	30	G. Deterrence	30
6		5 - 15			Retribution	50		
12		5 - 15			****			
13		5 - 15			Rehabilitation	80		
18		5 - 15			Incapacitation	35		
26		5 - 15			G. Deterrence	80		
33		5 - 15			Rehabilitation	50		
9		6 - 18			Incapacitation	80		
15		6 - 18			Incapacitation	50		
17		6 - 18			Incapacitation	50	G. Deterrence	50
29		6 - 18			****			
31		6 - 18			Retribution	50	G. Deterrence	50
32		0 - 25			****			
8		8.3 - 25			Incapacitation	50	G. Deterrence	50
24		8.3 - 25			Retribution	75		

**** No dominant objective was identified. Points were evenly distributed across three or more objectives.

CASE 3: Roy Maxwell

Conviction Offense: Robbery 1°

Roy Maxwell, a 21 year old male with an extensive juvenile and adult record for property related crimes, was indicted for Robbery 1°, a B felony, and convicted after trial of the same offense.

Offense Description

The defendant, with codefendant James Early, was charged with the armed robbery of a shoe store. According to the PSR:

> "On July 16, 1976, at approximately 11:30 a.m. at 938 Blake Avenue, a shoe store owned by complainant Herman Barnett, the defendant, and his co-defendant, James Early, ran into the store with Early displaying a weapon and demanding money. According to complainant Barnett's testimony the defendant took money from the register, totalling approximately seventy dollars and defendant Early went through Mr. Barnett's pocket after Barnett had already given Early money. No customers in the store were bothered according to testimony. Codefendant Early placed the gun he was using on a shelf in the store and both he and the defendant fled."

Both offenders were apprehended outside the store by a police officer who was responding to a radio run.

Defendant's Statement

The defendant maintained his innocence of the offense. He stated "I can't see taking personal things from a person," and noted that his previous offenses were all stolen cars or property. He claimed that on the day in question he had gone into the shoe store to buy a pair of sneakers, and that the codefendant had forced him at gun point to participate in the robbery:

> "Fearing for his life, the defendant stated that he got the money from the register and attem-

> pted to give it to Early, but that Early at that time, was frisking the owners of the store attempting to get other property. The defendant next stated that he ran from the stor and told this investigator he did so in an attempt to call the police. He noted that he did leave with the money in his hand and was approximately half a block away on his way to the police station when the police, in fact, grabbed him. When questioned as to why he had not left the money in the store and run to get the police, the defendant stated he was just so nervous he didn't think of that."

Maxwell indicated that he sometimes played basketball with codefendant Early, but that they were not friends. Early, who is described as having an extensive juvenile and adult record, pleaded guilty to Robbery 1° and was sentenced to a two to six year prison term.

Complainant's Statement

No statement by the complainant was presented in the presentence report.

Prior Criminal Record

The defendant had an extensive juvenile and adult criminal record, having been known to the police since the age of fourteen. As a juvenile, he was arrested on six occasions for offenses including robbery, burglary and motor vehicle theft. He was eventually committed to a state training school for an offense which involved auto theft and leaving the scene of an accident.

As an adult, Maxwell had been arrested fifteen times, including four arrests for shoplifting and six for auto theft. He had also been arrested for robbery and burglary. The defendant had eight prior misdemeanor convictions, and had served six jail terms varying in length from five days to six months. He had also been placed on probation twice. His second probationary sentence was revoked after seven months when he was convicted of a misdemeanor (Criminal Possession of Stolen Property) and sentenced to six months in jail.

A bench warrant was also issued in the present case because Maxwell failed to appear in court:

> "He states that, in fact, he missed his Court date as he was locked up in the House of Detention and that the warrant did not fall on him. He was eventually released from the House of Detention as his case was dismissed and he never returned to Court on the instant offense claiming that he thought it had been taken care of. He states that he was eventually arrested at the Welfare Center where he went to collect his checks after the police traced him down."

Social History

At the time of his arrest the defendant lived with his mother and twin brother in a four room apartment in which they had resided for seven or eight years. His background was summarized by the investigating probation officer as follows:

> "The product of a disruptive family background, the defendant was raised by his welfare supported mother. A school dropout, the defendant states that he obtained his high school equivalency diploma while in jail in 1977. The defendant's employment history is poor."

In his Family Court record the defendant was described as "an extremely disturbed youth" who was "withdrawn and depressed." He was also found to have "borderline intellectual ability."

Dispositional Options

Incarceration in state prison is the mandatory disposition following conviction for Robbery 1°. The judge must impose a maximum of from three to 25 years, and may impose a minimum term equivalent to one-third of the maximum.

Probation Department Evaluation and Sentencing Recommendation

The investigating probation officer noted that the defendant "accepts very little responsibility for his actions," indicating that he can "give no rational explanation for his continued criminal activities.

The only thing he does state is that he is 'always with people who do the crimes and I'm always innocent.' "

The Probation Department sentence recommendation was a period of incarceration in state prison, the mandatory disposition.

Actual Sentence

The sentence actually imposed in this case was imprisonment for a maximum term of nine years. A minimum term was not imposed.

Judicial Response

As Table 3 indicates, there was widespread variation in the maximum terms imposed by judges participating in the study. Maximum sentences ranged the spectrum from 0 - 4 years to 8 1/3 - 25 years. Twenty-one (51%) of the judges imposed maximum terms of 9 years or less, while 49% imposed sentences of ten years or more. Maximum terms clustered at five (12.2%), six (12.2%), seven (12.2%), ten (24.4%) and fifteen (14.6%) years.

Slightly more than a third (36.6%) of the judges imposed a minimum term. As in case 2, judges who imposed maximum terms exceeding 10 years were much more likely to impose a minimum; 90% of these judges imposed a minimum as compared to 18.8% of the judges who imposed maximum terms of ten years or less.

1. *Sentencing Objectives*

There was no consensus among the judges as to the appropriate sentencing objectives in this case, although (as in case 2) incapacitation and retribution were most frequently listed as a major sentencing objective (by 13 and 12 of the judges, respectively). Even when judges were agreed on the weight to be assigned to the various objectives, sentences imposed often varied markedly. For example, Judge 11 and Judge 18 both assigned 75 points to incapacitation:

Judge 11: "Arrest record, failure of defendant to admit to crime. Invalid excuses for crime. Attitude in hoping to 'come back, appeal it and beat it.' Use of dangerous weapon is serious. While incarcerated defendant should receive some training and direction for future employment." (0-5 years)

Judge 18: "Bad record, failure on probation and short jail terms to deter him, use of gun, failure to fact up to his guilt. I set no minimum because defendant might be a good subject for parole after three or four years. The lengthy maximum will allow for parole supervision over an extended period." (0-10 years)

Thus, although both judges mentioned similar facts and designed their sentences to serve the same objectives, the sentence imposed by Judge 18 is *twice* as long as that imposed by Judge 11.

2. *Reasons for Sentencing Decisions*

There was a high degree of consensus among the judges concerning the relevant facts in this case, but little agreement about the sentence mandated by the facts. The same facts — presence of a weapon and the defendant's prior record — are used to justify sentences ranging from 0 - 4 years to 8 1/3 - 25 years:

Judge 14: "Use of weapon by co-defendant; continuing association with others criminally oriented; lack of remorse." (0-4 years)

Judge 34: "This was a violent crime with a loaded weapon; previous criminal involvement was extensive." (0-7 years)

Judge 25: "A. Previous record (numerous arrests).
B. Weapon Used.
Because of the extensive criminal record a long sentence was warranted. Maybe defendant might respond favorably in a structured surrounding." (0-10 years)

Judge 12: "It appears the defendant has a penchant for criminal activity and a strong feeling that he can lie his way out of the difficulties he gets into." (4-12 years)

Judge 31: "Long record of criminal activity and seriousness of the crime Robbery 1°. Mandatory prison sentence." (5-15 years)

Judge 8: "Extensive prior record. Use of deadly weapon." (8 1/3-25 years)

The sentence imposed on the codefendant, who pleaded guilty, also appeared to influence the decisions of a number of judges. Some of the judges believed that Maxwell should not be penalized for going to trial and that his sentence should be comparable to his codefendant's sentence of 2 - 6 years imprisonment:

Judge 16: "Nature of the offense, that is, robbery with a weapon -- prior record. My sentence may have been greater except I took into consideration the sentence of the co-defendant who apparently had a similar record to the defendant." (2-6 years)

Judge 28: "Background of defendant; nature of crime; loaded weapon; consistent with sentence of co-defendant." (0-6 years)

On the other hand, other judges concluded that Maxwell should receive a *more* severe sentence than his codefendant.

Judge 9: "Nature of crime, extensive record, crime committed with weapon. Co-defendant Early pleaded guilty. Although Early's guilt is greater because of his use of weapon, he was entitled to greater consideration because of his plea." (0-7 years)

Judge 10: "The defendant was convicted of an Armed Robbery after trial. It is a very serious crime and involved the use of force and violence against innocent victims. In addition, while awaiting trial the defendant committed another offense and he also failed to appear so that a bench warrant had to be issued for his arrest. The defendant had no real defense. If he goes to trial and is convicted, he cannot expect the same consideration as if he had pleaded guilty. Thus the difference in his sentence and that of his co-defendant. Also his prior record of violating the law." (0-10 years)

In sum, although judges were generally agreed on the relevant facts in this case, those facts were used to justify vastly dissimilar sentences.

CASE 3: Roy Maxwell

CONVICTION OFFENSE: Robbery 1° (B felony) ACTUAL SENTENCE: 0 - 9 years prison

JUDGE NUMBER	JAIL	PRISON MIN-MAX	PROBATION GRANTED	SPECIAL CONDITIONS	SENTENCING	OBJECTIVES
14		0-4			Retribution 40	Deterrence 40
36		0 - 4			S Deterrence 80	
2		0 - 5			Retribution 75	
4		0 - 5			Incapacitation 50	
11		0 - 5			Incapacitation 75	
21		0 - 5			Incapacitation 50	
22		0 - 5			S Deterrence 100	
5		0 - 6			Rehabilitation 40	
6		0 - 6			S Deterrence 70	
28		0 - 6			****	
40		0 - 6			Retribution 40	
16		2 - 6			St Deterrence 50	
7		0 - 7			Retribution 35	Incapacitation 35
9		0 - 7			Incapacitation 90	
20		0 - 7			Incapacitation 50	
34		0 - 7			Retribution 70	
39		0 - 7			S Deterrence 60	
15		0 - 9			Retribution 40	
19		3 - 9			Incapacitation 50	
27		3 - 9			****	
38		3 - 9			****	
1		0 - 10			Retribution 50	
10		0 - 10			Rehabilitation 40	
18		0 - 10			Incapacitation 75	
23		0 - 10			Rehabilitation 50	G. Deterrence 50
25		0 - 10			G. Deterrence 70	
35		0 - 10			Incapacitation 35	
37		0 - 10			Retribution 50	
41		0 - 10			Retribution 50	
3		3.3 - 10			****	
13		3.3 - 10			Rehabilitation 60	
12		4 - 12			S Deterrence 35	
30		0 - 15			Incapacitation 50	
24		5 - 15			Retribution 50	
26		5 - 15			Incapacitation 60	
29		5 - 15			****	
31		5 - 15			Retribution 50	G Deterrence 50
33		5 - 15			Rehabilitation 55	
32		3 - 25			S Deterrence 30	
8		8.3 - 25			Incapacitation 80	
17		8.3 - 25			Incapacitation 80	

**** No dominant objective was identified. Points were evenly distributed across three or more objectives.

CASE 4: Adam Dunbar

Conviction Offense: Assault 1°

Adam Dunbar, a thirty-two year old male with one prior and one subsequent arrest on assault-related charges, was indicted for Attempted Murder, an A felony, and convicted on a plea of guilty to Assault 1°, a C felony.

Offense Description

The defendant shot and permanently paralyzed a male visitor in the home of his estranged wife Louise, who had recently separated from him. The day before the offense, the victim, Willie Borden, met Louise and her sister at a social club and accepted an invitation to visit them the next day. The following afternoon, as Borden was talking and drinking wine with the pair, the defendant arrived. According to the PSR:

> "The defendant and Louise went into the bedroom to talk. According to Louise Dunbar, once in the bedroom the defendant stripped and was about to have intercourse with her when she advised the defendant that although she had not yet had an affair with the complainant, Willie Borden, she was interested in the complainant. She explained to the defendant that she was therefore not interested in having a relation with the defendant. The defendant, angry, dressed and struck Louise Dunbar with his gun."

The defendant left the bedroom and confronted the complainant in the kitchen. He fired four shots, and hit the victim three times. As a result of the shooting the victim was permanently paralyzed from the waist down and confined to a wheelchair.

The defendant was apprehended four years after the offense took place when he was arrested on an unrelated assault charge.

Defendant's Statement

The defendant admitted guilt and expressed remorse for the offense, but asserted extenuating circumstances:

> "The defendant states that he suspected the complainant of having a gun. The defendant responded by removing his gun from his waistband and shooting at the complainant four times. The defendant reiterates that he was angry... [and] expresses contrition for the instant offense. He explains the instant offense by stating that when he fired at the complainant he was 'temporarily insane'."

The defendant indicated that he carried a revolver because he had been "mugged" a few months before the offense. The "mugging" was apparently never reported to the police.

Complainant's Statement

The complainant was 35 years old at the time of the incident, and the father of three children. As a result of the shooting, he was permanently paralyzed and lost his job as a paper cutter. In describing the offense, the complainant stated that he didn't know the defendant, and that he never saw the defendant's wife after the shooting.

With regard to sentencing, complainant Borden indicated that he felt the defendant "should be 'put away' so that he cannot hurt anyone else."

Prior Criminal Record

Defendant Dunbar had two other arrests. The first, in 1967, led to a charge of felonious assault for use of a knife during an altercation. In 1977 (after the current offense) he was charged with possession of a weapon and reckless endangerment for having fired two shots at one Robert Crane. No dispositional information was available for either offense, although the defendant asserted that both cases had been dismissed.

Social History

Adam Dunbar was 28 years old at the time of the offense and 32 at the time of sentencing. The investigating probation officer summarized his background in these terms:

> "He has 2 teenage children from an out-of-

> wedlock union, one living with the defendant's mother and the other with her natural mother. His next relationship was a legal marriage and 3 children which ended in separation in 1975. He maintains interest in his children. A high school dropout, he was discharged from the Army as undesirable (AWOL) and then was a construction worker. The past year he has done odd jobs such as painting and fixing basements and lives with a cousin."

Dunbar admitted to drinking in excess, but had no history of drug abuse.

Dispositional Options

Incarceration in state prison is the mandatory disposition following conviction for Assault 1°. The judge must impose a maximum term of from three to fifteen years, and may impose a minimum term equivalent to one-third of the maximum.

Probation Department Evaluation and Recommendation

In evaluating the defendant, the investigating probation officer concluded that:

> "[A]lthough the defendant expressed contrition for the instant offense, he attempts to minimize his culpability. The defendant also attempts to minimize his involvement in his prior and subsequent arrests. All three arrests including the instant offense, involve assaults with a weapon. It is felt that at this time the defendant is in need of a structured environment."

The probation department's sentencing recommendation was commitment to state prison, the mandatory sentence.

Actual Sentence

The sentence actually imposed in this case was imprisonment for a maximum term of five years. A minimum term was not imposed.

Judicial Response

As Table 4 indicates, maximum sentences ranged from the statutory minimum of 0 - 3 years to the statutory maximum of 5 - 15 years. Twenty-one (51%) of the judges set maximum terms of ten years or less while 49% set maximums exceeding ten years. Within this range, maximum terms clustered at ten (26.8%) and fifteen (34.2%) years.

Eighteen (43.9%) of the judges imposed a minimum term. Only 23.8% of the judges who imposed maximum terms of 10 years or less imposed a minimum, as compared to 65% of the judges who imposed maximum terms exceeding 10 years.

1. *Sentencing Objectives*

The dominant and most frequently mentioned sentencing objective was retribution. Eighteen of the judges listed retribution as a major sentencing goal. Incapacitation was a major objective of nine judges.

Again there was no apparent relationship between the judges' stated sentencing objectives and the length of the terms imposed. Judge 2, for example, who imposed a maximum term of 3 years gave 100 points to retribution as his sentencing objective, while Judge 25 gave 100 points to retribution as justification for a maximum term of 15 years — *5 times* that imposed by Judge 2.

2. *Reasons for Sentencing Decisions*

Although the judges almost invariably mentioned past record and the seriousness of the offense in explaining their sentencing decisions, these facts were used to explain widely divergent sentences:

Judge 19: "This was an unprovoked assault and a jail term should be imposed, but lack of any criminal convictions indicates it should be minimal considering the serious injury inflicted." (0-4 years)

Judge 23: "Assault with a gun, dangerous weapon and previous charge involving a use of a knife." (0-7 years)

Judge 9: "Although this is defendant's first conviction, there are two other charges pending involving use of weapons. Additionally, the injury inflicted was most serious and deserves severe punishment. Moreover, defendant has already received substantial consideration by permitting him to plead to a C rather than a B felony." (0-12 years)

Judge 12: "Defendant appears to be a constant carrier of weapons which he will use at the least provocation." (3-15 years)

Judge 15: "Potential danger to community. Minimum necessary. Assaultive nature. Uses weapons. Unsatisfactory performance in service. No steady employment. Instant case arose one month after arrest on similar assault." (5-15 years)

Some judges also drew differing inferences about the offense and offender from the information with which they had been presented:

Judge 2: "Facts and circumstances surrounding the shooting lead me to believe that this is a once in a lifetime situation but some punishment is indicated." (0-3 years)

Judge 25: "A. Complainant paralyzed for rest of life.
B. Violent and assaultive nature of previous offenses.
C. Use of a gun in the commission of the crime.
"This defendant deserves the maximum sentence the law allows - he definitely shows a tendency towards violence. Lenience was shown by allowing him to plea to a lesser charge." (0-15 years)

Judge 24: "Crime was violent but it would appear the crime was a 'passion crime', not pre-meditated and out of a 'family situation'." (0-10 years)

Judge 29: "Defendant has demonstrated past assaultive and violent behavior. The victim was seriously injured. This was a senseless brutal crime and the defendant is a danger to society and the public in general. I would not place a minimum, due to the emotional state of the defendant and the possibility of rehabilitation." (0-12 years)

In sum, despite a high degree of consensus concerning the relevant facts in the case, those facts were given vastly different interpretations by the judges and used to justify vastly disparate sentencing decisions.

CASE 4: Adam Dunbar

CONVICTION OFFENSE: Assault 1° (C felony) ACTUAL SENTENCE: 0 - 5 years

JUDGE NUMBER	JAIL	PRISON MIN - MAX	PROBATION GRANTED	SPECIAL CONDITIONS	SENTENCING OBJECTIVES
2		0 - 3			Retribution 100
1		0 - 4			Retribution 60
19		0 - 4			Retribution 65
3		0 - 5			• • • •
22		2 - 6			Sp Deterrence 100
13		0 - 7			Rehabilitation 70
20		0 - 7			Retribution 75
23		0 - 7			Rehabilitation 50 G. Deterrence 50
31		0 - 7			Retribution 50 G. Deterrence 50
11		3 - 9			Incapacitation 50
4		0 - 10			Retribution 50
5		0 - 10			Rehabilitation 30 Sp Deterrence 30
7		0 - 10			Retribution 30 Incapacitation 30
14		0 - 10			Retribution 50
24		0 - 10			Retribution 50
28		0 - 10			Retribution 40 Incapacitation 40
34		0 - 10			Retribution 85
37		0 - 10			Incapacitation 75
10		3 - 10			Rehabilitation 40
21		3.3 - 10			Incapacitation 75
40		5 - 10			Retribution 60
9		0 - 12			Incapacitation 75
30		0 - 12			• • • •
41		0 - 12			Retribution 50
18		4 - 12			Incapacitation 50
26		4 - 12			G. Deterrence 50 Sp Deterrence 50
27		4 - 12			Retribution 90
6		0 - 15			Retribution 50
25		0 - 15			Retribution 100
29		0 - 15			• • • •
39		0 - 15			Incapacitation 70
12		3 - 15			Sp Deterrence 40
36		3 - 15			Incapacitation 90
8		5 - 15			Retribution 50 Rehabilitation 50
15		5 - 15			Incapacitation 50 Sp Deterrence 50
16		5 - 15			Incapacitation 40
17		5 - 15			Incapacitation 80
32		5 - 15			Sp Deterrence 50
33		5 - 15			Rehabilitation 50
35		5 - 15			• • • •
38		5 - 15			Retribution 50

• • • • No dominant objective was identified. Points were evenly distributed across three or more objectives.

CASE 5: Anthony Lang

Conviction Offense: Manslaughter 2°

Anthony Lang, a 26 year old male with eight prior arrests, was indicted for Manslaughter 1°, a Class B felony, and convicted on a plea of guilty to Manslaughter 2°, a Class C felony.

Offense Description

Defendant Lang stabbed and killed one Bob Dalton during an altercation in the apartment of the deceased. According to the PSR, on the evening of the incident, Dalton and several of his friends and relatives were drinking at his apartment. Dalton began "hugging and playing around" with his mother-in-law, who "told him to stop and pushed him away:"

> "The defendant intervened and pushed Dalton who in turn pushed the defendant's hand away and an argument ensued. The defendant produced a knife from his right rear pocket and stabbed Dalton several times. He then threw the knife out of the living room and fled."

The victim was pronounced dead at the scene of the crime. An autopsy revealed that the victim had been stabbed twice, and that at the time of his death he was intoxicated and had methadone in his system.

The bloodstained weapon, a "7 5/8 inch long folding knife with a yellow handle with 3 3/8 inch blade," was recovered by a police officer in the rear yard. The defendant was apprehended one month later at the home of a relative.

Defendant's Statement

The defendant admitted his guilt, but suggested that he acted in self-defense:

> "He said that Dalton, who was barring the way to the front door, came at him with his hands and so he pulled a knife from his pocket and stabbed him. He said that he was only trying to

> stop Dalton so he could get out of the apartment... [and] indicated that Dalton is the type of person you can't take for granted when he is drinking."

Complainant's Statement

Stephen Watson, a cousin of the deceased made the only statement on behalf of the victim:

> "Watson said that he heard from the police that the stabbing was unprovoked and as far as he is concerned, the defendant should receive life imprisonment."

Prior Criminal Record

Although Lang had no juvenile record, he had been arrested eight times as an adult:

> "[The] arrests [were] for Auto Theft, Burglary, Possession of Drugs and Assault [the last] reportedly involving an altercation with his mother. There was one Youthful Offender adjudication [for Attempted Possession of a Hypodermic Instrument] and two convictions for violations. There is an outstanding bench warrant in Criminal Court under the name of James Holt. Subsequent to the instant offense, the defendant was arrested on the complaint of his stepfather's girlfriend, Frances Bond, who charged him with breaking into her apartment and destroying property... [The] charges were dismissed [due to her subsequent failure to appear]."

Both previous convictions resulted in conditional discharges.

Social History

The defendant's background was summarized by the investigating probation officer as follows:

> "[The defendant] is a product of a miserable family background. He has been exposed to drinking and a series of his mother's husbands and paramours in the home. He is separated from his wife with whom he had 3 children. He talks of reconciliation. He claims to have graduated from high school. His employment record indicates an inability to hold on to a job."

The defendant admitted to heroin usage in 1972 and 1973. There were no indications of recent drug or alcohol abuse.

Dispositional Options

The following sentencing alternatives were available to the judges:

1) Conditional or unconditional discharge;

2) Fine up to $5,000;

3) Probation for five years, with or without special conditions;

4) Commitment to a local jail for up to sixty days, plus five years probation;

5) Commitment to a local jail for a term up to one year;

6) Commitment to state prison for a maximum term up to 15 years with or without a minimum term equivalent to one-third of the maximum.

Probation Department Evaluation and Recommendation

In initially evaluating Lang, the investigating probation officer concluded that:

> "[The defendant] is not a vicious or aggressive individual but lacking in valid judgement and difficulty in controlling his impulse control."

The initial Probation Department sentencing recommendation was incarceration.

A supplementary recommendation was made approximately two weeks later. Within this time, the probation department had learned that Lang was still seeking reconciliation with his wife, and that he was both employed part time and seeking college admission. Based on this information, the investigating probation officer made a new sentence recommendation:

> "[D]efendant is making an effort to change his ways and make a new life for himself. He has never received a trial on probation. Your honor might consider probation for five years with the understanding that any violation of probation will be dealt with in a speedy and harsh manner."

Actual Sentence

The sentence actually imposed was five years probation.

Judicial Response

As Table 5 indicates, the most frequently imposed disposition was commitment to state prison. Thirty-three judges (80.5%) imposed prison terms, as compared with only six (14.6%) who imposed straight probation and two (4.9%) who imposed probation plus 60 days in jail.

Maximum sentences selected by those judges who imposed a prison commitment ran the gamut from the statutory minimum of 0 - 3 years to the statutory maximum of 5 - 15 years. Practically every possible sentence in between was also imposed. Seventeen of the judges (41.5%) imposed prison terms of less than ten years, while sixteen (39.0%) imposed terms of ten years or more.

Eight (24.2%) of the thirty-three judges who imposed a prison sentence also imposed a minimum term. Only two (11.8%) of the judges who selected a maximum sentence of less than ten years imposed a minimum, as compared with six (37.5%) of those who selected a maximum term of ten years or more.

1. *Sentencing Objectives*

In this case, there did appear to be some relationship between the sentencing objective and the sentence imposed. All of the eight judges who imposed probation or a short jail term described rehabilitation as

a major sentencing objective, while only eight (24.2%) of the 33 judges who imposed a prison term mentioned rehabilitation as a major goal.

Judges who agreed on the appropriate sentencing objective nonetheless frequently disagreed regarding an appropriate disposition. Judge 23, who imposed 0 - 3 years imprisonment — the lowest permissible term — indicated that his sentencing objectives were rehabilitation and general deterrence (50 points each). Judge 25 indicated exactly the same sentencing objectives as the basis for his sentence of 5 - 15 years — the longest permissible term.

2. *Reasons for the Sentencing Decisions*

Judges frequently described the offense and offender in highly dissimilar terms. On the same facts, judges expressed particular disagreement as to the extent to which the attack was provoked. Compare the statements of Judge 32 and Judge 7:

Judge 32: "No [prior] convictions for serious crime; remorse at what occurred; fact that victim was drunk and on methadone; fact that *victim apparently instigated the altercation*. No clear intent to cause death. Decedent had background of violence.* Interested in continuing education shows positive motivation. Defendant apparently has been on bail for almost a year with no involvement with the law." [emphasis added]. (probation)

Judge 7: "Prior minor record. Death of victim. Lack of any real career objectives. *Two stab wounds indicates the purposefulness of attack*. Possession of a vicious weapon. Argument with drunken victim." [emphasis added]. (0-7 years)

Similar interpretations of the offense, however, also produced widely disparate sentences:

Judge 34: "This was a violent crime - the fact that both parties were probably drunk does not justify the taking of a life. None of the facts set forth in the P.S.I. warrants a sentence of probation." (0-5 years)

* There is in fact no indication in the PSR that Dalton had a history of violence.

Judge 11: "Decedent was intoxicated, possibility of defendant close to intoxication. Size of knife that defendant carried and had available to stab decedent. Lack of responsibility for his children, failure to keep contact with probation department...difficulty of defendant in controlling his impulse control." (3-9 years)

Judge 29: "In our particular area, crimes of violence and emotion tend to lead others to similar conduct if not dealt with harshly by the courts. Defendant has very little going for him and despite the fact that the victim wasn't much, he did very little to precipitate his brutal unprovoked death. Anyone with a knife in his pocket and several arrests should consider himself lucky he didn't have a "B" felony." (5-15 years)

In sum, there was no apparent consensus as to the inferences about the offense or offender which should be drawn from the facts of the case. Even those judges who described the incident in similar terms, however, imposed widely disparate sentences.

CASE 5: Anthony Lang

CONVICTION OFFENSE: Manslaughter 2° (C felony) ACTUAL SENTENCE: 5 Years Probation

JUDGE NUMBER	JAIL	PRISON MIN - MAX	PROBATION GRANTED	SPECIAL CONDITIONS	SENTENCING OBJECTIVES
2			5 years		Rehabilitation 100
3			5 years		Rehabilitation 100
12			5 years		Rehabilitation 50
13			5 years		Rehabilitation 80
15			5 years		Rehabilitation 80
32			5 years	vocational training	Rehabilitation 80
5	60 d		5 years		••••
14	60 d		5 years		Rehabilitation 50
4		0 - 3			Rehabilitation 30
23		0 - 3			Rehabilitation 50 G. Deterrence 50
40		0 - 3			Rehabilitation 40 Sp Deterrence 40
21		0 - 4			Retribution 50
22		0 - 5			Sp Deterrence 100
9		0 - 5			Incapacitation 90
10		0 - 5			Rehabilitation 50
19		0 - 5			Retribution 50 Sp Deterrence 50
34		0 - 5			Retribution 80
37		0 - 5			Retribution 50 Sp Deterrence 50
1		0 - 6			Retribution 85
36		2 - 6			Sp Deterrence 70
7		0 - 7			Retribution 50
16		0 - 7			••••
39		0 - 7			Incapacitation 60
41		0 - 7			Retribution 50
11		3 - 9			Incapacitation 50
6		0 - 10			Retribution 50
8		0 - 10			Rehabilitation 50 G Deterrence 50
17		0 - 10			Rehabilitation 50
18		0 - 10			••••
24		0 - 10			Retribution 75
28		0 - 10			Retribution 30 Incapacitation 30
38		0 - 10			Retribution 60
31		0 - 10			Retribution 50 G. Deterrence 50
35		5 - 10*			••••
30		0 - 12			Sp Deterrence 30
20		4 - 12			Retribution 75
26		4 - 12			Incapacitation 50
27		4 - 12			Retribution 60
33		0 - 15			Rehabilitation 40
25		5 - 15			Rehabilitation 50 G. Deterrence 50
29		5 - 15			G. Deterrence 50

* This is an illegal sentence. The minimum term may not exceed one-third of the maximum term imposed.

CASE 6: Juan Gomez

Conviction Offense: Manslaughter 1°
Criminal Possession of a Weapon 3°

Juan Gomez, a twenty year old male with one prior misdemeanor conviction, was indicted for Murder 2°, an A-I felony, and Criminal Possession of a Weapon 3°, a D felony. He was convicted on a plea of guilty to Manslaughter 1°, a B felony, and Criminal Possession of a Weapon 3°, a D felony.

Offense Description

Defendant Gomez, a marijuana dealer, shot and killed one Milton Warren following an argument about a drug purchase. According to the PSR, on the evening of the incident, Warren and a friend, George Roman, got out of a taxicab and purchased a $5 bag of marijuana from an unknown person:

> "As the defendant approached Warren and Roman on a 10 speed bicycle, Warren reportedly told Roman that the defendant was angry at him because he had not purchased marijuana from him. Milton Warren and the defendant argued and reportedly Warren pulled a knife during the exchange of words. The defendant then went across the street on his bicycle, got off the bike and reached up to a windowsill where he picked up a paperbag, unwrapped [a] newspaper and took out a gun and shot the deceased."
> "Records indicate the defendant fired five shots, two at the deceased and three at witness Roman."

The victim, age thirty, was pronounced dead on arrival at the hospital.

Gomez was arrested approximately a month after the incident as a result of information provided to the police by a "confidential informant." During a brief chase, Gomez dropped a loaded gun and threw a leather pouch containing cocaine out of a window.

Defendant's Statement

The defendant admitted his guilt to the Manslaughter charge and expressed remorse for his conduct, saying "he doesn't know what got into him." He denied guilt on the weapons charge, indicating he pleaded guilty for expediency.

In explaining the shooting the defendant asserted that the victim and his friend George Roman had been drinking, and that Warren had started the dispute by calling the defendant names. He also claimed that he went to get a gun across the street, which he knew was kept on a basement window sill, because Warren brandished a knife and George Roman was armed with a pistol. He also stated that he shot the victim only once.

The defendant also asserted that he only sold loose joints of marijuana and was not a "big dealer."

Complainant's Statement

The victim's wife made a statement on his behalf. She indicated that, as a result of Warren's death, she and their three children, ages 4 to 14, were supported by Social Security Survivor's benefits. In regard to sentencing, Mrs. Warren stated that the defendant "should receive whatever sentence the law allows."

Prior Criminal Record

The defendant had been arrested once previously in 1977, and charged with Burglary 3°, Criminal Possession of a Controlled Substance, Disorderly Conduct and Criminal Trespass. He was convicted of a misdemeanor and received a conditional discharge.

Social History

The defendant's background was summarized by the investigating probation officer as follows:

> "A native and citizen of Panama, he [has been] in this city about 4 years as an illegal alien. His common law wife describes him favorably and he has been an integral part of a small family unit that includes her daughter from a former union. The defendant, a former boxer, has been supporting his family selling marijuana."

The defendant had no known history of drug or alcohol abuse.

Dispositional Options

Incarceration in state prison is the mandatory disposition following conviction for Manslaughter 1°. The judge must impose a maximum term of from three to 25 years, and may impose a minimum term equivalent to one-third of the maximum.

Probation Department Evaluation and Recommendation

In evaluating the defendant, the investigating probation officer concluded that:

> "He sees this as a mistake in his life and relates that he cannot understand his own behavior and feels badly that he has taken a life. He seemed sincere in his remorse and puzzled by the violent behavior that he has shown himself capable of."

The probation department sentencing recommendation was commitment to state prison for both offenses charged, the sentences to run concurrently.

Actual Sentence

The sentence actually imposed was imprisonment for a maximum of ten years on the Manslaughter 1° charge and for a maximum term of five years on the weapons charge, to be served concurrently.

Judicial Response

As Table 6 indicates, maximum terms imposed ranged from the statutory minimum of 0 - 3 years to the statutory maximum of 8 1/3 - 25 years. Practically every possible sentence in between was also imposed. Five judges imposed a ten year maximum. Eleven (26.8%) judges imposed maximum sentences of ten years or less, while thirty (73.2%) imposed maximum terms exceeding ten years.

Seventeen (41.5%) of the judges imposed a minimum term. None of the judges who did so imposed a maximum sentence of less than fifteen years.

1) *Sentencing Objectives*

Retribution and incapacitation were most frequently indicated as the major sentencing objectives in this case. Again, however, there was little relationship between the stated goal and the sentence imposed; statements of similar goals were coupled with widely dissimilar sentences.

2) *Reasons for the Sentencing Decision*

Although there was substantial agreement as to both the relevant facts and the inferences to be drawn from them, such concensus did not produce similar sentencing decisions. Even in the presence of identical sentencing objectives, judges still imposed vastly dissimilar terms. Judges 38 and 27, for example, each gave 90 points to retribution and made very similar comments:

Judge 38: "Use of weapon. Circumstances of offense-opportunity to leave scene." (0-15 years)

Judge 27: "Seriousness of offense. He could have walked away from it." (7-21 years)

Judges 9 and 36 both assigned 90 points to incapacitation as a sentencing objective and reached these results:

Judge 9: "Nature and seriousness of crime." (0-15 years)

Judge 36: "Violence and seriousness of criminal acts; little justification or mitigation. History (pre-incident and post-incident) of illegal possession of deadly weapon." (5 - 20 years)

Judges also reacted very differently to the defendant's drug sale activities:

Judge 21: "Violent crime-death of victim - use of weapon. Indeterminate sentence because of mitigating factors, i.e., no serious previous violent crimes; appears to have a stabilized home life and concern for family. This may be an isolated act of violence. I did not consider the defendant's marijuana activities as an important factor in

sentence. Unfortunately, these are symptomatic of economic and cultural conditions in certain communities and not effectively amenable to control by law enforcement." (0-10 years)

Judge 22: "Five shots at defendant and companion. Illegal narcotics activity. Defendant got a break being allowed to plead Manslaughter 1°, on a good case of Murder 2°." (8 1/3 - 25 years)

Judge 29: "I agree with victim's widow that the defendant should receive the maximum sentence. There is no excuse to leave a widow with three children. Drugs and guns along with street violence call for the severest of treatments by the courts." (8 1/3 - 25 years)

In sum, neither the judges' stated sentencing objectives nor the facts used to justify the sentencing decisions provide an explanation for the vastly different sentences imposed.

CASE 6: Juan Gomez

CONVICTION OFFENSE: Manslaughter 1° (B felony) ACTUAL SENTENCE: 0 - 10 years

JUDGE NUMBER	JAIL	PRISON MIN-MAX	PROBATION GRANTED	SPECIAL CONDITIONS	SENTENCING OBJECTIVES
2		0 - 3			Retribution 100
7		0 - 5			Retribution 35 Incapacitation 35
23		0 - 6			G. Deterrence 50
40		0 - 6			Retribution 60
5		0 - 8			Rehabilitation 30 Sp Deterrence 30
19		0 - 9			Retribution 75
3		0 - 10			****
4		0 - 10			Rehabilitation 30
13		0 - 10			G. Deterrence 60
21		0 - 10			Incapacitation 50
39		0 - 10			Retribution 40 Rehabilitation 40
37		0 - 12			Incapacitation 60
1		0 - 15			Retribution 70
9		0 - 15			Incapacitation 90
14		0 - 15			Retribution 40 Sp Deterrence 40
34		0 - 15			Retribution 85
38		0 - 15			Retribution 90
41		0 - 15			Retribution 50
18		5 - 15			Incapacitation 50
20		5 - 15			Retribution 75
22		5 - 15			Sp Deterrence 100
6		5 - 15			Retribution 50
16		0 - 18			G. Deterrence 50
12		6 - 18			Sp Deterrence 50 G. Deterrence 50
31		6 - 18			Retribution 50 G. Deterrence 50
28		0 - 20			Retribution 40
10		5 - 20			Retribution 30 Rehabilitation 30
33		5 - 20			Rehabilitation 40
35		5 - 20			****
36		5 - 20			Incapacitation 90
11		7 - 21			Incapacitation 50
15		7 - 21			Retribution 40
27		7 - 21			Retribution 90
17		0 - 25			Incapacitation 50 G. Deterrence 50
24		0 - 25			Retribution 50
30		0 - 25			Retribution 30
32		0 - 25			Retribution 25 Rehabilitation 25
8		8.3 - 25			Incapacitation 50 G. Deterrence
25		8.3 - 25			Sp Deterrence 50 Other 50
26		8.3 - 25			Incapacitation 80
29		8.3 - 25			Retribution 50 G. Deterrence 50

**** No dominant objective was identified. Points were evenly distributed across three or more objectives.

CASE 7: John Baxter

Conviction Offense: Attempted Criminal Sale of a Controlled Substance 6°

John Baxter, a 46 year old male with eight prior arrests and five convictions, was indicted for Criminal Sale of a Controlled Substance 5°, a C felony and convicted on a plea of guilty to Attempted Criminal Sale of a Controlled Substance 6°, an E felony.

Offense Description

The defendant sold methadone to an undercover policeman. According to the PSR:

> "As an undercover police officer walked in front of 149 Broad Street, the defendant approached him, asking, "hey you looking for meth?" The undercover officer responded in the affirmative and the defendant told him to follow him to an OTB office....[T]he defendant entered [the OTB office] and returned shortly telling the undercover officer that the methadone was being sold two bottles for $15. The undercover officer agreed to the price and the defendant gave him two vials containing methadone for $15."

The defendant was arrested at the scene. Subsequently he absconded on bail twice and was not returned to court until two years later when he was arrested for another offense.

Laboratory analysis revealed that only one vial in fact contained methadone, a total of 7/8 oz. plus 2.14 mil.

Defendant's Statement

The defendant admitted his guilt, but "offers no reasons for his involvement."

Complainant's Statement

The complainant police officer's report is reflected in the above

description of the offense. He made no additional statement described in the PSR.

Prior Criminal Record

Defendant Baxter had seven prior arrests and six convictions which spanned a period of twenty years. He had served one prison term and two short jail terms.

Between 1958 and 1960 Baxter was convicted in Massachusetts of Contributing to the Delinquency of a Minor (for which he received a 30 day jail term), Bigamy, Accessory before the Fact of Rape (5 counts) and Assault with Intent to Rape a Female Child under 16. For the latter three offenses Baxter received concurrent terms of imprisonment for 3 - 5 years on the Bigamy charge and 5 - 7 years on the rape related cases.*

After release from prison in Massachusetts in 1964, Baxter remained arrest-free until 1972, when he was charged with Criminal Possession of a Dangerous Drug 6° in New York. This charge was dismissed. He was convicted in 1973 of Disorderly Conduct and fined, then in 1975 was charged with Assault 1° for a stabbing that necessitated emergency surgery and a month's hospitalization. This charge was still pending at disposition of the present offense. Subsequent to the instant offense, he was convicted of Resisting Arrest and sentenced to seven days in jail.

Social History

At the time of his arrest the defendant was a patient in a Methadone Maintenance Program and was unemployed. He had only a third grade education, and indicated that he received Army disability benefits of $257 per month as a result of having been blinded in the right eye and wounded while serving in the army in Korea. He also "admit[ted] obtaining income from illegal sources, including massage parlors and prostitution." He indicated that he had been unemployed since 1970 "when a truck fell on him as he was changing a tire...[and claimed] that he has a civil suit pending against [his employer]." Prior to 1970 Baxter described various employments which he had held, but the investigating probation officer noted that:

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* Baxter was originally sentenced to concurrent terms of 15 - 25 years on the rape related cases, but was resentenced after his motion for a new trial was granted. The Rape Accessory case involved the robbery of a young couple in a parked car, during which the woman was raped several times. Baxter did not participate in the rape.

> "Baxter gives such conflicting information regarding employment and claims to be unable to recall exact dates of employment, that it is difficult to access his employment adjustment.

Although Baxter's son indicated that he had a close relationship with his father and noted "that his father has a good relationship with the other two children in the home," he lived with his current wife only intermittently and admitted "a pattern of extramarital liaisons."

The defendant denied any history of psychiatric treatment, but had been placed in Bridgewater State Hospital for three weeks in 1960 as a result of his arrest for sexually assaultive crimes.

Dispositional Options

The following sentencing alternatives were available to the judges:

1) Conditional or unconditional discharge;

2) Fine up to $5,000;

3) Probation for five years, with or without special conditions;

4) Commitment to a local jail for up to sixty days, plus five years probation;

5) Commitment to a local jail for a term up to one year;

6) Commitment to state prison for a maximum term of from 3 to 4 years.*

Probation Department Evaulation and Recommendation

In evaluating the defendant, the investigating probation officer concluded that

> "Baxter presents himself as a streetwise individual and appears to identify masculinity with philandering and physical prowess. His involvement herein appears motivated by his

* The sentencing judge may not set a minimum term for conviction of an E felony. N.Y. Penal Law §70.00(2) (c) (McKinney).

> desire for a quick profit and seems an example of his fairly marginal existence."

In view of "his overall lifestyle, his criminal record and his being a fugitive on the instant offense for two years," the probation department's sentencing recommendation was incarceration.

Actual Sentence

The sentence actually imposed in this case was commitment to a local jail for six months.

Judicial Response

As Table 7 indicates, the sentences imposed ranged from probation to a maximum term of seven years — an illegal sentence. Thirty-four (82.9%) of the judges imposed a term in state prison (four of them in excess of the permissible statutory maximum). Four judges (9.8%) imposed a local jail term of twelve months, while one judge imposed a sixty day jail term, one a sixty day jail term plus probation, and one a sentence of probation. Despite the narrow range of choice (3 or 4 years) there was no consensus among those judges who imposed a prison term as to the appropriate length. Thus 10 judges (29.4%) imposed a maximum term of three years and 20 (58.8%) imposed a term of four years.

In addition to the illegal maximum sentences, six judges (14.6%) imposed a *minimum* term of incarceration, which in this case is not permitted by statute.

1. *Sentencing Objectives*

There was no consensus among the judges as to the major sentencing goals in this case. Six judges rated rehabilitation a major goal, seven special deterrence, nine general deterrence, eleven incapacitation, and twelve retribution.

Even among those judges who were agreed on the appropriate sentencing objectives, vastly different sentences were imposed. Judge 21, for example, gave 100 points to incapacitation to justify his sentence of 60 days in jail; Judge 36 also gave 100 points to incapacitation to justify his sentence of 1 1/3 - 4 years in state prison.

2. *Reasons for the Sentencing Decision*

Judges frequently reached widely divergent interpretations of the

seriousness of the offense and offender. Judges 37 and 20, for example, saw the offense as a minor crime and the defendant as a relatively minor offender in need of rehabilitative services and accordingly imposed probationary sentences:

Judge 37: "Addict - in need of continued help. Not a crime of great magnitude. Might consider 60 days in jail as shock treatment for his failure to appear but he has already been in custody." 8/16/77 - 11/2/77, the date of this report. (probation - drug program special condition)

Judge 20: "Except for pending charges his prior record of convictions for serious crime is remote. Nevertheless, jail is indicated to impress the defendant."
(60 days jail plus probation - drug program special condition)

Judges 17 and 7, on the other hand characterized the defendant as a violent and vicious criminal and imposed prison terms:

Judge 17: "The defendant's criminal history - particularly in violent sexual crimes, the selling and use of drugs, the pending charge of Assault in the first degree - mandate the longest possible period of incarceration."
(1 1/3 - 4 years)

Judge 7: "Drug Sale, many prior convictions, (some vicious). Bench Warrants (2) required to obtain presence. He appears to have been uncooperative with probation."
(0 - 4 years)

Even those judges who gave similar characterizations of the offense and offender, however, imposed widely different sentences:

Judge 10: "The crime involved the sale of methadone which is supplied at no cost by the State to drug addicts. More importantly, the defendant has a complete disregard for the criminal justice system by failing to appear on two occasions. He also has not learned to respect the law despite prior convictions and incarcerations."
(12 months jail)

Judge 1: "A. Overall life style.
B. Arrest record.

C. Contempt for mandate of court by absenting himself for two years.
D. Subsequent arrest." (0-3 years)

Judge 13: "His irresponsible mode of living, his disdain for the legal process, as evidenced by the two Bench Warrants required for his appearance in court, his anti-social activities and his criminal record." (0-4 years)

Judge 15: "This 46 year old defendant is a menace to the community who appears to have a corrupting influence on juveniles, is a drug user who absconded from authorities for two years after arrest. He exhibits a seasoned life of crime." (1 1/3 - 4 years)

Judge 29: "This is a good person to have off the street for as long as possible. Despite the low felony, this defendant is unquestionably a career criminal who is assaultive, utterly devoid of social or moral conscience." (1 1/3 - 4 years)

Even judges who expressed identical sentencing objectives and similar reasons for their sentences imposed different terms. Thus, the maximum sentence imposed by Judge 17 is four times longer than the one imposed by Judge 21, both of whom assigned 100 points to incapacitation as a sentencing objective and recited substantially the same reasons for their sentence choice:

Judge 21: "An apparent hopeless case of a man involved in a life time of crime. The specific crime is the least consideration - but affords the opportunity to incapacitate the defendant and remove him from society." (12 months jail)

Judge 17: "The defendant's criminal history - participating in violent sexual crimes, the selling and use of drugs, the pending charge of Assault in the First Degree - mandate the longest possible period of incarceration. I would never have taken a plea." (1 1/3 - 4 years)

Similarly, Judge 2 and Judge 34 both assigned 100 points to retribution and emphasized the defendant's prior record, yet Judge 2 imposed a prison term of 0 - 3 years while Judge 34 imposed a twelve month jail term:

Judge 34: "Defendant's bad record and the recommendation of the probation department that defendant be incarcerated. Probation not indicated." (12 months jail)

Judge 2: "Arrest record and the fact that defendant is a person who may use his methadone maintenance as a means to obtain extra money." (0-3 years)

Judges also imposed identical sentences on the basis of *different* objectives. Judge 25, for example, imposed the same 0 - 3 year prison term as did Judge 2, above, yet on the basis of general deterrence rather than retribution:

Judge 25: "Definite anti-social patterns - there is absolutely no chance for rehabilitation - incarceration only punishment indicated." (0-3 years)

In sum, this case presents the widest possible array of dispositions. There was little agreement among the judges as to sentencing objectives, and the facts of the case are sometimes given substantially different interpretations. Yet even when judges were agreed as to the nature of the case and appropriate sentencing objectives, vastly dissimilar sentences were imposed.

CASE 7: John Baxter

CONVICTION OFFENSE: Attempted Criminal Sal of a Controlled Substance 6* (E felony)

ACTUAL SENTENCE: Jail 6 months

JUDGE NUMBER	JAIL	PRISON MIN - MAX	PROBATION GRANTED	SPECIAL CONDITIONS	SENTENCING OBJECTIVES
37			5 years	Drug rehabilitation	Rehabilitation 80
20	60 d		5 years	Drug rehabilitation	Rehabilitation 35 G. Deterrence 35
21	60 d				Incapacitation 100
10	12 m				Sp Deterrence 40
11	12 m				Incapacitation 50
34	12 m				Retribution 100
35	12 m				Retribution 40
1		0 - 3			Retribution 60
2		0 - 3			Retribution 100
4		0 - 3			Sp Deterrence 35
5		0 - 3			Rehabilitation 50
19		0 - 3			****
25		0 - 3			G. Deterrence 100
26		0 - 3			G. Deterrence 50 Sp Deterrence 50
27		0 - 3			****
38		0 - 3			Incapacitation 70
41		0 - 3			Rehabilitation 75
3		0 - 4			Retribution 50 Incapacitation 50
6		0 - 4			Retribution 50
7		0 - 4			Retribution 40
8		0 - 4			Incapacitation 50 G. Deterrence 50
13		0 - 4			Rehabilitation 50 G. Deterrence 50
14		0 - 4			Retribution 50 Sp Deterrence 50
16		0 - 4			Sp Deterrence 50
22		0 - 4			Incapacitation 90
24		0 - 4			Sp Deterrence 50
28		0 - 4			Retribution 50
30		0 - 4			****
32		0 - 4			Rehabilitation 90
33		0 - 4			Rehabilitation 50
39		0 - 4			Incapacitation 90
18		1.3 - 4*			Incapacitation 75
15		1.3 - 4*			Retribution 60
17		1.3 - 4*			Incapacitation 100
29		1.3 - 4*			Incapacitation 50
36		1.3 - 4*			Incapacitation 100
12		2 - 4*			G. Deterrence 30 Sp Deterrence 30
9		0 - 5**			Incapacitation 100
31		0 - 5**			Retribution 50 G. Deterrence 50
40		0 - 5**			Retribution 50
23		0 - 7**			G. Deterrence 100

* These are illegal sentences. By statute, the sentencing court is prohibited from imposing a minimum term in cases where the defendant has been convicted of a Class E felony.

** These are illegal sentences. The maximum term may not exceed four years.

CASE 8: Joseph Falk

Conviction Offense: Attempted Burglary 3°

Joseph Falk, a twenty year old male with one juvenile conviction, four adult arrests and one adult conviction, was indicted for Burglary 2°, a C felony, and convicted on a plea of guilty to Attempted Burglary 3°, an E felony.

Offense Description

Defendant Falk and a codefendant, Phillip Winston, unlawfully entered the apartment of complainant Robert Randall and stole a color television and stereo system. According to the PSR:

> "On March 20, 1978 at 2:50 A.M. Police Officer Nelson responded to a radio call that a burglary was in progress at 515 Riverview Avenue. When he arrived at the scene he observed co-defendant Winston exiting from the building with a T.V. set. Seconds later, the defendant was seen leaving the building with a stereo set. Both were stopped and questioned by the arresting officer. The Defendant stated that he was helping a friend move. At that point the complainant Robert Randall appeared and identified his property. It was then determined that the complainant's window, by the fire escape, was forced open."

The defendant was arrested and taken into custody.

Defendant's Statement

Defendant Falk admitted his guilt. In explaining the offense, Falk indicated that earlier in the evening complainant had made homosexual advances to him and that he had gone with the complainant to his home "because he wanted to see what was in the apartment." He stated that he then went to codefendant Winston's apartment, and that Winston suggested the burglary. Falk also indicated that his motive in committing the offense was "to get money for food because his paramour was having difficulty with welfare and she had also purchased some furniture on credit."

Complainant's Statement

No statement by the complainant was presented in the PSR.

Prior Criminal Record

The defendant had been adjudicated a juvenile delinquent at the age of fifteen for homicide, based on an incident in which "the defendant's father shot Louis Craft [the defendant's cousin] and the defendant stabbed Craft 7 times, causing his death a few hours later." Falk was sentenced to 18 months juvenile probation.*

Since the age of sixteen, Falk had been arrested four times, for menacing, petit larceny, assault and criminal trespass. All charges except the last were dismissed. For that offense, involving the theft of stereo components from a store, he was convicted of a misdemeanor and received an unconditional discharge.

Social History

The defendant's background was summarized by the investigating probation officer as follows:

> "[H]e was raised in an unstable home environment in which his father, a drug addict and heavy drinker, physically abused the mother. Despite this, the defendant appears to have been attached to his father.
>
> The defendant dropped out of school in the 9th grade. He reportedly tried to join the National Guard at the age of 16 and 17 but was discharged after a short time. At age 18, he enlisted in the Army but was discharged 3 months later. His current paramour maintains that the defendant tried to find work and was scheduled to take a test for the Post Office but was arrested for the instant offense."

The defendant as a juvenile had experimented with heroin and glue sniffing, and had "several other episodes of impulsive-aggressive

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* His father was convicted of Manslaughter 2° and sentenced to 0 - 4 years imprisonment.

behavior prior to the homicide of his cousin." Following that incident he received a psychiatric evaluation, which described him as "a borderline personality with impulse disorder," and indicated that "there is no evidence of psychotic process at present although this is a possible future outcome if he is untreated."

Dispositional Options

The following sentencing alternatives were available to the judges:

1) Conditional or unconditional discharge;

2) Fine up to $5,000;

3) Probation for five years, with or without special conditions;

4) Commitment to a local jail for up to sixty days, plus five years probation;

5) Commitment to a local jail for a term up to one year;

6) Commitment to state prison for a maximum term of from 3 to 4 years.

Probation Evaluation and Recommendation

In evaluating the defendant, the investigating probation officer concluded that:

> "...[He] has no concrete accomplishment or [has] improved his life style in any positive manner. Rather, since adolescence, he appears to have serious psychological problems. He has virtually no work history and has been arrested 5 times. Some of these offenses suggest an aggressive and violent potential on the part of the defendant."

The probation department sentencing recommendation was incarceration.

Actual Sentence

The sentence actually imposed was a twelve month jail term.

Judicial Response

As Table 8 indicates, the judges imposed sentences ranging from probation to a maximum term of five years imprisonment — an illegal sentence. Virtually every possible sentence in between the extremes was also selected. Thirty-two (78%) of the judges imposed a state prison term (including the term in excess of the permissible statutory maximum). Five judges (12.2%) imposed a twelve month jail term; three (7.3%) imposed a sixty day jail term plus probation, and one imposed probation alone. Among the judges who imposed a prison term, there was no consensus as to whether 3 or 4 years was the appropriate maximum. Thirteen (40.6%) imposed a maximum term of three years, and eighteen (56.3%) imposed a maximum term of four years.

As in case 7, in addition to the illegal maximum sentence, six judges (14.6%) illegally imposed a *minimum* term of incarceration.

1. *Sentencing Objectives*

Rehabilitation and incapacitation were most frequently indicated as major sentencing objectives in this case, by seventeen and eleven judges respectively. Eight judges mentioned special deterrence as a major goal, while five mentioned retribution, and five general deterrence.

There was no apparent relationship between the judges' sentencing objectives and the sanctions they imposed. Sentences based largely on rehabilitation ranged from probation to incarceration for a maximum term of four years.

2. *Reasons for the Sentencing Decision*

There was a high degree of consensus in this case as to the relevant facts, and judges almost invariably stressed the defendant's violent and psychologically disturbed background in describing the basis for their sentencing decisions. Such agreement was not, however, translated into similar sentencing decisions. Thus Judges 37, 5, 13 and 22 all stressed the defendant's psychological problems and listed rehabilitation as a major sentencing goal — yet imposed sentences ranging from probation to a maximum term of 4 years:

Judge 37: "Got a break on similar incident almost two years earlier. Follower here. Bad family background: i.e., father and mother. Psychological problems. Stolen goods all recovered."
(5 years probation - psychiatric counselling special condition)

Judge 5: "Prior arrests. No probation. Doubt he would voluntarily attend clinic."
(12 months jail - recommend psychiatric treatment)

Judge 13: "The defendant's irresponsible and unproductive lifestyle, his potential for violence and his psychiatric problems would benefit from a period of incarceration."
(0 - 3 years)

Judge 22: "Rehabilitation is an objective here because of defendant's disturbed psychiatric background resulting from his attachment to his father, which appears to be diminishing." (0 - 4 years)

Judges who characterized the defendant as unamenable to treatment almost invariably imposed prison terms, but also for varying periods:

Judge 3: "Despite attempts to help the defendant with psychiatric treatment, he failed to cooperate in these ventures and actually absconded from one hospital. It does not appear that this defendant is capable of being rehabilitated and the sentence seems appropriate." (0 - 3 years)

Judge 34: "Past record, especially fairly recent conviction for criminal trespass followed by the instant charge. Does not seem to respond favorably to therapy." (0 - 4 years)

Judge 21: "Consider burglary of home a 'potentially' violent crime. Defendant's record of violence coupled with the crime committed mandates maximum sentence. Imposition of a minimum term is *de minimus* therefore none imposed." (0 - 4 years)

Judges 29 and 12 similarly expressed little faith in the defendant's rehabilitative potential but nonetheless urged psychiatric treatment. Both imposed a minimum (illegal) as well as the highest possible maximum term:

Judge 29: "There is a high probability that this young man will be institutionalized for the rest of his life and may kill

someone else before he finishes. I would secure all medical and psychological records and recommend keeping him in jail as long as possible to attempt to teach him some vocational skills with whatever psychological treatment available." (1 1/3 - 4 years)

Judge 12: "Incarceration is believed to be the best in the herein matter because of the violent and vicious nature of the defendant. If possible defendant should receive psychiatric treatment." (1 1/3 - 4 years)

In sum, although judges emphasized similar facts in this case, they disagreed about appropriate sentencing goals and the defendant's rehabilitative potential. Even those judges who agreed, however, imposed widely disparate sentences.

CASE 8: Joseph Falk

CONVICTION OFFENSE: Attempted Burglary 3° (E felony) ACTUAL SENTENCE: 1 Year Jail Term

JUDGE NUMBER	JAIL	PRISON MIN - MAX	PROBATION GRANTED	SPECIAL CONDITIONS	SENTENCING OBJECTIVES
37			5 years	Psychiatric Counsel	Rehabilitation 90
35	60 d		5 years		****
20	50 d		5 years	Drug & Psych Counsel	Rehabilitation 60
31	60 d		5 years	Psychiatric Counsel	Rehabilitation 50
24	12 m				Retribution 50 Sp Deterrence 50
5	12 m				Rehabilitation 60
10	12 m				Sp Deterrence 40
11	12 m				Sp Deterrence 50
34	12 m				Retribution 40 Incapacitation 40
1		0 - 3			Retribution 50
3		0 - 3			Incapacitation 100
7		0 - 3			Rehabilitation 40
8		0 - 3			Rehabilitation 50 G. Deterrence 50
13		0 - 3			Rehabilitation 70
18		0 - 3			Incapacitation 45
23		0 - 3			Rehabilitation 50 G. Deterrence 50
25		0 - 3			Rehabilitation 50 G. Deterrence 50
26		0 - 3			G. Deterrence 50 Sp Deterrence 50
28		0 - 3			Rehabilitation 30 Sp Deterrence 30
38		0 - 3			Incapacitation 60
40		0 - 3			Rehabilitation 50
41		0 - 3			Rehabilitation 75
6		0 - 4			G. Deterrence 40
9		0 - 4			Retribution 50 Incapacitation 50
16		0 - 4			Rehabilitation 60
19		0 - 4			Sp Deterrence 50
21		0 - 4			Incapacitation 100
22		0 - 4			Rehabilitation 50 Sp Deterrence 50
27		0 - 4			Sp Deterrence 66
30		0 - 4			Rehabilitation 50
32		0 - 4			Rehabilitation 100
33		0 - 4			Rehabilitation 70
36		0 - 4			Incapacitation 100
39		0 - 4			Incapacitation 60
2		1.3 - 4*			Retribution 100
12		1.3 - 4*			****
15		1.3 - 4*			Incapacitation 60
17		1.3 - 4*			Incapacitation 75
29		1.3 - 4*			****
14		1.3 - 4*			****
4		0 - 5**			Incapacitation 40

* These are illegal sentences. By statute, the sentencing court is prohibited from imposing a minimum term in cases where the defendant has been convicted of a Class E felony.

** This is an illegal sentence. The maximum term may not exceed four years.

* * *

Cross-Judge Comparisons

The findings presented in the preceding section indicate that judges who considered the same PSR imposed widely varying sentences. We examined these results to determine whether the range of variation could be attributed to differences in the judges' sentencing "styles," or to whether the judge presides in an upstate or downstate county.

1. *Sentencing Styles*

Our analysis of the judges' sentencing decisions demonstrate that the wide range of variation in the sentences imposed in each case could not be attributed to the fact that some judges are consistently severe and some consistently lenient.

A. *Methodology*

For each of the eight cases, all 41 judges participating in the study were assigned a rank according to the type of disposition and length of the maximum term imposed. A rank of 1 was assigned to the most lenient judge, 41 to the most severe. When two or more judges imposed identical sentences, an averaging technique was employed to determine rank.* Using these rankings, the judges were then compared according to two tests of leniency and severity.

In the first, more stringent test, "leniency" in any given case was defined as a rank ranging from 1 to 10.25. To achieve this rank the judge's sentence was less severe than 75% of the sentences imposed. Similarly, "severity" was defined as a rank of 30.75 to 41, meaning that the sentence imposed was more severe than 75% of the sentences. A "moderate" sentence was defined as one ranking between 10.5 and 30.75.

In the second test "leniency" was defined as a rank below the median of 20.5 and "severity" as a rank above the median, from 20.5 to 41.

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* If the most lenient sentence in a case was one year in prison, the next most lenient two years, and the next two judges imposed three years, these last two judges would be given a rank of 3.5 and the next rank would be 5. If three judges gave the three year sentence, they would all be given a rank of 4 and the next rank would be 6. In order to minimize the number of tied ranks, when two judges imposed the same maximum term, but one judge also imposed a minimum term, he was ranked as having imposed the more severe sentence.

B. *Results*

Using the first test, no judge obtained a lenient rank across all eight cases. Judge 2 and Judge 5 came closest to a lenient rating for all sentencing decisions. Judge 5 placed in the lenient category in 6 out of the 8 cases, and Judge 2 placed in the lenient category in five out of the eight cases. Judge 2 also imposed the least severe sentence in two cases.

Similarly, no judge achieved a severe rank across all cases. Judge 17 and Judge 29 came closest to achieving a severe rating in each case. Judge 17 placed in the severe category in seven out of eight cases, and ranked 29th, placing his sentence close to the 30.75 cut-off point, in the remaining case. Judge 29's sentences were within the "severe" range in six out of eight cases.

Using the second, broader definition of "leniency" and "severity" still only seven judges could be categorized as lenient or severe. Judges 17, 29, 30, and 33 were consistently severe, while Judges 1, 5, and 34 were consistently lenient.

With these few exceptions, the relative severity of the sentence imposed by any given judge varied in each case.[10]

In conclusion, the tremendous variation in the type of dispositions and the length of maximum terms imposed by the judges was not the result of differences in "sentencing styles." Moreover, if the sentences imposed by the two "severe" and the two "lenient" judges were excluded from the distribution of the sentences presented in Tables 1 - 8, only a negligible reduction in the amount of sentencing variation would follow. Thus, the broad span of sentencing disparity in each case is not the result of a few judges whose sentencing patterns are extreme.

TABLE 9: Relative Severity Rank of 41 New York State Judges For Each of the Eight Cases

JUDGE CODE	CASE NUMBER 1	2	3	4	5	6	7	8
01	7.5	6.0	25.5	2.5	19.0	15.5	12.5	16.0
02	7.5	18.5	5.0	1.0	3.0	1.0	12.5	37.5
03	7.5	23.0	30.5	4.0	3.0	9.0	24.5	16.0
04	19.0	11.5	5.0	14.5	10.0	9.0	12.5	41.0
05	7.5	1.0	9.5	14.5	7.5	5.0	12.5	7.0
06	35.0	30.5	9.5	29.5	29.0	20.5	24.5	28.5
07	35.0	2.0	15.0	14.5	22.5	2.0	24.5	16.0
08	19.0	40.5	40.5	37.5	29.0	39.5	24.5	16.0
09	7.5	36.0	15.0	23.0	15.5	15.5	39.0	28.5
10	28.0	27.0	25.5	19.0	15.5	28.5	5.0	7.0
11	7.5	6.0	5.0	10.0	25.0	32.0	5.0	7.0
12	7.5	30.5	32.0	32.5	3.0	24.0	37.0	37.5
\$2	19.0	30.5	30.5	7.0	3.0	9.0	24.5	16.0
14	38.5	25.0	1.5	14.5	7.5	15.5	24.5	37.5
15	7.5	36.0	18.0	37.5	3.0	32.0	34.5	37.5
16	7.5	11.5	12.0	37.5	22.5	24.0	24.5	28.5
17	40.5	36.0	40.5	37.5	29.0	35.5	34.5	37.5
18	28.0	30.5	25.5	26.0	29.0	20.5	32.0	16.0
19	28.0	11.5	20.0	2.5	15.5	6.0	12.5	28.5
20	28.0	6.0	15.0	7.0	37.0	20.5	2.0	3.5
21	19.0	15.5	5.0	20.0	12.0	9.0	5.0	28.5
22	7.5	15.5	5.0	5.0	15.5	20.5	24.5	28.5
23	19.0	6.0	25.5	7.0	10.0	3.5	41.0	16.0
24	38.5	40.5	36.0	14.5	29.0	35.5	24.5	7.0
25	19.0	6.0	25.5	29.5	40.5	39.5	12.5	16.0
26	40.5	30.5	36.0	26.0	37.0	39.5	12.5	16.0
27	19.0	6.0	20.0	26.0	37.0	32.0	12.5	28.5
28	35.0	25.0	9.5	14.5	29.0	26.0	24.5	16.0
29	28.0	36.0	36.0	29.5	40.5	39.5	34.5	37.5
30	35.0	25.0	33.0	23.0	35.0	35.5	24.5	28.5
31	28.0	36.0	36.0	9.0	34.0	24.0	39.0	3.5
32	19.0	39.0	39.0	37.5	6.0	35.5	24.5	28.5
33	28.0	30.5	36.0	37.5	39.0	28.5	24.5	28.5
34	19.0	18.5	15.0	14.5	15.5	15.5	5.0	7.0
35	35.0	18.5	25.5	37.5	33.0	28.5	5.0	2.0
36	28.0	21.0	1.5	32.5	20.0	28.5	34.5	28.5
37	28.0	11.5	25.5	14.5	15.0	12.0	1.0	1.0
38	7.5	18.5	20.0	37.5	29.0	15.5	12.5	16.0
39	7.5	6.0	15.0	29.5	22.5	9.0	24.5	28.5
40	7.5	14.0	9.5	21.0	10.0	3.5	39.0	16.0
41	7.5	22.0	25.5	23.0	22.5	15.5	12.5	16.0

2. *Upstate/Downstate Variation*

Despite the common belief that New York judges who preside in upstate counties* impose more severe sentences than their downstate brethren, our analysis of the sentencing patterns of judges participating in the study does not support the conclusion that the wide range of variation in the sentences imposed in each case can be primarily attributed to differences in upstate/downstate sentencing patterns.

A. *Methodology*

An average rank was computed for each judge on the basis of his or her rank in each of the eight cases. From a comparison of the average ranks, a "final rank" was assigned to each judge. A final rank of 1 was assigned to the judge with the lowest average rank, of 2 to the judge with the second lowest average rank, and so forth. As Judge 41's location was unknown, he was excluded from the analysis. The average and final ranks are displayed in Table 10.

Using the final ranks, the judges were then categorized as "lenient" or "severe" using two tests. Under the first test a "lenient" judge was defined as one with a final rank of from 1 to 10.00, a "severe" judge as one with a final rank of from 31.0 to 40.0. Under the second, less stringent, test a "lenient" judge was defined as one with a final rank below 20.0, a "severe" judge as one with a final rank above 20.0.

Using the final ranks assigned to the judges and both definitions of leniency and severity, a Chi-square test was then performed to determine whether a higher proportion of "severe" judges presided in upstate locations than would be expected in a chance distribution. Using the second, broader definition of leniency and severity, upstate and downstate judges were also compared on a case-by-case basis using the same test.

Upstate and downstate judges were next compared, again on a case-by-case basis, using a Chi-square test to determine whether a higher proportion of upstate judges imposed a sentence above the median than would be expected in a chance distribution. Finally, the average sentence of upstate judges was compared with that of downstate judges on a case-by-case basis using a T-test to determine whether there was a statistically significant difference in the average length of sentence imposed by each group.

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* Upstate was defined as a county north of Westchester.

B. *Results*

An examination of Table 10 demonstrates that the widespread variation in sentences imposed in the study is not simply a problem of regional disagreement. Among both upstate and downstate judges there are substantial differences in rank and length of the average maximum term imposed.

Using both definitions of leniency and severity, the Chi Square test revealed that, at a .95 significance level, there were no statistically significant differences in the proportion of lenient and severe judges upstate and downstate.[11]

The same results were obtained using the median sentence as the basis of comparison. In case 3, for example, 12 downstate and 7 upstate judges set severe (above the median) sentences while 15 downstate and 6 upstate judges set lenient (below the median) sentences. This pattern, compared to the expected distribution of 6.5 severe and 7.5 lenient upstate judges, revealed no statistically significant difference between the expected and actual results.[12]

As illustrated in Table 11, the case-by-case comparison of *average* upstate and downstate sentences yielded the same results. In all cases, a T-test revealed that, at a .95 significance level, the average upstate sentence was not significantly different than the average downstate sentence.[13]

In sum, the wide sentencing disparity revealed in the study cannot be primarily attributed to differences in upstate/downstate sentencing patterns.

TABLE 10: Average and Final Ranks of 40 New York State Judges

JUDGE CODE	AVERAGE RANK	FINAL RANK
01	12.8	4.0
02	10.5	2.0
03	14.2	8.0
04	15.1	12.5
05	7.9	1.0
06	25.0	29.0
07	16.1	15.0
08	29.9	37.0
09	21.8	22.5
10	18.9	18.0
11	11.9	3.0
12	24.8	28.0
13	16.9	16.0
14	20.0	20.0
15	25.1	30.5
16	20.3	21.0
17	35.4	40.0
18	25.1	30.5
19	15.1	12.5
20	14.5	9.0
21	14.0	7.0
22	14.8	10.5
23	15.6	14.0
24	27.4	33.0
25	22.9	26.0
26	28.9	35.0
27	22.0	24.0
28	21.8	22.5
29	34.2	39.0
30	29.0	36.0
31	25.5	32.0
32	27.8	34.0
33	30.6	38.0
34	13.6	6.0
35	22.6	25.0
36	23.7	27.0
37	13.4	5.0
38	19.1	19.0
39	17.3	17.0
40	14.8	10.5

NOTE: Judges 28 - 40 preside in upstate counties.

TABLE 11: Mean, Standard Deviation, Median and T-Test Results for the Eight Cases

	ALL CASES N = 41[1]			UPSTATE N = 13			DOWNSTATE N = 27			
CASE	MEAN in years	S.D.[2]	MEDIAN MAXIMUM TERM in years	MEAN in years	S. D.	MEDIAN MAXIMUM TERM in years	MEAN in years	S. D.	MEDIAN MAXIMUM TERM in years	T-TEST[3]
1	0.55	1.5	Probation 5 years	0.10	0.08	Jail 60 days	0.78	1.8	Probation 5 years	1.33
2	11.8	5.9	10	12.7	5.4	15	11.4	6.2	10	0.63
3	10.0	5.3	9	11.1	5.5	10	9.5	5.2	9	0.87
4	11.0	3.6	10	12.6	2.8	15	10.2	3.8	10	1.97
5	6.7	4.5	7	8.3	4.3	10	5.9	4.5	5	1.56
6	16.2	6.3	15	17.8	5.7	20	15.6	6.5	15	1.01
7	3.33	1.44	4	3.31	1.54	4	3.35	1.41	4	0.08
8	2.96	1.35	3	2.64	1.60	3	3.12	1.21	3	1.03

[1] Includes Judge 41 for whom a geographical region could not be determined.

[2] S. D. refers to the standard deviation from the mean.

[3] T-tests were used to determine whether there were statistically significant differences between the mean or average sentences imposed by the upstate and downstate judges as a group. In no case, using a two tailed probability, was the t significant at the .05 or higher level.

Conclusion

A major objective of this study was to explore the phenomenon of sentencing disparity in New York. The results of our study support the conclusion that disparity — unwarranted variation in sentencing — is widespread across the state. While it has sometimes been suggested that sentencing variation is due to the unique facts of each case, here — by having judges impose sentence in precisely the *same* cases — we have demonstrated that the wide divergence in sentences imposed is based upon difference in judicial attitudes, rather than the cases themselves. In this sense, our present sentencing system does indeed provide "individualized justice" — but with perhaps a different meaning than adherents to indeterminate sentencing attach to those words.

While no one would expect uniformity in sentencing, we were unprepared for the wide range of sentences our study revealed. We found that when judges were presented with a case involving a choice among probation, jail, and prison terms, there was considerable variation in both the type and length of sentence imposed. Vast disparity was also evident in cases where a state prison term was mandated: the sentence imposed by one judge might be twice as long as the sentence imposed by another.

With regard to the second objective of this study — to identify factors which may contribute to sentence disparity — we found that judges could agree on the objective for imposing a sentence in a given case, and yet drastically differ on the length of the sentence. For example, in one case, retribution was used to justify sentences of both 0 - 5 years and 8 1/3 - 25 years. Thus, even sentences based on identical rationales often produced disparate results. When judges disagreed upon the interpretation to be given to the facts, or the objective to be served by the sentence (as they often did), the resulting disparity in sentencing was just as wide. We also found that the wide range of sentencing disparity in each case could not be attributed either to regional sentencing patterns, or the fact that some judges are consistently lenient or severe.

This sentencing simulation exercise did not, of course, measure *actual* sentencing practices, but we are reasonably confident that the results *do* reflect reality. The present indeterminate sentencing system, by providing judges with vast discretion and little guidance as to how to use it, encourages unwarranted variation in sentencing. We have shown here that unless judicial discretion is adequately structured, sentence disparity will be the inevitable result: the sentence meted out to an offender will too often depend on the identity of the judge rather than the facts of the case itself.

FOOTNOTES TO APPENDIX C: Sentencing Simulation Study

1. Federal Judicial Countil, *The Second Circuit Sentencing Study: A Report to the Judges of the Second* Circuit (A. Partridge & W. Eldridge eds. 1974).

2. N.Y. Penal Law §70.06 (McKinney).

3. The sampling design and actual selection of participants was by Louis Harris and Associates, Inc. The sampling procedure is described below:

> "The sample was first allocated by region of the state, with 30 interviews allocated with members of each group in downstate counties (the New York City Standard Metropolitan Statistical Area), and 20 interviews conducted with members of each group in upstate counties (defined as counties outside the New York City SMSA). This approximates the number of felony indictments by region in New York State.
>
> "Within each region, each county was assigned a number of interviews proportionate to the number of reported felony indictments (1975-1976) in that county. Only counties with fulltime assistant district attorneys were included in the sample selection.
>
> "To insure some representation from less populous upstate counties with fewer felony indictments, all upstate counties were stratified into two groups:
>
> 1. those with 200 or more felony indictments;
>
> 2. those with less than 200 felony indictments.
>
> "County selection proceeded within each stratum in proportion to the number of felony indictments within each stratum first, then within each county.
>
> "Interviews were conducted in a total of 25 New York State counties."

Louis Harris and Associates, Inc., *Survey of Actors in the New York State Criminal Justice System*, at 3 - 4 (November 21, 1978).

4. Using the procedures outlines in Note 3, 51 judges were asked to participate in the exercise; 41 or 80% actually participated.

5. In order to insure the anonymity of the respondents, the judges were not asked to sign their names. Postmarks were used to identify the counties represented.

6. D. Gottfredson, B. Stecher & C. Cosgrove, *Sentencing In Essex County New Jersey* (December, 1978) (unpublished manuscript).

7. N. Y. Penal Law §70.02 (McKinney Supp. 1978). The Violent Felony Offender Law provides for specific mandatory minimum period of imprisonment pursuant to a conviction for violent felonies. By statute, the court is required to set the minimum term at one-third of the maximum term imposed. All of the cases used in this study were decided before the effective date of the violent offender law. If these crimes had been committed after September 1, 1978, four of the defendants *may* have been subject to sentencing under the Violent Felony Provisions. There were three reasons for directing the judges to assume that the V.F.O. Laws do not apply:

1) Whether or not a defendant is ultimately sentenced under the Violent Felony Offender statute depends on whether certain facts are specified in the indictment. This information was not available in the presentence reports used in the sample.

2) Given the "newness" and the complexity of the VFO, judges might impose sentences that in actuality were not in compliance with the law. It therefore seemed advisable to have the judges operate within the statutory framework with which they were most familiar.

3) Although the sentences imposed in the course of this exercise may not be typical of those imposed in accordance with the new VFO law, they are assumed to reflect practices under the "old" law.

8. *See* L. T. Wilkins, D. M. Gottfredson, J. Robison & C. Sadowsky, *Information Selection And Use In Parole Decision-Making, Report Number Five*, National Council on Crime and Delinquency Research Center (June, 1973); L. T. Wilkins, *Information Overload: Peace or War with the Computer, Report Number Eleven*, National Council on Crime and Delinquency Research Center (June, 1973).

9. P. Hoffman, *Paroling Policy Feedback, Report Eight*, National Council on Crime and Delinquency Research Center, at 11 (June, 1973).

10. These results are comparable to those obtained in the Second Circuit Sentencing Study. Federal Judicial Council, *supra* note 1, at 36.

11. Twelve downstate judges had ranks over 20, as did 8 upstate judges. The formula used for the computation was Chi Square corrected for continuity:

$$X^2 = \frac{N\left(\left[ad - bc\right] - \frac{N}{2}\right)^2}{(a+b)(c+d)(a+c)(b+d)}$$

Chi Square = .456, p = .500 (2 tailed probability). *See* H. Blalock Jr., *Social Statistics*, at 286 (June, 1972).

Fisher's Exact Test was also used to determine whether upstate or downstate judges were disproportionately represented in the most lenient or severe ranks. Four downstate and 5 upstate judges obtained final ranks of 31 to 40. Seven downstate and 2 upstate judges obtained ranks of 1 to 10. The probability of obtaining these results was .143, which indicates that neither upstate nor downstate judges were disproportionately represented in these categories. Fishers Exact Test is preferable to the Chi Square test when the N is less than or equal to 30. *See* Blalock, *supra*, at 289-291.

12. The results of the Chi Square tests and the two tailed probability for the cases were: Case 2: $X^2 = .048$, $p = .826$; Case 3: $X^2 = .048$, $p = .826$; Case 4: $X^2 = .802$, $p = .370$; Case 5: $X^2 = .456$, $p = .500$; Case 6: $X^2 = .802$, $p = .370$; and Case 8: $X^2 = .048$, $p = .826$.

Fisher's Exact Test was used for cases 1 and 7; the results were .123 and .300 respectively. Fisher's Exact Test was used for these two cases because the number of judges imposing sentences above the median was 5 or less and the Chi-Square test therefore was inappropriate. In all eight cases, the null hypothesis that the two groups (upstate and downstate judges) were drawn from a population with the *same* median was accepted. *See* S. Seigel, *Nonparametric Statistics for the Behavioral Sciences*, at 111-115 (1956).

Ordinarily, the Mann-Whitney or Kolmogorov-Smirnov tests could be used to determine whether there were significant differences in the rankings of the upstate and downstate judges. These tests are, however, based on the assumption that there are no tied pairs. Thus, because of the inordinately large number of tied pairs present in this data, these two statistics could not be computed meaningfully. *Blalock, supra* note 11 at 255-265.

13. The T test with pooled variance was used for each case. The following formula for the pooled estimate of the common standard deviation was employed:

$$0_{x_1 - x_2} = \frac{N_1 s_1^2 + N_2 s_2^2}{N_1 + N_2 - 2} \quad \frac{N_1 + N_2}{N_1 N_2}$$

where N^1 equals the number of upstate judges (13) and N^2 equals the number of downstate judges (27). s^2 and s^{22} refer to the standard deviation squared for each case for the upstate and downstate judges respectively.

$$t = \frac{X_1 - X_2}{0_{x_1 - x_2}}$$

with 38 degrees of freedom ($N^1 + N^2 - 2$). See Table 11 for the results of the test in each case. *Blalock, supra* note 11, at 219-228.

APPENDIX D

Survey of Actors in the New York State Criminal Justice System

SURVEY OF ACTORS

IN THE

NEW YORK STATE CRIMINAL JUSTICE

SYSTEM

Conducted for:

EXECUTIVE ADVISORY COMMITTEE ON SENTENCING

NEW YORK STATE

November 21, 1978

By

LOUIS HARRIS AND ASSOCIATES, INC.

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CHAPTER I:

INTRODUCTION

Louis Harris and Associates conducted this survey of New York State trial judges, assistant district attorneys and defense attorneys — all of whom currently participate in felony casework — for the Executive Advisory Committee on Sentencing of the State of New York. The Executive Advisory Committee has been charged by Governor High L. Carey with:

- evaluating the effectiveness of existing laws relating to imprisonment, probation and parole in achieving appropriate sentencing goals;
- studying and evaluating proposals to improve the effectiveness of laws relating imprisonment, probation and parole, and analyzing the impact of such proposals on the various elements of the criminal justice system and on the public at large;
- reviewing and evaluating proposed criminal justice legislation which may be submitted to the Committee by the Governor.

The Executive Committee asked Louis Harris and Associates to supplement the Committee's efforts by collecting systematic in-depth input on the questions under study from a randomly selected sample of 50 New York State trial judges, 50 assistant district attorneys, and 50 defense attorneys, all of whom are relevant actors in the State's justice system.

The survey sought to evaluate aspects of the sentencing process through the perspectives of various kinds of participants. The survey is thus able to report both shared and divergent views resulting from their differing roles and viewpoints.

A. *Sample Characteristics*

Respondents selected to participate in this study represent a small but randomly selected sample of New York State judges who handle felony cases, assistant district attorneys who, wherever possible, specialize in felony cases, and defense attorneys who handle felony cases.

By length of experience, expressed in median years:

- Judges in the sample have served a median 6.41 years on the bench and have specif-

ically handled felony cases a median 5.43 years. The judges spent a median 88% of their time on felony cases in the past year and imposed a median 74 sentences in felony cases.

- Assistant district attorneys in the sample have served a median 5 years as prosecutors, have handled a median 64.41 felony cases in the past twelve months, and participated in a median 7.11 felony trials in the past year.
- Defense attorneys in the sample have been involved a median 7.45 years in felony cases, have handled a median 59 felony cases in the past twelve months, and have participated in a median 3.25 felony cases which went to trial in the past twelve months. Two out of three (66%) of the defense attorneys are legal aid attorneys, 30% are 18(B) attorneys or public defenders,* and 4% are private attorneys.

B. *Sample Design*

The sample of judges, prosecutors, and defense attorneys was a stratified, cluster sample in which all three groups were interviewed in the same set of counties.

The sample was first allocated by region of the state, with 30 interviews allocated with members of each group in downstate counties (the New York City Standard Metropolitan Statistical Area), and 20 interviews conducted with members of each group in upstate counties (defined as counties outside the New York City SMSA). This approximates the number of felony indictments by region in New York State.

Within each region, each county was assigned a number of interviews proportionate to the number of reported felony indictments (1975-1976) in that county.[1] Only counties with full-time assistant district attorneys were included in the sample selection.

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* Public defenders work full-time as defense attorneys for the indigent, while 18(B) attorneys are private attorneys who defend indigents only part-time.

To insure some representation from less populous upstate counties with fewer felony indictments, all upstate counties were stratified into two groups:

1. those with 200 or more felony indictments;

2. those with less than 200 felony indictments.

County selection proceeded within each stratum in proportion to the number of felony indictments within each stratum first, then within each county.

Interviews were conducted in a total of 25 New York State counties.

After county selection, the names of assistant district attorneys handling felony cases and legal aid, 18(B) and defense attorneys for each sample county were obtained by Louis Harris and Associates. Respondents were then selected at random from all eligible names within each county. The judicial sample was drawn from a list of judges presiding over felony cases provided by the Office of Court Administration, State of New York.

The survey design resulted in completed interviews with the following distributions:

	Total	*Upstate*	*Downstate*
Judges	51	20	31
Assistant District Attorneys	50	20	30
Defense Attorneys	50	20	30

All interviews were conducted by Louis Harris and Associates between September 14, 1978 and October 16, 1978.

The median length of interviews was as follows:

— Judicial sample: 54 minutes

— Prosecutor sample: 51 minutes

— Defense attorneys sample: 52 minutes

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[1]New York State, division of Criminal Justice Services, *Annual Report, 1976: Crime and Justice*, p. 133.

CHAPTER II:

PLEA BARGAINING

A plea bargain is an agreement between the prosecutor and the accused where the accused, through defense counsel, agrees to submit guilt in exchange for a charge reduction or sentencing recommendation. Guilty pleas accounted for 91.7% of convictions reported statewide in 1976 in cases where the defendant was originally indicted for a felony.[1]

Most prosecutors and defense attorneys — upstate and downstate — report that most of their felony cases in the past twelve months have involved pleas. The survey also finds that all three groups agree that judges usually accept a guilty plea to a reduced charge. One reason judges usually accept plea bargains may be that, according to judges, prosecutors and defense attorneys, judges usually participate in plea bargaining discussions.

The survey finds that:

- Prosecutors and district attorneys — upstate and downstate — report that about 3 out of 4 of their felony cases in the past twelve months involved pleas.

- Judges, prosecutors, and defense attorneys agree that judges usually accept a guilty plea to a reduced charge.

- One reason judges usually accept plea bargains may be that, according to judges, prosecutors and defense attorneys, judges usually participate in the plea bargaining discussions.

- Most prosecutors (86%) indicate their offices have rules or guidelines on the type of plea bargaining, but 14% say they do not. Over half (53%) the prosecutors with guidelines report the guidelines are not in written form.

- In spite of the widespread existence of plea bargain guidelines, most defense attorneys (94%) and prosecutors (68%) believe that

[1]New York State, Division of Criminal Justice Services, *Annual Report, 1976: Crime and Justice*, p. 133.

some defense attorneys are able to get a better plea bargain for their client than can others.

- A majority of judges (59%) and half the defense attorneys favor putting plea negotiations on the record, while prosecutors oppose on the record negotiations, 53%-43%.

A. *Guilty Pleas*

Prosecutors and defense attorneys agree that most criminal convictions result from guilty pleas. Prosecutors estimate that 75.2% (median) of convictions stem from guilty pleas, while defense attorneys estimate an almost identical 76.1% of convictions result from guilty pleas.

Pleas are clearly not confined to the downstate area. Prosecutors and defense attorneys report that as high or a higher percentage of cases are pleaded upstate as downstate.

PERCENT OF CASES INVOLVING PLEAS

Q. About what percentage of your felony cases in the past 12 months have resulted in guilty pleas?

	Prosecutors			Defense Attorneys		
	Total (n=49)	Up-state (n=19)	Down-state (n=30)	Total (n=50)	Up-state (n=20)	Down-state (n=30)
	%	%	%	%	%	%
None	4	5	3	-	-	-
1 - 20%	6	-	10	8	10	7
21 - 40%	6	-	10	2	5	-
41 - 60%	6	11	3	10	10	10
61 - 80%	31	26	33	36	20	47
81 - 100%	35	53	23	38	55	27
Not sure	-	-	-	-	-	-
Refused/no answer	12	5	16	6	-	10
Median % of cases	75.2	86.4	70.5	76.1	83.1	73.4

B. *Judicial Participation in Plea Bargaining*

Plea bargain discussions *usually* involve the judge in addition to the defense counsel and the prosecutor, according to the survey. Judges "almost always participate" in plea bargaining discussions, according to a majority of judges (62%), prosecutors (68%) and defense attorneys (74%). Only 6% of the judges say they never participate. Upstate judges (75%) are more likely than downstate judges (53%) to in-

dicate they almost always participate in plea bargaining discussions. Prosecutors' perceptions are different. Downstate prosecutors are more likely than upstate prosecutors to report that the judges almost always participate in plea bargaining discussions. Almost seven out of ten defense attorneys — upstate and downstate — say judges participate in plea bargaining.

JUDGES' PARTICIPATION IN PLEA BARGAINING

Q. Do you (does the judge) almost always participate in plea bargaining discussions, sometimes participate, hardly ever participate, or never participate in plea bargaining discussions?

	Judges			Prosecutors			Defense Attorneys		
	Total (n=50)	Up-state (n=20)	Down-state (n=30)	Total (n=50)	Up-state (n=20)	Down-state (n=30)	Total (n=50)	Up-state (n=20)	Down-state (n=30)
	%	%	%	%	%	%	%	%	%
Almost always participate	62	75	53	68	45	83	74	70	77
Sometimes participate	20	20	20	24	45	10	12	15	10
Hardly ever participate	12	-	20	4	10	-	12	15	10
Never participate	6	5	7	4	-	7	2	-	3
Not sure	-	-	-	-	-	-	-	-	-
Refused/no answer	-	-	-	-	-	-	-	-	-

C. *Judicial Acceptance of Plea Bargains*

Judges will usually accept a guilty plea to a reduced charge resulting from a plea bargain, according to the survey. About nine out of ten judges (90%), prosecutors (84%) and defense attorneys (94%) say judges usually accept a guilty plea to a reduced charge. Virtually no upstate-downstate differences emerge.

HOW OFTEN DO JUDGES ACCEPT PLEA BARGAINS?

Q. Do you (does the judge) usually accept a guilty plea to a reduced charge, sometimes, hardly ever, or never accept a guilty plea to a reduced charge?

	Judges			Prosecutors			Defense Attorneys		
	Total (n=51)	Up-state (n=20)	Down-state (n=31)	Total (n=50)	Up-state (n=20)	Down-state (n=30)	Total (n=50)	Up-state (n=20)	Down-state (n=30)
	%	%	%	%	%	%	%	%	%
Usually accept guilty plea	90	95	87	84	75	90	94	90	97
Sometimes accept guilty plea	10	5	13	8	20	-	2	5	-
Hardly ever accept guilty plea	-	-	-	-	-	-	-	-	-
Never accept guilty plea	-	-	-	2	5	-	4	5	3
Not sure	-	-	-	-	-	-	-	-	-
Refused/no answer	-	-	-	6	-	10	-	-	-

D. *Control on Prosecutorial Discretion*

1. *Guidelines For Plea Bargaining*

Most felony convictions involve plea bargains. What checks exist on prosecutorial discretion in the bargaining process? The survey asked judges, prosecutors, and defense attorneys about the existence of rules or guidelines, whether guidelines, where present, are followed, and whether supervisors routinely review cases that are pleaded down.

Do guidelines or rules exist on the use of plea bargaining and charge reduction, given the central role of plea bargaining in the criminal justice system?

Most prosecutors (86%) indicate that their offices have rules or guidelines on the use of plea bargaining, but 14% say they do not have guidelines. Over half (53%) of prosecutors with guidelines report the guidelines are *not* in written form. Upstate prosecutors (80%) are slightly *less* likely than downstate prosecutors (90%) to report that their offices have guidelines. A large majority (63%) of upstate prosecutors saying rules exist indicate the rules are not written, while downstate prosecutors reporting guidelines exist split 48%-48% on whether the guidelines are in written form or not.

Prosecutors, judges and defense attorneys working in the same locales are relatively consistent in reporting the existence of rules and guidelines. In only one prosecutor's office do assistant D.A.'s disagree among themselves on whether rules exist.

Only three judges disagree with prosecutors on the existence of guidelines in their area. One out of five judges (20%) is uncertain. Specific locales are not reported to preserve anonymity.

DO PLEA BARGAINING RULES OR GUIDELINES EXIST?

Q. Does the prosecutor's (your) office that serves your court (this area) have rules or guidelines on the use of plea bargaining and charge reduction?

	Judges			Prosecutors			Defense Attorneys		
	Total (n=51)	Up-state (n=20)	Down-state (n=31)	Total (n=50)	Up-state (n=20)	Down-state (n=30)	Total (n=50)	Up-state (n=20)	Down-state (n=30)
	%	%	%	%	%	%	%	%	%
Has rules	63	50	71	86	80	90	90	75	100
Does not have rules	16	30	6	14	20	10	8	20	-
Not sure	20	20	19	-	-	-	2	5	-
Refused/no answer	2	-	3	-	-	-	-	-	-

Nine out of ten defense attorneys (90%) agree that the offices of district attorneys have guidelines, but only 18% say the guidelines are written. Almost half (49%) the defense attorneys reporting the existence of rules say the rules are not in written form, while 33% are not sure whether they are written or not.

Judges are less certain than the others that plea bargain rules exist. While 63% of judges indicate that the prosecutor's office which serves their court does have rules, 20% are not sure, and 16% report the prosecutors do not have rule.

ARE RULES IN WRITTEN FORM?*
(Base: Have rules or guidelines)

Q. Now I'd like to ask you some questions about these rules or guidelines. Are the rules or guidelines in written form?

	Prosecutors			Defense Attorneys		
	Total (n=43)	Up-state (n=16)	Down-state (n=27)	Total (n=45)	Up-state (n=15)	Down-state (n=30)
	%	%	%	%	%	%
In written form	44	38	48	18	13	20
Not in written form	53	63	48	49	60	43
Not sure	2	-	4	33	27	37
Refused/no answer	-	-	-	-	-	-

*Not asked of Judges

Most prosecutors believe the guidelines are neither too specific nor too general, but defense attorneys find them too specific. Almost all prosecutors (95%) in offices where guidelines exist say the level of specificity of the guidelines is about right. Only 5% say they are too specific. Over half of defense attorneys (51%) say the guidelines are too specific, while only 16% say they are about right. Downstate defense attorneys are almost twice as likely as upstate attorneys to say the rules are too specific, 60% vs. 33%.

HOW SPECIFIC ARE GUIDELINES?
(Base: have rules or guidelines)

Q. Do you feel the guidelines are too specific, not specific enough, or about right?

	Prosecutors	Defense Attorneys		
	(n=43)	Total (n=45)	Upstate (n=15)	Downstate (n=30)
	%	%	%	%
Too specific	5	51	33	60
Not specific enough	-	11	20	7
About right	95	16	27	10
Not sure	-	13	-	20
No answer	-	9	20	3

2. *Are Guidelines Followed?*

Plea bargaining guidelines, where they exist, do cover specific crimes and are usually followed, according to prosecutors and defense attorneys. Seven out of ten prosecutors (70%) in offices with guidelines say the rules cover specific crimes while 28% say they do not. A large majority of defense attorneys (64%) agree that the rules cover specific charges. Prosecutors agree unanimously (100%) that the rules are "usually" followed. Most defense attorneys (71%) also say the rules are usually followed, but 22% believe they are followed "only sometimes" or "hardly ever" followed.

DO PROSECUTORS FOLLOW GUIDELINES?
(Base: Have rules or guidelines)

Q. Some people tell us that some prosecutors don't always follow the guidelines. In your opinion, do such rules or guidelines usually seem to be followed (in this office), only sometimes seem to be followed, or hardly ever seem to be followed?

	Judges	Prosecutors	Defense Attorneys		
	(n=32)	(n=43)	Total (n=45)	Up-state (n=15)	Down-state (n=60)
	%	%	%	%	%
Usually followed	84	100	71	73	70
Only sometimes followed	9	-	20	20	20
Hardly ever followed	3	-	2	-	3
Not sure	3	-	7	7	7
Refused/no answer	-	-	-	-	-

Supervisors also routinely review cases that are pleaded down, according to 91% of prosecutors and 73% of defense attorneys. Almost three out of ten (29%) upstate defense attorneys are not sure if plea bargains are routinely scrutinized by supervisors, compared to a lesser 10% of downstate defense attorneys.

DO SUPERVISORS REVIEW PLEA BARGAINS?
(Base: Have rules or guidelines)

Q. Does a supervisor routinely review cases that are pleaded down?

	Prosecutors	Defense Attorneys		
	(n=43)	Total (n=44)	Upstate (n=14)	Downstate (n=30)
	%	%	%	%
Does review	91	73	57	80
Does not review	7	11	14	10
Not sure	2	16	29	10
Refused/no answer	-	-	-	-

E. *Do the Actors Make a Difference?*

1. *Prosecutors and Charge Reduction*

Judges, prosecutors and defense attorneys differ on the question of how different assistant district attorneys might affect charge reduction and sentence recommendation. All three groups were asked, "Would the *same* defendant accused of the *same* crime be at all likely to receive a different *charge reduction*?" A large majority of judges and assistant district attorneys do not believe a different assistant district attorney would make a difference. Almost three out of four judges (73%) say it would not be likely that a different prosecutor would result in a different charge reduction, while 80% of assistant district attorneys do not believe a different prosecutor would lead to a different charge reduction. By contrast, a small plurality of defense attorneys believe a different assistant district attorney assigned to the case *would* make a difference in charge reduction, by 43%-39%, with 18% volunteering it "depends".

WOULD DIFFERENT PROSECUTOR RESULT IN DIFFERENT CHARGE REDUCTION?

Q. Based upon your general observations, if a different assistant district attorney were assigned to the case, would the *same* defendant accused of the *same* crime be at all likely to receive a different *charge reduction*?

	Judges			Prosecutors			Defense Attorneys		
	Total (n=51)	Up-state (n=20)	Down-state (n=31)	Total (n=50)	Up-state (n=20)	Down-state (n=30)	Total (n=49)	Up-state (n=19)	Down-state (n=30)
	%	%	%	%	%	%	%	%	%
Would be likely	18	20	16	10	10	10	43	53	37
Would not be likely	73	75	71	80	75	83	39	37	40
Depends (vol.)	10	5	13	10	15	7	18	11	23
Not sure	-	-	-	-	-	-	-	-	-
Refused/no answer	-	-	-	-	-	-	-	-	-

2. *Prosecutors and Sentence Recommendations*

The groups were also asked, "If a different assistant district attorney were assigned to the case, would the *same* defendant accused of the *same* crime be at all likely to receive a different *sentence recommendation*?" Opinion is somewhat more divided on this question. Two out of three judges (67%) believe a different assistant district attorney would *not* likely result in a different sentence recommendation, while a lesser 56% of assistant district attorneys also indicate that a different prosecutor would not likely result in a different sentence

recommendation. Defense attorneys are more divided with 47% believing a different prosecutor would not likely result in a different sentence recommendation and 37% believing it would likely result in a different sentence recommendation. Downstate prosecutors and defense attorneys are somewhat more likely to believe that the prosecutor makes a difference.

WOULD DIFFERENT PROSECUTOR RESULT IN DIFFERENT SENTENCE RECOMMENDATION?

Q. If a different assistant district attorney were assigned to the case, would the *same* defendant accused of the same crime be at all likely to receive a different *sentence recommendation*?

	Judges			Prosecutors			Defense Attorneys		
	Total (n=49)	Up-state (n=19)	Down-state (n=30)	Total (n=50)	Up-state (n=20)	Down-state (n=30)	Total (n=49)	Up-state (n=19)	Down-state (n=30)
	%	%	%	%	%	%	%	%	%
Would be likely	22	21	23	24	15	30	37	26	43
Would not be likely	67	74	63	56	55	57	47	53	43
Depends (vol.)	4	-	7	18	25	13	14	16	13
Not sure	-	-	-	-	-	-	-	-	-
Refused/no answer	6	5	7	2	5	-	2	5	-

a. *Frequency of Prosecutors' Sentence Recommendations*

While opinion is divided on how much difference an individual prosecutor might make in sentence recommendations, most prosecutors only sometimes or hardly ever make sentence recommendations, according to judges and prosecutors. However, prosecutor's sentence recommendations are reportedly more prevalent downstate than upstate. Overall, only 16% of judges indicate that prosecutors in their courtrooms almost always make sentence recommendations. Downstate judges are twice as likely as their upstate counterparts to say prosecutors almost always make sentence recommendations. Almost two-thirds of upstate judges (65%) say prosecutors hardly ever or never make sentence recommendations, compared to 35% downstate.

b. *Judges and Prosecutor's Sentence Recommendations*

When prosecutors do make sentence recommendations, only 31% of judges say they give these recommendations "a great deal of consideration," while 58% say "some consideration" and 11% say "not much consideration." A large majority of judges (69%) also indicate that their sentences only "sometimes" or "almost never" coincide with the prosecutors recommendations.

DO PROSECUTORS MAKE SENTENCE RECOMMENDATIONS?

Q. (In your courtroom, do prosecutors) (In the felony cases you participate in) Do you almost always make sentence recommendations, sometimes make sentence recommendations, hardly ever, or never make sentence recommendations?

	Judges			Prosecutors		
	Total (n = 51)	Up-state (n = 20)	Down-state (n = 31)	Total (n = 50)	Up-state (n = 20)	Down-state (n = 30)
	%	%	%	%	%	%
Almost always	16	10	19	34	15	47
Sometimes	37	25	45	38	30	43
Hardly ever	35	45	29	18	35	7
Never	12	20	6	8	20	-
Not sure	-	-	-	2	-	3
Refused/no answer	-	-	-	-	-	-

Prosecutors believe their sentence recommendations reflect the judge's sentence more often than judges indicate. Over half the prosecutors (53%) believe their sentence recommendations "almost always" or "usually" coincide with the actual sentence, while 45% say they sometimes or "almost never" correspond.

Judges whose sentences do not always coincide with the prosecutor's recommendations were asked to select which among three reasons is most important when they choose not to follow a prosecutor's sentence recommendation. Over half the judges cite the length or seriousness of the defendant's prior record, while 45% cite the physical injury sustained by the victim, and 33% choose the defendant's history of drug addiction, alcoholism, or mental illness.

However, over half the judges volunteered reasons not listed in the questionnaire. Many judges cite mitigating circumstances of the case as reasons for not following the prosecutor's recommendations. One judge cited, "the facts and feel of the case." Another cited, "factors revealed in the pre-sentence report, of which the prosecutor is unaware." Several judges expressed a concern that the prosecutor's recommendations are often too severe a sentence, not taking all these (mitigating) factors into consideration." Another judge commented that, "the prosecutor nearly always recommends incarceration in every case. I personally believe I should attempt to take into account...the individual case."

CONTINUED

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REASONS FOR NOT FOLLOWING PROSECUTOR'S RECOMMENDATIONS*
(Base: Judges whose sentences do *not* almost always coincide with prosecutor's sentence recommendations)

Q. Here are some reasons that some judges have given us for not following a prosecutor's sentencing recommendation. When you decide *not* to follow the prosecutor's sentence recommendation, what are the main reasons? Any others?

	Judges		
	Total (n = 40)	Upstate (n = 13)	Downstate (n = 27)
	%	%	%
Length or seriousness of defendant's prior record	53	31	63
Seriousness of physical injury sustained by the victim	45	31	52
Defendant's history of drug addiction, alcoholism, or mental illness	33	38	30
Other (vol.)	53	84	52
Not sure	5	15	-
Refused/no answer	3	8	-

* Adds to more than 100% because multiple responses were permitted.

3. *Defense Attorneys and Plea Bargains*

In spite of the reported widespread existence of plea bargain guidelines, the survey finds a widespread belief by defense attorneys (94%) and prosecutors (68%) that some attorneys are able to get a better plea bargain for their clients than can others. Downstate prosecutors are more likely than upstate prosecutors to believe some defense attorneys can get a better plea bargain, by 77%-55%.

ARE SOME ATTORNEYS ABLE TO GET BETTER PLEA BARGAINS THAN OTHERS?*

Q. Are some defense attorneys more able than others to get better plea bargains for their clients?

	Prosecutors			Defense Attorneys		
	Total (n = 50)	Upstate (n = 20)	Downstate (n = 30)	Total (n = 50)	Upstate (n = 20)	Downstate (n = 30)
	%	%	%	%	%	%
Some are more able	68	55	77	94	85	100
None are more able	28	35	23	2	5	-
Not sure	4	10	-	2	5	-
Refused	-	-	-	2	5	-

* Not asked of judges.

Defense attorneys differ with prosecutors about why some lawyers get better plea bargains. Most of the reasons mentioned by both defense attorneys and prosecutors relate to the defense attorneys' overall effectiveness and skills. However, defense attorneys are more likely than prosecutors to cite their personal relationships with the prosecutor and judge as reasons for getting better plea bargains. For example, 31% of defense attorneys, but only 3% of prosecutors, cite the relationship between the defense counsel and prosecutor as a reason why some lawyers strike better plea bargains than others. Forty percent of upstate defense lawyers mention the attorney's relationship with the prosecutor, compared to 27% of downstate defense lawyers. Almost one in five defense lawyers (18%) cite rapport with the judge as a key reason, compared to only 6% of prosecutors. The threat of going to trial is mentioned by only 13% of defense attorneys and 9% of prosecutors.

WHY SOME DEFENSE ATTORNEYS GET BETTER PLEA BARGAINS THAN OTHERS
(Base: Say some defense attorneys get better plea bargains)

Q. What would you say is the major reason for this? (Multiple responses permitted)

	Defense Attorneys			Prosecutors		
	Total (n=45)	Up-state (n=15)	Down-state (n=30)	Total (n=34)	Up-state (n=11)	Down-state (n=23)
	%	%	%	%	%	%
Better/more effective lawyers	49	40	53	15	27	9
Relationship lawyer has with prosecutor/the D.A.	31	40	27	3	-	4
Rapport with the judge	18	13	20	6	-	9
Experience in criminal law, knowledge of what is important	16	13	17	15	9	17
Experience within the judicial system	13	20	10	15	18	13
Trial ability, prepared to threaten with a trial	13	13	13	9	27	-
Personality of the lawyer	13	20	10	18	9	22
Preparation/investigation/ acquisition of facts	7	-	10	18	18	17
Analytical ability, assessing the case	7	7	7	18	9	22
Pattern of cases handled, some seek plea bargain cases	7	7	7	3	9	-
Effective presentation, convincing explanation	4	-	7	15	18	13
All other reasons	7	7	7	-	-	
Don't know	-	-	-	-	-	-

Said one defense attorney, "The good relationship they may enjoy with the prosecutor is one (reason), the fear they may engender in the prosecutor is another." Another said. "They see these guys every day in the week." Other defense attorneys charged that political connections may be helpful in getting to know the prosecutor and hence, getting a better plea bargain. A downstate defense counsel said an important consideration is "whether or not he's known, politically active."

F. *Summary*

In sum, the study finds that plea bargain discussions include not only the prosecutor and defense counsel, but, often, the judge as well.

The study finds general agreement that some defense attorneys are able to get a better plea bargain than others. Results are mixed on the question of how much the individual prosecutor affects charge reduction. The existence of specific guidelines for plea bargaining and the supervision of plea bargains, reported earlier, might be working to limit the latitude of the individual prosecutorial discretion.

G. *Reforms: Putting Negotiations On-the-Record*

Judges, prosecutors, and defense attorneys are divided on two proposals to bring more openness to the plea bargaining process. Judges favor putting plea negotiations on the record by 59%-37%, while assistant district attorneys oppose putting plea negotiations on the record 53%-43%. Defense attorneys favor it by a slim 50%-46% margin. Downstate district attorneys oppose requiring on-the-record plea negotiations, 60%-33%, while upstate district attorneys favor it, 58%-42%. Downstate defense attorneys are also more likely than their upstate counterparts to oppose on-the-record negotiations.

SHOULD PLEA NEGOTIATIONS BE PUT ON THE RECORD?

Q. Would you favor or oppose a rule requiring plea negotiations to be put on the record?

	Judges			Prosecutors			Defense Attorneys		
	Total (n=51)	Up-state (n=20)	Down-state (n=31)	Total (n=49)	Up-state (n=19)	Down-state (n=30)	Total (n=50)	Up-state (n=20)	Down-state (n=30)
	%	%	%	%	%	%	%	%	%
Favor	59	65	55	43	58	33	50	65	40
Oppose	37	25	45	53	42	60	46	25	60
Not sure	2	5	-	2	-	3	4	10	-
Refused/no answer	2	5	-	2	-	3	-	-	-

The three groups are also divided on the question of whether the defendant should have the option of being present during plea negotiations. Judges favor giving the defendant the option, 53%-43%, while prosecutors divide almost evenly, 50% in favor, 48% opposed. Defense attorneys oppose the option, 56%-44%.

SHOULD DEFENDANT HAVE OPTION TO BE PRESENT DURING PLEA NEGOTIATIONS

Q. Do you think the defendant should have the option of being present during plea negotiations?

	Judges			Prosecutors			Defense Attorneys		
	Total (n=51)	Up-state (n=20)	Down-state (n=31)	Total (n=50)	Up-state (n=20)	Down-state (n=30)	Total (n=50)	Up-state (n=20)	Down-state (n=30)
	%	%	%	%	%	%	%	%	%
Should have option	53	50	55	50	60	43	44	45	43
Should not have option	43	40	45	48	40	53	56	55	57
Not sure	4	10	-	-	-	-	-	-	-
Refused/no answer	-	-	-	2	-	3	-	-	-

CHAPTER III:

SENTENCING

The wide range of discretion accorded judges in the current sentencing structure is based upon the assumption that the punishment should fit both the offense and the offender. In tailoring the sentence, the judge is expected to take into consideration the nature and circumstances of the offense, the defendant's prior record, and the personal characteristic of the defendant.

At the nub of the sentencing dilemma are the key conflicting issues of judicial discretion in tailoring the punishment to fit the crime and circumstances, on the one hand, and insuring rationality and equality of treatment of convicted felons, on the other. As one judge said, the judicial process should be intelligible to the extent that "a person who disobeys the law can reasonably predict the legal consequences of his conduct."

This survey finds that judges and other actors clearly recognize that sentence disparity exists, that is, that judges differ in the severity or leniency of their sentences:

- About two-thirds of judges and even larger percentages of prosecutors and defense attorneys indicate there are judges in their area who might be described as "very lenient."

- Most actors believe sentences in rural and upstate areas are more severe than those in urban areas or downstate.

- One in three judges and about half the prosecutors and defense attorneys agree that judge shopping occurs in their area. Judge shopping refers to the practice of either prosecutors or defense attorneys to schedule a case so that it will appear before a favorable judge.

- One source of sentence disparity may be that while most judges say they take into account the actual amount of time an offender will likely serve, judges differ considerably in their expectation of actual time served for a variety of crimes.

In sum, the survey finds that many actors in the criminal justice system believe that, because judges have great latitude in sentencing, defendants convicted of the same crime, with the same background, may not be treated similarly. The severity of the sentence may depend on the judge and the geographical area.

A. *Perceived Sentence Disparity*

1. *Lenient Judges*

Almost two-thirds of judges (63%) tell us that there are judges in their area who might be described as "very lenient" in their sentencing. Only 27% indicate that there are no judges in their area who might be described as very lenient. An even larger 71% of judges say there are judges in their area who might be described as very severe in their sentencing, while only 22% say there are no other judges in their area who might be described as very severe. Large majorities of judges both upstate and downstate concur that judges in their area differ in their sentencing practices. Most prosecutors and defense attorneys also agree, with those downstate prosecutors and defense attorneys slightly more likely than their upstate counterparts to concur.

ARE SOME JUDGES IN YOUR AREA MORE LENIENT? MORE SEVERE?

Q. Judges tell us that some judges are more lenient, and that other judges are more severe. Are there judges in your area who might be described as very lenient in their sentencing? Are there judges who might be described as very severe in their sentencing?

	Judges				Prosecutors			Defense Attorneys		
	Total (n = 51)	Up-state (n = 20)	Down-state (n = 31)	Urban (n = 33)	Total (n = 49)	Up-state (n = 19)	Down-state (n = 30)	Total (n = 50)	Up-state (n = 20)	Down-state (n = 30)
	%	%	%	%	%	%	%	%	%	%
Very Lenient Judges										
Are judges	63	60	65	67	86	84	87	58	50	63
Are no judges	27	35	23	18	14	16	13	42	50	37
Not sure	8	5	10	12	-	-	-	-	-	-
Refused/no answer	2	-	3	3	-	-	-	-	-	-
Very Severe Judges										
Are judges	71	65	74	73	73	63	80	88	75	97
Are no judges	22	30	16	18	27	37	20	12	25	3
Not sure	8	5	10	9	-	-	-	-	-	-
Refused/no answer	-	-	-	-	-	-	-	-	-	-

One indication of perceived sentencing disparity is that 92% of judges believe that some judges in their area would sentence the same offender convicted of the same crime more or less severely than other judges in their area. A near unanimous 94% of defense attorneys and 95% of prosecutors agree that some judges in their area would sentence the same offender convicted of the same crime more or less severely than other judges in their area.

WOULD DIFFERENT JUDGES IMPOSE MORE OR LESS SEVERE SENTENCES

Q. Do you believe that some judges in your area would sentence the *same* offender convicted of the *same* crime more or less severely than other judges in your area?

	Judges			
	Total (n=51)	Upstate (n=20)	Down-state (n=31)	Urban (n=33)
	%	%	%	%
Some judges would	92	100	87	91
No judges would	2	-	3	-
Not sure	6	-	10	9
Refused/no answer	-	-	-	-

2. *Judge Shopping*

The study also finds that one in three judges (34%) say a "great deal" or "some" judge shopping goes on in their area. Judges shopping refers to the practice of either prosecutors or defense counsels trying to schedule a case so that it will appear before a favorable judges. Three out of five prosecutors (60%) and half the defense attorneys also agree that judge shopping occurs in their areas.

Judge shopping is less frequent upstate and in rural areas than downstate or in urban areas. As one upstate rural judge said, "In Erie that's a real factor, but here it is not. They're stuck with me."

Upstate actors report considerably less judge shopping than their downstate counterparts. For example, downstate judges (42%) report judge shopping more frequently than upstate judges (21%).

DO LAWYERS "JUDGE SHOP" IN YOUR AREA?

Q. How much "judge shopping" would you say goes on in this area, that is, lawyers trying to find a judge who is more lenient than others — is there a great deal, some, or none at all?

	Judges			Prosecutors			Defense Attorneys		
	Total (n=50)	Up-state (n=19)	Down-state (n=31)	Total (n=50)	Up-state (n=20)	Down-state (n=30)	Total (n=50)	Up-state (n=20)	Down-state (n=30)
	%	%	%	%	%	%	%	%	%
Great deal	12	5	16	10	10	10	14	5	20
Some	22	16	26	50	30	63	36	20	40
None at all	62	79	52	40	60	27	48	65	37
Not sure	4	-	6	-	-	-	-	-	-
Refused/no answer	-	-	-	-	-	-	2	-	3

3. *Perceptions of Sentence Disparity, by Locale*

Actors in the criminal justice system widely believe that sentencing disparity exists. Many believe disparity exists not only in their own area, but also between upstate and downstate and among types of areas. They tend to believe upstate and rural judges impose the most severe sentences.

Sentences are more severe upstate, according to a large majority of defense attorneys and prosecutors and a plurality of judges. More than three in five defense attorneys (62%) and an even larger 74% of prosecutors believe upstate sentences tend to be more severe than downstate sentences. Four in ten judges (41%) rate upstate sentences more severe, while only 12% perceive downstate sentences more severe. However, with many judges declining to answer, conclusions are difficult to draw.

Upstate judges agree with the verdict that upstate sentences are stiffer, by 60%-0%, with 25% saying there is not much difference. Downstate judges call upstate sentences more severe by 29%-19%, but 29% are not sure or refuse to answer. Another 23% of downstate judges find not much difference or say it depends on the crime.

SEVERITY OF SENTENCES UPSTATE/DOWNSTATE

Q. Do you think sentences tend to be more severe upstate or downstate, or isn't there much difference between them?

	Judges			Prosecutors			Defense Attorneys		
	Total (n=51)	Upstate (n=20)	Downstate (n=31)	Total (n=50)	Upstate (n=20)	Downstate (n=30)	Total (n=50)	Upstate (n=20)	Downstate (n=30)
	%	%	%	%	%	%	%	%	%
Upstate	41	60	29	74	70	77	62	55	67
Downstate	12	-	19	4	5	3	8	10	-
Not much difference	18	25	13	8	5	10	10	10	10
Depends on crime (vol.)	8	5	10	2	-	3	-	-	-
Not sure	16	5	23	12	20	7	20	25	17
Refused/no answer	6	5	6	-	-	-	-	-	-

Prosecutors, by 58%-6%, also say that probation is more frequently used downstate than upstate. Defense attorneys agree, 44%-10%. Most judges (63%) say they are not sure or that there is not much difference between upstate and downstate use of probation. An overwhelming 80% of downstate prosecutors say that probation is more often imposed downstate. Downstate and upstate judges differ little on the question.

PROBATION/FREQUENCY UPSTATE/DOWNSTATE

Q. Do you believe that probation is used more frequently upstate or downstate, or isn't there much difference between them?

	Judges			Prosecutors			Defense Attorneys		
	Total (n=49)	Up-state (n=18)	Down-state (n=31)	Total (n=50)	Up-state (n=20)	Down-state (n=30)	Total (n=50)	Up-state (n=20)	Down-state (n=30)
	%	%	%	%	%	%	%	%	%
Upstate more	12	11	13	6	10	3	10	20	3
Downstate more	24	22	26	58	25	80	44	35	50
Not much difference	22	28	19	12	15	10	12	10	13
Depends on crime (vol.)	-	-	-	2	5	-	-	-	-
Not sure	35	29	32	22	45	7	32	30	33
Refused/no answer	6	-	10	-	-	-	2	5	-

Sentencing in rural areas is seen as more severe than sentencing in urban or suburban areas. When judges, prosecutors and defense attorneys are asked if they think sentences tend to be more severe in an urban area, in a suburban area, or in a rural area, 68% of prosecutors and 48% of defense attorneys say they believe that sentences are more severe in rural areas. Judges are more divided. About three in ten (29%) judges believe sentencing to be more severe in rural areas, but 20% say urban sentencing is more severe, and 44% are not sure, or say there is not much difference or that it depends on the crime.

SEVERITY OF SENTENCE BY LOCALE

Q. Do you think sentences tend to be more severe in an urban area, in a suburban area, or in a rural area, or isn't there much difference between them?

	Judges			Prosecutors			Defense Attorneys		
	Total (n=51)	Up-state (n=20)	Down-state (n=31)	Total (n=50)	Up-state (n=20)	Down-state (n=30)	Total (n=50)	Up-state (n=20)	Down-state (n=30)
	%	%	%	%	%	%	%	%	%
Sentences More Severe In:									
Urban area	20	5	29	10	10	10	10	15	7
Suburban area	8	15	3	8	5	10	16	15	17
Rural area	29	30	29	68	65	70	48	45	50
Not much difference	22	20	23	6	10	3	16	15	17
Depends on crime (vol.)	6	5	6	4	5	3	-	-	-
Not sure	12	20	6	4	5	3	8	5	10
Refused/no answer	4	5	3	-	-	-	2	5	-

Consistent with the belief that sentencing is more severe in rural areas, a majority of prosecutors (62%) and 50% of defense attorneys believe that probation is used more frequently in urban areas than in suburban or rural areas. One in four judges (27%) agree that probation is used more frequently in urban areas, but 60% of judges are not sure, refuse, or say there is not much difference among areas in the use of probation.

FREQUENCY OF USING PROBATION

Q. Is probation used more frequently in urban, suburban, or rural areas — or doesn't the area make much difference?

Where Probation Used More Frequently:	Judges			Prosecutors			Defense Attorneys		
	Total (n=49)	Up-state (n=18)	Up-state (n=31)	Total (n=50)	Up-state (n=20)	Up-state (n=30)	Total (n=50)	Up-state (n=30)	Up-state (n=30)
	%	%	%	%	%	%	%	%	%
Urban More	27	22	29	62	40	77	50	40	57
Suburban More	4	6	3	8	10	7	6	10	3
Rural More	10	6	13	2	5	-	4	5	3
Not much difference	27	28	26	14	20	1	20	25	17
Depends on crime (vol.)	-	-	-	2	-	3	-	-	-
Not sure	27	39	19	12	25	3	18	15	20
Refused/No answer	6	-	10	-	-	-	2	5	-

4. *Sentencing Disparity: Differing Judicial Perceptions of Likely Sentences*

Judges also vary widely in their perceptions of the length of prison terms likely to be handed down statewide for various offenses. Judges were asked "to estimate the length of sentences that would most likely be handed down statewide for various offenses. For each of the offenses, assume that the offender has no prior felony record and that the conviction was the result of a plea bargain." The following is the range of responses:

JUDGES ESTIMATE MOST LIKELY SENTENCES FOR VARIOUS OFFENSES

Q. Would you estimate the length of sentences that would most likely be handed down statewide for various offenses. We would like your best estimate. For each of the offenses, assume that the offender has no prior felony record and that the conviction was the result of a plea bargain.

No. of years	Robbery 1st Degree (n=46)	Burglary 3rd degree (n=46)	Manslaughter 1st degree (n=44)	Assault 1st degree (n=45)	Robbery 2nd degree (n=46)
	%	%	%	%	%
0*	-	20	-	-	2
1	-	17	-	-	4
2	-	24	-	2	7
3	11	13	2	16	15
4	2	22	-	9	17
5	26	2	9	20	17
6	4	-	2	9	4
7	9	2	9	13	20
8	7	-	5	4	2
9	-	-	-	2	-
10	22	-	30	18	7
11	-	-	-	-	-
12	2	-	9	2	-
13	2	-	-	-	2
14	-	-	-	-	-
15	11	-	27	2	2
16	2	-	-	-	-
17	2	-	-	2	-
18 and more	-	-	6	-	-
Median years	7	2	10	6	5

Note: Not sure and no answer excluded. Where a range of years was given, the mid-point of the range was recorded.

* Denotes a sentence of less than 6 months or that the defendant would receive probation.

The survey finds considerable variation among judges in their expectations of sentences handed down for many of the crimes listed. For assault 1st degree, 18% of judges expect sentences of three years or less, while 24% expect a sentence of ten years or more. For manslaughter 1st degree, 57% expect a sentence of ten years or less, while 33% expect a sentence of fifteen years or more. For robbery 1st degree, 39% expect a sentence of five years or less, while 15% expect a sentence of fifteen years or more.

The broad range of responses for some of the crimes listed do not even take the form of a bell shaped curve — that is, wide at the center and narrow at the tails. For robbery 1st degree, the distribution "peaks" at 5 years, 10 years or 15 years. By contrast, the range of estimates for burglary 3rd degree is more tightly distributed, attributable in part to the fact the maximum term for this offense may not exceed 7 years.

The survey also finds considerable variation in prosecutors' and defense attorneys' sentence perceptions. In general, the prosecutors and defense attorneys expect slightly shorter sentences, on the average (median), than do judges. But the distribution of prosecutors' and defense attorneys' estimated sentences is almost as broad as that of the judges.

B. *Taking Account of Time Offender Is Likely to Serve*

Almost all judges (84%) say they take into account the time they believe an offender will actually serve when imposing a sentence, but they vary considerably in how long they expect offenders to serve.

CONSIDERATION OF SENTENCE TIME

Q. When you (judges) impose a sentence, do you (do you think they) take into account the time you (they) believe an offender actually is likely to serve in prison or jail?

	Judges	Prosecutors	Defense Attorneys
	(n = 51)	(n = 50)	(n = 50)
	%	%	%
Take into account	84	74	94
Do not take into account	16	24	6
Not sure	-	2	-
Refused/no answer	-	-	-

1. *Variations In Expectations of Time Actually Served*

The survey reveals some variation in how much time judges expect the offender *will actually serve*. Judges were asked, "What do you

believe is the average time actually served in prison or jail for each of these offenses where the offender has no prior felony record and the conviction was the result of a plea bargain?" Where a range of years was given, say "three to five years," the mid-range year was recorded, in this case, four years.

PROSECUTORS AND DEFENSE ATTORNEYS ESTIMATE MOST LIKELY SENTENCES FOR VARIOUS OFFENSES

Q. Would you estimate the length of sentences that would most likely be handed down statewide for various offenses. We would like your best estimate. For each of the offenses, assume that the offender has no prior felony record and that the conviction was the result of a plea bargain.

	Robbery 1st Degree		Burglary 3rd Degree		Manslaughter 1st Degree		Assault 1st Degree		Robbery 2nd Degree	
	Prosecutors (n=45)	Defense Attorneys (n=45)	Prosecutors (n=44)	Defense Attorneys (n=46)	Prosecutors (n=44)	Defense Attorneys (n=42)	Prosecutors (n=45)	Defense Attorneys (n=45)	Prosecutors (n=46)	Defense Attorneys (n=46)
	%	%	%	%	%	%	%	%	%	%
No. of years										
0	*	2	19	11	*	5	2	4	2	7
1	*	2	20	28	*	*	*	2	7	9
2	7	4	20	11	5	10	11	16	22	20
3	24	16	14	11	7	*	16	20	26	20
4	20	16	7	7	7	10	18	11	17	15
5	7	13	*	2	14	10	18	9	15	9
6	2	9	*	*	2	5	2	2	2	2
7	18	20	*	*	14	5	11	18	7	15
8	*	2	*	*	*	7	*	2	*	*
9	2	2	*	*	2	5	*	*	*	*
10	18	7	*	*	27	21	20	4	2	4
11	*	*	*	*	*		*	*	*	*
12	*	*	*	*	*	2	*	*	*	*
13	*	*	*	*	*	*	*	*	*	*
14	*	*	*	*	*	*	*	*	*	*
15	2	7	*	*	18	17	2	7	*	*
16	*	*	*	*	2	*	*	*	*	*
17	*	*	*	*	*	*	*	*	*	*
18 or more	*	*	*	*	2	5	*	2	*	*
Median years	4	5	1	2	9	8	5	4	3	3

Note: Not sure and no answer excluded.

JUDGES' ESTIMATE ACTUAL TIME SERVED FOR VARIOUS OFFENSES

Q. What do you believe is the average time actually served in prison or jail for each of these offenses where the offender has no prior felony record?

	Robbery 1st Degree (n=45)	Burglary 3rd Degree (n=46)	Manslaughter 1st Degree (n=43)	Assault 1st Degree (n=44)	Robbery 2nd Degree (n=45)
	%	%	%	%	%
No. of years					
0	-	12	-	-	2
1	2	51	-	11	18
2	31	28	5	39	58
3	24	5	28	32	16
4	22	-	21	14	4
5	16	-	26	2	2
6	-	-	7	2	-
7	-	-	9	-	-
8	-	2	-	-	-
9	-	-	-	-	-
10 or more	4	2	5	-	-
Median years	3	1	4	2.5	2

Note: Not sure and no answer excluded.

For assault 1st degree, judges' expectation of time served ranges from 11% who say one year to 14% who expect the inmate to serve four years or more. For robbery 1st, 33% of judges expect the offender to serve two years or less, while 20% expect him to serve five years or more. Almost all (96%) expect the defendant to serve five years or more.

While variation exists, judges disagree *less* on how long a criminal will actually serve than they do on what length sentence an offender is likely to get. The clear implication is that, while judges vary widely in their sentence expectations, they vary less in how long they expect criminals to serve.

A clear pattern emerges when expectations of sentence length are compared to expectations of time actually served. Overall, judges expect offenders to serve about half the length of their sentence, if median year computations are compared.

JUDGES' ESTIMATES OF SENTENCES AND TIME SERVED: MEDIAN YEARS

	Judges					
	Expected Sentence:			Expected Time Served		
	Total (n=45)	Up-state (n=17)	Down-state (n=29)	Total (n=44)	Up-state (n=15)	Down-state (n=29)
	%	%	%	%	%	%
Robbery 1st degree	7	10	7	3	3	3
Burglary 3rd degree	2	1	2	1	1	1
Manslaughter 1st degree	10	15	10	4	5	4
Assault 1st degree	6	7	5	2	3	2
Robbery 2nd degree	5	5	5	2	2	2

Upstate judges tend to be somewhat higher than downstate judges in their sentence expectations.

Prosecutors and defense attorney's expectations of actual time served are generally similar to those of the judges.

MEDIAN ESTIMATES OF SENTENCE AND TIME SERVED: PROSECUTORS AND DEFENSE ATTORNEYS

	Prosecutors		Defense Attorneys	
	Expected Sentence	Expected Time Served	Expected Sentence	Expected Time Served
	%	%	%	%
Robbery 1st degree	5	2	5	3
Burglary 3rd degree	1	1	2	1
Manslaughter 1st degree	9	4	8	4
Assault 1st degree	5	2	4	2
Robbery 2nd degree	3	1	3	2

C. *Parole and the Parole Board*

The amount of time an offender, once incarcerated, will serve in prison is to a large extent determined by the policies and practices of the Parole Board. In New York State, if a sentencing court has set a minimum term, an inmate is eligible for parole at the expiration of that minimum. If the judge has not set a minimum term, the Parole Board will set the minimum shortly after the offender's admission to prison. He is eligible for release when his minimum term expires; when he comes up for parole, he may be granted release. If he is denied parole, his case may be reheard within two years.

About 70% of all inmates released from prison are released by action of the Parole Board. Another 26% are "conditionally released," which means they have served two-thirds of their sentence and are subject to parole supervision. The remaining 4% serve out their entire sentence.

1. *Parole Board Policies and General Release*

Most judges, prosecutors, and defense counsels believe the Parole Board has general policies on release which enable them to predict the amount of time an offender will actually serve. Judges believe such policies exist, but 64%-16%, with 20% not sure. More than three out of four prosecutors (78%) and defense attorneys (76%) also believe the Parole Board has general policies.

DOES PAROLE BOARD HAVE GENERAL RELEASE POLICIES

Q. Do you believe that the Parole Board has any general policies on release decisions which enable you to predict the amount of time an offender will actually serve?

Parole Board:	Judges (n=50)	Prosecutors (n=49)	Defense Attorneys (n=50)
	%	%	%
Has policies	64	78	76
Does not have policies	16	12	8
Not sure	20	10	12
Refused/no answer	-	-	4

2. *Release on First Eligible Date and Percent of Minimum Sentence Served*

When asked about what percentage of offenders are released by the parole board at their first eligible date, a wide range of responses is recorded, with judges, prosecutors and defense attorneys offering very different estimates. Almost one in five judges (18%) believe that 33% of offenders or less are released at their first eligible release date. By contrast, 24% of judges believe 67% of offenders or more are released at their first eligible release date. More than one-third of the judges (35%) are not sure or do not answer.

Prosecutors also provide a wide range of responses, with 28% indicating that half or fewer of the offenders are released at their first eligibility date, while 34% say more than three out of four inmates are released at their first eligibility date.

Defense attorneys believe far fewer offenders are released when first eligible than do judges or prosecutors. Over half the defense attorneys (58%) estimate that the Parole Board releases half or fewer of the inmates at first eligibility.

Upstate and downstate estimates among the three groups are inconsistent. Downstate prosecutors and defense attorneys estimate fewer offenders being released when first eligible than do their upstate counterparts. By contrast, downstate judges believe twice as many offenders are released when first eligible than do their upstate brethren, 69% vs. 31%.

PERCENTAGE RELEASED BY PAROLE BOARD WHEN FIRST ELIGIBLE

Q. What percentage of offenders do you believe are released by the Parole Board at their first eligible release date?

	Judges			Prosecutors			Defense Attorneys		
	Total (n=49)	Up-state (n=19)	Down-state (n=30)	Total (n=50)	Up-state (n=20)	Down-state (n=30)	Total (n=50)	Up-state (n=20)	Down-state (n=30)
	%	%	%	%	%	%	%	%	%
None	2	5	-	-	-	-	10	-	17
1 - 33%	16	32	7	6	5	7	38	30	43
34 - 50%	10	21	3	22	5	33	10	20	3
51 - 66%	14	5	20	14	15	13	12	20	7
67 - 75%	8	5	10	14	20	10	4	-	7
76 - 90%	6	-	10	24	25	23	8	5	10
91 - 100%	8	-	13	10	15	7	2	5	-
Not sure	29	26	30	10	15	7	16	20	13
Refused/no answer	6	5	7	-	-	-	-	-	-

The groups are more consistent in estimating the percentage of the maximum sentence an individual will serve in incarceration. About three out of four judges, prosecutors and defense atorneys believe offenders will serve half or less of their maximum sentence.

PERCENTAGE OF MAXIMUM SENTENCE USUALLY SERVED IN INCARCERATION

Q. (When imposing a sentence) what percentage of the maximum sentence do you think the individual will usually serve in incarceration?

	Judges (n=51)	Prosecutors (n=50)	Defense Attorneys (n=50)
	%	%	%
None	6	2	2
1 - 33%	51	66	38
34 - 50%	18	16	38
51 - 66%	2	2	6
67 - 75%	2	2	4
76 - 90%	-	-	2
91 - 100%	-	-	-
Not sure	16	10	8
Refused/no answer	6	2	2

3. *Reasons for Granting Parole*

Overcrowded prisons, not rehabilitation or good institutional adjustment, is the major reason judges, prosecutors and defense attorneys cite as why the Parole Board grants parole. Almost half the judges (45%) cite prison overcrowding, followed by a distant good institutional adjustment, mentioned by 14% and served enough time, by 10%. Rehabilitation is the *least* mentioned reason judges believe the Parole Board grant parole.

An overwhelming 86% of prosecutors also cite overcrowded prisons as the main reason for granting parole. A scant 2% of prosecutors

mention rehabilitation; another 2% point to good institutional adjustment.

MAJOR REASON FOR PAROLE BOARD GRANTING PAROLE

Q. This card lists reasons that some judges (prosecutors/defense attorneys) give for the Parole Board granting parole. What, in your opinion, is the *major reason* for the Parole Board's decision to grant parole to an individual?

	Judges (n = 51)	Prosecutors (n = 50)	Defense Attorneys (n = 50)
	%	%	%
Rehabilitated	4	2	4
Good institutional adjustment	14	2	24
Prisons overcrowded	45	86	30
Has served enough time	10	4	20
Inmate not dangerous	6	4	6
Other	2	-	6
Not sure	16	2	8
Refused/no answer	4	-	2

How does the Parole Board decide which prisoners will and will not be paroled? The main reasons cited by judges for *not* granting parole are the seriousness of the offense (27%), followed closely by poor institutional adjustment (25%) and seriousness of prior record (24%). Lack of rehabilitation is mentioned by only 6%. Prosecutors and defense attorneys respond similarly.

WHY PAROLE BOARD DOES NOT GRANT PAROLE

Q. What, in your opinion, is the major reason why the Parole Board does not grant parole?

	Judges (n = 51)	Prosecutors (n = 50)	Defense Attorneys (n = 50)
	%	%	%
Not rehabilitated	6	8	8
Poor institutional adjustment	25	40	28
Seriousness of the offense	27	26	30
Seriousness of the prior record	24	20	22
Other	2	2	-
Not sure	12	6	10
Refused/no answer	4	-	2

CHAPTER IV:

SPECIAL ISSUES IN SENTENCING

This chapter delves into special issues related to sentencing, such as minimum sentences, mandatory minimums, youthful offender status, the Rockefeller drug laws, and the second and persistent felony statutes.

This survey finds:

- Judges and prosecutors favor judge-set minimum sentences, but defense attorneys oppose minimums. All three groups agree that minimum sentences are rarely imposed when not required by statute.
- Almost half of the defense attorneys and one in four judges see no benefits to mandatory minimum sentences. One in four prosecutors see no significant drawbacks. Certainty of punishment is the most liked feature of mandatory minimums while the reduction of judicial discretion, particularly to take account of mitigating circumstances, are the most often cited drawbacks.
- The Rockefeller drug laws are seen as ineffective in curbing drug-related crime.
- Three groups split on the issue of whether second and persistent felony offender statutes have reduced crime.

A. *Minimum Terms*

A large majority of judges (69%) and prosecutors (84%) agree that judges should sometimes set minimum terms, even if a defendant has no prior felony convictions and where a minimum term is not required by law. Defense attorneys reject minimum sentences, by 58%-42%.

SHOULD JUDGES SET MINIMUM TERMS

Q. In sentencing defendants with no prior felony convictions, and where a minimum term is not required by law, do you (think judges should) ever set a minimum term?

	Judges (n=51)	Prosecutors (n=50)	Defense Attorneys (n=50)
	%	%	%
Should set minimum	69	84	42
Should not set minimum	29	4	58
Not sure	2	6	-
Refused/no answer	-	6	-

While judges have set minimum sentences, they rarely impose them. Three in ten judges say they do not impose minimum sentences, while another 42% say they impose minimum sentences in less than 10% of their cases.

PERCENTAGE OF FELONY CASES SET WITH MINIMUM SENTENCE

Q. Where the offender has no prior felony convictions, and where a minimum term is not required by law, in about what percentage of those cases do you find yourself (judges) setting a minimum term?

	Judges (n = 50)	Prosecutors (n = 50)	Defense Attorneys (n = 50)
	%	%	%
None	30	16	16
1 - 10%	42	48	54
11 - 20%	14	18	10
21 - 40%	6	6	8
41 - 60%	2	-	2
61 - 80%	2	-	2
81 - 100%	2	6	2
Not sure	2	6	6
Refused/no answer	-	-	-
Median %	5.4	7.7	6.9

B. *Mandatory Minimum Sentences*

Judges, prosecutors and defense attorneys were asked to discuss the pros and cons of legislatively set mandatory minimum sentences. Almost half the defense attorneys (45%) and about one in four judges see *no* benefits in mandatory minimum sentences. Of those actors who do see benefits, certainty of punishment and removing serious offenders from society are seen as the major benefits of minimum sentences. Almost 3 in 10 judges (29%) and an overwhelming 61% of prosecutors mention certainty of punishment. About 1 in 4 judges (24%) and prosecutors (27%) list the need to remove serious offenders from society as a reason for support of minimum sentences.

Few judges, prosecutors, or defense attorneys believe mandatory minimums act as a deterent to crime.

In favor of mandatory minimums, one judge said, "...it takes the control away from parole...(and) gives it back to the court." A prosecutor said, "A sentence with no minimum is virtually worthless." Many judges and prosecutors cited the "certainty of punishment" as a deterrent to criminal activity. Still another prosecutor mentioned the need for "standardization of sentencing throughout the state."

BENEFITS OF MANDATORY MINIMUM SENTENCE

Q. What do you see as the major benefits of mandatory minimum terms?

	Judges (n=49)	Prosecutors (n=49)	Defense Attorneys (n=49)
	%	%	%
Certainty of punishment for specific crimes, definite period of incarceration	29	61	18
Protects society, removes serious offenders from society	24	27	12
Acts as deterrent to crime	12	12	4
Definite date for parole, defendant knows what to expect	10	8	18
Less pressure on judge, discretion not required	8	4	2
Prevents lenient sentences, eliminates discretion	4	18	2
Accomplishes goal of plea bargaining, lower maximum sentence with minimum	2	2	8
Would result in fewer appeals	-	-	-
All other benefits	4	6	8
Don't know	-	-	-
None/no benefits	24	-	45

The major drawback of sentences with mandatory minimums is that it eliminates the discretion of the judge in considering individual cases. Said one prosecutor, "...the judge's hands are tied." More than one in five judges (24%) and prosecutors (21%) argue that not all crimes warrant incarceration. "There are situations where incarceration is not the answer," said one judge. Some judges (14%) and prosecutors (13%) also say that sentences with mandatory minimum sentences impede plea bargains. A small percentage say the minimum sentence eliminates the possibility of alternative sentencing thereby making some judges or juries reluctant to convict.

More than one in four prosecutors (27%) mention no drawbacks to mandatory minimums, compared to only 12% of judges, and 8% of defense attorneys.

DRAWBACKS OF MANDATORY MINIMUM SENTENCE

Q. What do you see as the significant drawbacks of mandatory minimum terms?

	Judges (n=49)	Prosecutors (n=48)	Defense Attorneys (n=50)
	%	%	%
Eliminates discretion of judge or Parole Board, no flexibility	37	17	42
Eliminates consideration for individual cases/mitigating circumstances	35	33	40
Type of crime may not warrant incarceration	24	21	20
Impedes plea bargaining process	14	13	6
No incentive for good behavior/rehabilitation	8	8	12
Increased number of trials	6	4	6
Arbitrary system, too discretionary	6	8	8
Eliminates alternative sentencing, better rehabilitation	4	4	16
Jury/judge reluctant to convict due to minimum sentence imposed	4	4	-
All other reasons	8	4	-
Don't know	-	-	-
None/no drawbacks	12	27	8

C. *Rockefeller Drug Laws*

Most judges, prosecutors and defense lawyers agree that the Rockefeller drug laws, which set specific penalties for drug law offenders, are not an effective way to reduce drug-related crime. Defense counsels, not unexpectedly, overwhelmingly question the effectiveness of the laws, 90%-10%. Seven out of ten judges (69%) and 60% of prosecutors also believe the laws have not reduced drug-related crime.

Urban judges differ sharply from their non-urban brethren. Urban judges question the effectiveness of the laws by 87%-13%. However, judges in the state's suburban areas believe the laws have reduced drug-related crime, 54%-38%. Suburban prosecutors split evenly, 50%-50%, but their urban counterparts, by 64%-36%, doubt the Rockefeller drug laws are effective. Defense attorneys upstate and downstate find the drug laws ineffective.

ROCKEFELLER DRUG LAW EFFECTIVENESS

Q. Do you believe the Rockefeller drug laws, which set specific penalties for drug-law offenders, are an effective way to reduce drug-related crimes or not?

	Judges			Prosecutors			Defense Attorneys		
	Total (n=49)	Up-state (n=18)	Down-state (n=31)	Total (n=50)	Up-state (n=20)	Down-state (n=30)	Total (n=49)	Up-state (n=19)	Down-state (n=30)
	%	%	%	%	%	%	%	%	%
Are effective	27	33	23	38	40	37	10	5	13
Are not effective	69	56	77	60	55	63	90	95	87
Not sure	4	11	-	2	5	-	-	-	-
Refused/no answer	-	-	-	-	-	-	-	-	-

URBAN - SUBURBAN ASSESSMENTS

	Judges		Prosecutors		Defense Attorneys	
	Urban (n=31)	Suburban (n=13)	Urban (n=33)	Suburban (n=12)	Urban (n=32)	Suburban (n=12)
	%	%	%	%	%	%
Are effective	13	54	36	50	13	8
Are not effective	87	38	64	50	88	92
Not sure	-	11	-	-	-	-
Refused/no answer	-	-	-	-	-	-

D. *Second and Persistent Felony Statutes*

Judges, prosecutors, and defense attorneys differ considerably in their assessments of whether second and persistent felony statutes have reduced crime. These statutes provide mandatory minimum prison terms if the felony is a second and persistent one. A majority of prosecutors believe the statutes *have* reduced crime, 58%-32%. Defense attorneys question the effectiveness of the statutes by 74%-18%. Judges split about evenly on the issue, with 45% saying the statutes have reduced crime and 43% saying they have not reduced crime.

Upstate judges are much more favorable than downstate judges in their assessments of the second and persistent felony statutes. Two out of three upstate judges (67%) believe they have reduced crime, compared to only 32% of their downstate brethren.

WHETHER SECOND AND PERSISTENT FELONY STATUTES REDUCE CRIME

Q. What about the second and persistent felony statutes — have they reduced crime or not? By second and persistent felony statutes I mean those providing mandatory minimum sentences based upon whether the felony is a second or persistent one.

	Judges			Prosecutors			Defense Attorneys		
	Total (n = 49)	Up-state (n = 18)	Down-state (n = 31)	Total (n = 50)	Up-state (n = 20)	Down-state (n = 30)	Total (n = 50)	Up-state (n = 20)	Down-state (n = 30)
	%	%	%	%	%	%	%	%	%
Have reduced crime	45	67	32	58	55	60	18	30	10
Have not reduced crime	43	33	48	32	30	33	74	50	90
Not sure	12	-	19	10	15	7	8	20	-
Refused/no answer	-	-	-	-	-	-	-	-	-

CHAPTER V:

THE PRE-SENTENCE REPORT

One key element of individualized sentencing is the pre-sentence investigation report (PSI). Once a defendant has pleaded or been found guilty, he is assigned to a probation officer for pre-sentence investigation. The report containing the results of this investigation gives an account of the offense, the defendant, defendant's prior record, his family, work, his strength and weaknesses, treatment needs and alternative programs to incarceration. The report is given to the judge to consider in sentencing a defendant. If the sentence is probation, the report is given to the probation officer who will supervise the new probationer. If the defendant is sentenced to incarceration, the pre-sentence report constitutes an important source of information used by the Parole Board when considering whether to release an inmate on parole. Appellate courts also make use of the pre-sentence report in reviewing sentences.

Evaluations of pre-sentence reports vary, to some extent, by whether the respondent is a judge, prosecutor, or defense attorney, and, whether the respondent works upstate or downstate. The survey finds:

- Most judges and prosecutors believe information in the pre-sentence reports to be generally accurate. Many defense attorneys question the reliability of report information in the past twelve months.

- Large majorities of prosecutors and defense attorneys and almost half the judges believe the pre-sentence reports should be provided earlier than they now receive them. Most prosecutors and defense attorneys say they ordinarily do not receive the report until the day of sentencing, while two-thirds of judges receive the report ordinarily only a day or two before sentencing or on the day of sentencing.

- Downstate actors more frequently criticize report accuracy and timing than do their upstate counterparts.

- Most judges and prosecutors believe the pre-sentence reports should contain sen-

tence recommendations. Most also believe that considerations other than the individual case sometimes influence the probation officers' sentence recommendations. Foremost among these outside considerations mentioned, are the probation department's caseload and the probation officers' perception of the judge's usual sentencing practices.

A. *What Information is Important*

Almost half the judges (47%) and prosecutors (46%) list the defendant's prior record as the "one item of information most valuable to you." The survey reveals that the length or seriousness of the defendant's prior record is important to judges in several respects. Judges indicate that the prior record is the most likely reason they might decide *not* to impose probation as a sentence and is the major reason judges give for *not* following a prosecutor's sentence recommendation.

ITEM OF INFORMATION IN PSI

Q. What *one* item of information in the pre-sentence investigations has been most valuable to you?

	Judges			Prosecutors		
	Total (n=51)	Up-state (n=20)	Down-state (n=31)	Total (n=50)	Up-state (n=20)	Down-state (n=30)
	%	%	%	%	%	%
Defendant's prior record	47	60	39	46	55	40
Description of offense	27	20	32	16	15	17
Family and job background	8	10	6	24	15	30
Drug, alcohol, or mental health background	2	-	3	6	-	10
Other	8	5	10	10	15	7
Depends (vol.)	14	10	16	-	-	-
Not enough experience with PSI's (vol.)	-	-	-	2	-	3
Not sure	-	-	-	-	-	-
Refused/no answer	-	-	-	2	-	3

Prosecutors are three times as likely as judges to list family and job background as the most valuable item of information in the pre-sentence report. Twenty-four percent of prosecutors list job and family background as most important, compared to only 8% of judges. Judges (27%) value the description of the offense more highly than

prosecutors (16%). Upstate judges and prosecutors value the defendant's prior record more than those downstate. Sixty percent of upstate judges rate the defendant's prior record as most important compared to 39% of downstate judges. Among upstate prosecutors, 55% rate the defendant's record most important, compared to 40% of downstate prosecutors.

B. *Accuracy of Reports*

How reliable is the information contained in the reports? Most judges and prosecutors believe the reports are "almost always" or "usually" accurate, but many defense attorneys question the reports' accuracy. Among judges, 94% believe the pre-sentence investigation reports to be "almost always" or "usually accurate", while a somewhat lesser 76% of assistant district attorneys believe the pre-sentence investigation reports are almost always or usually accurate.

Defense attorneys have less faith in the accuracy of pre-sentence investigation reports. Only 48% of the defense attorneys believe the pre-sentence investigation reports are almost always or usually accurate while 50% find them "only sometimes" or "never" accurate. Furthermore, 94% of defense attorneys indicate they have challenged information in a pre-sentence report sometime in the past twelve months, as indicated previously.

PERCEIVED ACCURACY OF PSI REPORTS

Q. In general, do you find PSI's to be almost always accurate, usually accurate, only sometimes accurate, or never accurate?

	Judges			Prosecutors			Defense Attorneys		
	Total (n=51)	Up-state (n=20)	Down-state (n=31)	Total (n=50)	Up-state (n=20)	Down-state (n=30)	Total (n=50)	Up-state (n=20)	Down-state (n=30)
	%	%	%	%	%	%	%	%	%
Almost always accurate	27	45	16	22	25	20	6	10	3
Usually accurate	67	55	74	54	60	50	42	55	33
Only sometimes accurate	6	-	10	14	10	17	46	35	53
Never accurate	-	-	-	-	-	-	4	-	7
Depends (vol.)	-	-	-	2	-	3	2	-	3
Not sure	-	-	-	4	5	3	-	-	-
Refused/no answer		-	-	4	-	7	-	-	-

Large percentages of defense attorneys both downstate and upstate question the accuracy of the PSI reports. Downstate defense attorneys are most critical, with three out of five (60%) believing the PSI reports to be "only sometimes" or "never" accurate, while 35% of their upstate counterparts believe similarly that the reports are only sometimes or never accurate.

Few judges and prosecutors, downstate or upstate, criticize the report as usually inaccurate. Only 10% of downstate judges and 17% of downstate prosecutors find the PSI reports to be "only sometimes accurate." None report them to be "never accurate." Even fewer upstate judges and prosecutors believe the reports to be generally inaccurate.

1. *Challenged PSI Information*

Almost all the defense attorneys (94%) indicate they had challenged information in a PSI report in the past twelve months. Defense attorneys indicate they are less likely to challenge information on the defendant's prior record than they are to challenge descriptions of the defendant's background — perhaps to emphasize mitigating factors or to make an argument for probation. The most likely to be challenged by them are:

— family and job background, by 32%;

— description of the offense, by 30%;

— defendant's prior record, by 15%;

— drug, alcohol, and mental background, by 15%.

The survey reveals striking upstate/downstate differences in items which defense attorneys are most likely to challenge. Upstate attorneys are eight times as likely to cite the description of the defendant's prior record as challenged information than are downstate attorneys, 32% vs. 4%.

Downstate attorneys are about twice as likely to question description of offense and family and job background than are their upstate counterparts.

PSI INFORMATION DEFENSE ATTORNEYS ARE MOST LIKELY TO CHALLENGE
(Base: Have challenged information in pre-sentence reports)

Q. Looking down the list of pre-sentence investigation items on this card, which one of these are you *most* likely to challenge?

	Defense Attorneys		
	Total (n=47)	Upstate (n=19)	Downstate (n=28)
	%	%	%
Description of offense	30	16	39
Family and job background	32	21	39
Defendant's prior record	15	32	4
Drug, alcohol, mental health background	15	21	11
Other (specify)	9	11	7
Depends (vol.)	2	-	4
Not sure	-	-	-
Refused/no answer	-	-	-

2. *Source of Offense Description*

What is the main source of the pre-sentence reports' description of the offense — a frequently challenged area of the report? Defense attorneys are much more likely than prosecutors to believe the information comes from the prosecutor's file, by 58-42%. Only 16% of defense attorneys mention police records as the information source, while 22% list the probation officer's investigations.

Prosecutors split almost evenly on the question of information source, with 42% mentioning the prosecutor's file, and 40% listing police records. Only 14% of prosecutors mention the probation officer's investigations as the main information source.

Downstate defense attorneys and prosecutors are more than twice as likely as their upstate counterparts to cite the prosecutor's file as the main source for the description of the crime.

MAIN SOURCE FOR PSI DESCRIPTION OF CRIME

Q. What do you believe to be the main source for the description of offense behavior found in the PSI — police reports, the prosecutor's file, the probation officer's investigations, or is it some other source?

	Prosecutors			Defense Attorneys		
	Total (n=50)	Upstate (n=20)	Downstate (n=30)	Total (n=50)	Upstate (n=20)	Downstate (n=30)
	%	%	%	%	%	%
Police reports	16	25	10	40	50	33
Prosecutor's file	58	30	77	42	25	53
Probation officer's investigations	22	40	10	14	15	13
Other source	6	5	7	12	15	10
Not sure	4	-	7	6	10	3
Refused/no answer	2	5	-	-	-	-

C. *Sentence Recommendations in PSI*

Judges and assistant district attorneys disagree with defense attorneys on whether PSI's *should* contain recommendations concerning incarceration or non-incarceration. Judges strongly support specific recommendations by 39%-33%, while assistant district attorneys favor them by an even more overwhelming 82%-18% margin. By contrast, defense attorneys oppose *incarceration* recommendations 56%-40%.

Upstate and downstate judges divide sharply on the issue. Downstate judges favor specific recommendations 71%-26%, while upstate judges oppose sentence recommendations by a thin 45%-40% margin. Most prosecutors, upstate and downstate, favor sentence recommendations.

SHOULD PSI's CONTAIN SENTENCE RECOMMENDATIONS?

Q. Do you believe that PSI's should contain or should not contain specific recommendations for incarceration and non-incarceration?

	Judges			Prosecutors			Defense Attorneys		
	Total (n=51)	Up-state (n=20)	Down-state (n=31)	Total (n=50)	Up-state (n=20)	Down-state (n=30)	Total (n=50)	Up-state (n=20)	Down-state (n=30)
	%	%	%	%	%	%	%	%	%
Should	59	40	71	82	90	77	40	45	37
Should not	33	45	26	18	10	23	56	50	60
Not sure	2	-	3	-	-	-	4	5	3
Refused/no answer	6	15	-	-	-	-	-	-	-

The most important reason why judges and prosecutors favor specific sentence recommendations in the pre-sentence investigation reports is the belief that those who conduct the investigation are more familiar with the defendant's background and the circumstances surrounding the commission of the crime. This reason is cited by 51% of judges, 68% of prosecutors and by 29% of defense attorneys who support specific recommendations.

WHY PSI's SHOULD/SHOULD NOT INCLUDE
INCARCERATION RECOMMENDATIONS
(Base: Feel PSI's should or should not include recommendations)

Q. Why do you believe PSI's (should/should not) contain specific recommendations for incarceration?

	Judges (n=47)	Prosecutors (n=50)	Defense Attorneys (n=48)
	%	%	%
PSI Should Recommend Sentence	*64*	*82*	*42*
In-depth social worker's point of view, knowledge of defendant's background	51	68	29
Judges rely on PSI report, PSI has most information at time of sentence	17	16	10
Most experience/expertise	9	10	6
Judges like a back-up, share in blame when less than maximum sentence	9	2	6
In a position to specify alternate programs, create alternates to incarceration	6	6	8
PSI pointless without ability to make recommendations, more than mere fact finding	2	-	-
All other reasons	-	2	2
PSI Should Not Recommend Sentence	*36*	*18*	*58*
Judge should be the decision maker, having same information as PSI	19	12	23
PSI should only collect facts, not infringe on judge's discretion	17	4	13
PSI under too much pressure, shallow reports, snap judgments	6	4	23
Judges know more about cases than PSI	4	2	-
PSI may be biased in their judgment	4	-	17
All other reasons	2	4	2
Don't know	-	-	-

Reasons for opposition to PSI sentencing recommendations vary among the three groups. Judges are most likely to fear that the sentence recommendations infringe on the judge's role and sentencing discretion; only 6% of judges complain about the quality of report preparation or personnel as a reason.

About one in five judges (19%) indicate they oppose sentencing recommendations because the judge should be the decision maker, while 17% say the PSI should only collect the background facts. One judge said that the "discretion of the judge is too important to be left to the pre-sentence investigation." Another said, "I feel when they indicate incarceration, they are getting in the judge's way."

Defense attorneys are much more likely than others to question the quality of PSI reports or the probation officers who prepare them. Almost one in four defense attorneys (23%) cite the shallowness of the reports, while 17% say the reports are biased. One defense attorney, for example, said, "We are dealing now with inexperienced probation people who are overworked and their numbers have been depleted so that they are carrying too big a load...they don't have or spend enough time to be valuable." Another attorney said that the pressure of report preparation sometimes leads to "snap judgments." Twenty-three percent of defense attorneys also cite infringement on the judge's role as a reason for opposing PSI sentence recommendations.

D. *Influences on Probation Officers Making Sentence Recommendations*

While most judges and prosecutors favor sentence recommendations in the pre-sentence investigation reports, most believe that considerations other than the individual case sometimes or occasionally influence probation officers when making a sentence recommendation. Twenty-four percent of judges believe that probation officers are "frequently" or "sometimes" influenced by considerations other than the individual case, while 39% say that probation officers are "occasionally" influenced by outside considerations. Only 22% say probation officers are "never" influenced by outside considerations. Almost half the prosecutors (46%) also believe that probation officers are "frequently" or "sometimes" influenced by outside considerations other than the individual case, while 34% believe they are "occasionally" influenced by such considerations. A majority of defense attorneys (62%) say outside influences "frequently" or "sometimes" influence probation officers.

HOW OFTEN ARE PROBATION OFFICERS INFLUENCED BY OUTSIDE CONSIDERATIONS?

Q. How often do you think probation officers, when making a sentence recommendation, are influenced by considerations other than the individual case, such as the probation department caseload, the prosecutor's recommendations, community pressures and so on — does this happen frequently, sometimes, only occasionally, or never?

	Judges			Prosecutors			Defense Attorneys		
	Total (n=49)	Up-state (n=19)	Down-state (n=30)	Total (n=50)	Up-state (n=20)	Down-state (n=30)	Total (n=50)	Up-state (n=20)	Down-state (n=30)
	%	%	%	%	%	%	%	%	
Frequently	8		13	16	15	17	46	30	57
Sometimes	16	26	10	30	40	23	16	15	17
Occasionally	39	53	30	34	25	40	28	45	17
Never	22	11	30	8	15	3	2	-	3
Not sure	10	5	13	8	5	10	4	5	3
Refused/no answer	4	5	3	4	-	7	4	5	3

Judges who believe that outside factors do influence probation officers cite a number of such factors, but topping the list are the probation officer's perceptions of the judge's "usual sentencing practices" and probation department caseload — each cited by 23%. Other outside influences include:

— community pressures, by 19%;

— the prosecutor's recommendations, by 13%;

— mitigating factors, such as prior record, or "exhibition of true remorse," volunteered by 13%.

Leading the list of factors cited by prosecutors as influencing the probation officer is the prosecutor's recommendations, cited by 30%, followed by the probation department caseload, by 17%, the probation officer's perception of the judge's usual sentencing practices, by 9%, and community pressures cited by 9%. More than one in three prosecutors (35%) volunteered responses, including mitigating factors or the personality of the individual probation officer. One prosecutor cited the "individual probation officer's philosophy of probation, which in turn is shaped by his view of human nature." Another emphasized the offender's "family background and what type of individual he is."

Defense attorneys most frequently cite the prosecutor's recommendations (26%), community pressures (23%) and probation department caseload (19%) as factors important to probation officers.

FACTORS OTHER THAN INDIVIDUAL CASE
WHICH INFLUENCE PROBATION DEPARTMENT'S RECOMMENCATIONS
(Base: Those who say factors other than individual case influence probation officers)

Q. Here is a list of some of the factors other than the individual case which some judges say influence the probation department's recommendations. Which *one* of these factors do you believe most strongly influences the probation department's recommendations?

	Judges			Prosecutors			Defense Attorneys		
	Total (n=31)	Up-state (n=15)	Down-state (n=16)	Total (n=23)	Up-state (n=11)	Down-state (n=12)	Total (n=31)	Up-state (n=91)	Down-state (n=22)
	%	%	%	%	%	%	%	%	%
Community pressures	19	27	13	9	9	8	21	11	27
Prosecutor's recommendations	13	13	13	30	45	17	26	22	27
The probation officer's perception of the judge's usual sentencing practices	23	20	25	9	9	8	19	11	9
Probation department caseload	23	13	31	17	9	25	19	22	13
Other	13	13	13	35	27	42	16	11	18
Not sure	3	7	-	-	-	-	6	22	-
Refused/no answer	6	7	6	-	-	-	-	-	-

E. *Present Timing of the PSI's*

The pre-sentence report is intended to provide the judge with detailed information about the nature and circumstances and the offender's criminal history and background. The survey finds that judges, prosecutors and defense attorneys do not receive the report until near or on the day of sentencing.

Most prosecutors (82%) and defense attorneys (70%) report they do not ordinarily receive the pre-sentence report until the day of sentencing, while over half the judges (68%) ordinarily receive the pre-sentence report a day or two before sentencing or on the day of sentencing, according to the survey.

The problem seems particularly acute downstate for all three groups. Among downstate judges, 26% report they ordinarily do not receive the PSI until the day of sentencing, while another 61% do not receive it until one to two days before sentencing. Thus, 87% of the downstate judges have two days or less to review the report. Though none of the upstate judges indicate the PSI is ordinarily received on the day of sentencing, 37% say they receive it one to two days before sentencing. An overwhelming 93% of downstate prosecutors do not typically receive the report until the day of sentencing, compared to a lesser, but significant 65% of upstate prosecutors.

Almost all downstate defense counsels (93%) say they ordinarily receive the report on the day of sentencing, compared to 35% of upstate defense attorneys.

NUMBER OF DAYS BEFORE SENTENCING PSI IS ORDINARILY RECEIVED

Q. About how many days before sentencing do you ordinarily receive the PSI report?

	Judges			Prosecutors			Defense Attorneys		
	Total (n=50)	Up-state (n=19)	Down-state (n=31)	Total (n=44)	Up-state (n=17)	Down-state (n=27)	Total (n=50)	Up-state (n=20)	Down-state (n=30)
	%	%	%	%	%	%	%	%	%
Day of sentencing	16	-	26	82	65	93	70	35	93
1 - 2 days before	52	37	61	2	6	-	16	30	7
3 - 4 days before	14	26	6	5	12	-	4	10	-
5 - 7 days before	14	21	10	2	6	-	4	10	-
8 or more	6	16	-	-	-	-	2	5	-
Not sure	-	-	-	-	-	-	4	10	-
Refused/no answer	-	-	-	9	12	7	-	-	-

F. *Should PSI's Be Provided Earlier*

A large majority of assistant district attorneys (64%) would prefer that the PSI be provided earlier in the process than at present, with 30% satisfied with the present timing. Defense attorneys prefer an earlier presentation of the PSI by an even more overwhelming 74%-24%. Judges split almost evenly on the issue, with 49% favoring the PSI provided earlier, and 47% finding the present timing to be satisfactory.

Defense attorneys, overall, are most unhappy with the present timing of the pre-sentence report, by 74%-24%. Downstate defense attorneys are particularly dissatisfied with the present timing, by 87%-13%. One likely reason is that almost all defense attorneys indicate they have challenged report information. They would have little time to challenge the report information if it is not seen before the day of sentencing.

SHOULD PSI's BE PROVIDED EARLIER

Q. Do you believe the PSI should be provided at an earlier point in the process, or do you think the timing of the PSI is now satisfactory?

	Judges			Prosecutors			Defense Attorneys		
	Total (n=51)	Up-state (n=20)	Down-state (n=31)	Total (n=50)	Up-state (n=20)	Down-state (n=30)	Total (n=50)	Up-state (n=20)	Down-state (n=30)
	%	%	%	%	%	%	%	%	%
Provide at earlier point	49	25	65	64	65	63	74	55	87
Timing satisfactory now	47	70	32	30	309	30	24	40	13
Not sure	2	-	3	-	-	-	2	5	-
Refused/no answer	2	5	-	6	5	-	-	-	-

Upstate judges believe that the present timing of the PSI is satisfactory by a lopsided 70%-25%. Downstate judges prefer that the PSI be provided earlier by an almost as lopsided 64%-32%.

As expected, almost all judges who typically receive the pre-sentence report on the day of sentencing say they want the report earlier, by 91%-9%. Half the judges (52%) who get the report one to two days before sentencing prefer to get the report earlier. Only 17% of judges who get the report three or more days before sentencing want to receive it earlier.

RELATIONSHIP BETWEEN WHEN PSI IS RECEIVED AND POSITION ON TIMING

	Receive PSI:		
	Day of Sentencing	1-2 Days Before	3 or more days before
	%	%	%
Report Should Be:			
Provided at earlier point	91	52	17
Satisfactory now	9	43	72
Not sure/refused	-	5	11

Judges, assistant district attorneys and defense counsels dissatisfied with the present timing of the PSI differ sharply on when would be the most desirable time to receive the PSI. Most prosecutors (66%)) dissatisfied with the present timing of the PSI would prefer that the PSI be provided in the pre-conviction period. By contrast, an overwhelming majority of judges (75%) dissatisfied with the present timing of the PSI still prefer that the PSI be provided in the post-conviction period — but provided earlier in that period.

PERCENT OF FELONY CASES IN WHICH
PROSECUTORS REQUEST PRE-PLEA INVESTIGATIONS

Q. Thinking about the felony cases in which you have been involved in the past twelve months, in about what percentage of those cases have pre-plea investigations been requested?

	Judges (n = 51)	Prosecutors (n = 50)	Defense Attorneys (n = 50)
	%	%	%
None	41	26	42
1 - 5%	35	44	32
6 - 10%	6	10	6
11 - 20%	6	6	12
21 - 40%	6	4	2
41 - 60%	2	-	-
61 - 80%	-	2	-
81 - 100%	4	2	6
Not sure	-	2	-
Refused/no answer	-	4	-
Median %	1.1	3.3	1.8

G. *Pre-Plea Investigation*

Most prosecutors (64%) prefer that the pre-sentence reports be provided earlier — some prefer to receive the report in the pre-conviction period. Yet, most report they rarely, if ever, request a pre-plea investigation in felony cases. More than one out of four prosecutors (26%) indicate they requested *no* pre-plea investigations in the past twelve months. An additional 44% say they requested pre-plea investigations in only 1% to 5% of felony cases. Overall, prosecutors requested pre-plea investigations in a median 3.3% of cases. Judges and defense attorneys concur that pre-plea investigations are rarely requested.

BEST TIME TO RECEIVE PSI
(Base: Feel PSI should be provided at earlier point)

Q. What would be the best point in the case at which to receive the PSI — in the pre-conviction or post-conviction period?

	Judges (n = 24)	Prosecutors (n = 32)	Defense Attorneys (n = 37)
	%	%	%
Pre-conviction	21	66	49
Post-conviction	75	34	38
Not sure	4	-	5
Refused/no answer	-	-	8

H. *Summary*

In sum, most judges and prosecutors feel that the pre-sentence investigation reports are:

— generally accurate;

— provide valuable information, particularly on the defendant's prior record;

— should contain sentence recommendations by trained probation officers;

— should be provided earlier.

Providing the report earlier might increase the impact on actual sentencing. It would also allow defense counsel more time to examine and possibly challenge information contained within the report.

CHAPTER VI:

ALTERNATIVES TO INCARCERATION

Judges, by law, must imprison those convicted of certain violent crimes (such as robbery 1st degree, robbery 2nd degree, manslaughter 1st degree). For most other crimes, the judge has other sentencing options, including probation, fines, restitution and local jail.

This chapter will explore judges', prosecutors', and defense attorneys' perceptions of the effectiveness of alternatives to imprisonment. Specifically, the questions were designed to elicit opinions concerning the availability of alternatives to incarceration, the effectiveness of probation supervision, and the appropriateness and applicability of restitution.

A. *Probation*

The most often utilized alternative to incarceration is probation. Many judges and prosecutors question the effectiveness of probation supervision. Three out of ten judges (31%) say probation supervision is "usually" effective. However, an even larger 45% say it is only "sometimes" effective, and another 16% rate probation supervision as "hardly ever effective." Prosecutors are more negative about the effectiveness of probation supervision than are judges. Only 8% of assistant district attorneys find probation supervision usually effective. Over half (54%) rate probation supervision as "sometimes effective" while 33% say it is "hardly ever effective." Only one out of five defense attorneys rate probation as "usually effective", while over half say probation is sometimes effective.

Sharp upstate/downstate differences emerge in the evaluation of probation supervision, with downstate judges, prosecutors and defense attorneys rating the supervision more negatively than their upstate counterparts. Only 16% of downstate judges rate probation supervision as usually effective, compared to 55% of their upstate brethren. A scant 10% of downstate defense attorneys evaluate probation supervision as usually effective, compared to 35% of upstate defense counsels. Almost half of downstate prosecutors (47%) believe probation supervision to be hardly ever effective, compared to 15% of their upstate counterparts.

EFFECTIVENESS OF PROBATION SUPERVISION

Q. Based on your own experiences and what you have observed, how would you rate the effectiveness of probation supervision? Do you think it is usually effective, sometimes effective, or hardly ever effective?

	Judges			Prosecutors			Defense Attorneys		
	Total (n=51)	Upstate (n=20)	Downstate (n=31)	Total (n=50)	Upstate (n=20)	Downstate (n=10)	Total (n=50)	Upstate (n=20)	Downstate (n=30)
	%	%	%	%	%	%	%	%	%
Usually effective	31	55	16	8	10	7	20	35	10
Sometimes effective	45	30	55	54	70	43	52	45	57
Hardly ever effective	16	15	16	34	15	47	26	20	30
Not sure	4	-	6	2	5	-	2	-	3
Refused/no answer	4	-	6	2	-	3	-	-	-

Judges, prosecutors and defense attorneys in New York City hold probation supervision to be less effective than do their counterparts elsewhere in the state. The effectiveness gap is widest among judges. Over half the non-New York City judges rate probation supervision as usually effective, compared to only 16% in New York City. About twice as many New York City prosecutors and defense attorneys as those elsewhere rate probation supervision as hardly ever effective.

EFFECTIVENESS OF PROBATION SUPERVISION:
NEW YORK CITY/ELSEWHERE

	Judges		Prosecutors		Defense Attorneys	
	New York City	Rest of State	New York City	Rest of State	New York City	Rest of State
	%	%	%	%	%	%
Usually	16	52	11	6	6	28
Sometimes	58	48	37	65	56	50
Hardly ever	16	-	53	23	39	19
Not sure	5	-	-	3	-	3
Refused	5	-	-	3	-	-

However, the major reason judges cite for *not* imposing probation as a sentence is *not* the ineffectiveness of probation but the length or seriousness of the defendant's prior record and the defendant's past failure on probation. Three out of four judges (75%) cite the length or seriousness of prior record as the major reason they might not impose probation as a sentence; 71% cite past failure on probation, while 63% cite the severity of the offense. The seriousness of physical injury sustained by the victim is mentioned by 63%. By contrast, the ineffectiveness of probation is cited by only 27% of judges as a reason they would likely decide not to impose probation as a sentence.

Prosecutors' responses mirror those of the judges. Three out of four prosecutors (76%) cite the length of seriousness of prior record as the most likely reason they might *not* recommend probation as a sentence. More than half (58%) cite the severity of the offense, while 46% of prosecutors mention past failure on probation as a likely reason they would not recommend probation as a sentence. The ineffectiveness of probation as a reason is cited by only 24% of prosecutors.

REASONS FOR NOT IMPOSING PROBATION

Q. Where there is a probation option, what are the most likely reasons why you might *not* (recommend *not* to) impose probation as a sentence?

	Judges			Prosecutors			Defense Attorneys		
	Total (n = 51)	Up-state (n = 20)	Down-state (n = 31)	Total (n = 50)	Up-state (n = 20)	Down-state (n = 30)	Total (n = 50)	Up-state (n = 20)	Down-state (n = 30)
	%	%	%	%	%	%	%	%	%
Length or seriousness of prior record	75	90	65	76	85	70	74	70	
Past failure on probation	71	75	68	46	55	40	56	75	43
Severity of offense	63	70	58	58	70	50	50	50	50
Seriousness of physical injury sustained by the victim	63	65	61	40	45	37	44	45	43
Defendant's history of drug abuse, alcoholism, or mental illness	29	35	26	6	5	7	10	5	13
Probation is ineffective	27	35	23	24	30	20	12	15	10
Other	4	5	3	4	5	3	8	15	3
Not sure	-	-	-	2	-	3	-	-	-
Refused/no answer	2	-	3	-	-	-	-	-	-

* Columns add to more than 100% because multiple responses were permitted.

B. *Alternatives to Incarceration and Probation*

Two-thirds of judges (67%) say that alternative programs to incarceration and probation exist in their area, but 31% say no alternative programs exist. More downstate judges (74%) than upstate judges (55%) indicate alternatives exist.

Prosecutors and defense attorneys are *more* likely than judges to say alternative programs exist. Prosecutors indicate they exist by 84%-14%, while defense attorneys say they exist by an even larger 90%-10%. In both cases, downstate respondents are somewhat more likely than upstate respondents to indicate alternative programs exist.

ALTERNATIVES TO INCARCERATION OR PROBATION

Q. In this area of New York State do programs other than probation exist which can serve as alternatives to incarceration?

	Judges			Prosecutors	Defense Attorneys
	Total (n = 51)	Up-state (n = 20)	Down-state (n = 31)	Total (n = 50)	Total (n = 50)
	%	%	%	%	%
Yes, alternative programs exist	67	55	74	84	90
No, alternative programs do not exist	31	45	23	14	10
Not sure	-	-	-	2	-
Refused/no answer	2	-	3	-	-

The groups differ sharply over whether the pre-sentence report or the probation department does or does not inform them of existing suitable alternative programs. Most judges, but not all, say the pre-sentence report or the probation department does inform them, while most prosecutors and defense attorneys say they are *not* so informed.

Judges who indicate alternative programs exist say, by 67%-30%, that the pre-sentence report or the probation department usually *does* inform them of suitable alternative programs for offenders.

Where alternative programs are said to exist, prosecutors, by 61%-37%, and defense attorneys, by 70%-27%, say the pre-sentence investigation report or the probation department does *not* inform them of suitable alternative programs for offenders.

Responses by region do not conflict. All upstate judges who say alternative programs exist also say the PSI report or the probation department does inform them, while only 52% of downstate judges say they are similarly informed. Upstate prosecutors and defense attorneys are also more likely than their downstate counterparts to report that they are informed. Almost seven out of ten upstate prosecutors who say alternative programs exist say the pre-sentence report or the probation department usually informs them of suitable alternative programs, compared to only 21% of downstate prosecutors reporting they are similarly informed.

Thus, all three groups indicate that suitable alternative programs are more likely to exist downstate than upstate. However, among those indicating their areas have alternative programs, those upstate say they are more likely to be informed than those downstate when suitable alternative programs are available.

DO PSI's OR PROBATION DEPARTMENT
INFORM ABOUT ALTERNATIVE PROGRAMS?
(Base: Those who say alternative programs exist in their area)

Q. Where there are existing alternative programs suitable for offenders, do PSI's or the probation department usually inform you or not inform you of these programs?

	Judges			Prosecutors			Defense Attorneys		
	Total (n=33)	Up-state (n=10)	Down-state (n=23)	Total (n=41	Up-state (n=13)	Down-state (n=28)	Total (n=44)	Up-state (n=15)	Down-state (n=29)
	%	%	%	%	%	%	%	%	%
Usually inform	67	100	52	37	69	21	27	53	14
Usually do not inform	30	-	43	61	31	75	70	40	86
Not sure	3	-	4	-	-	-	2	7	-
Refused/no answer	-	-	-	2	-	4	-	-	-

Even where judges indicated alternative programs exist, they say they have sentenced an average (median) of only 7.4% of offenders to these programs in the past twelve months. More than one in four downstate judges (26%) in areas where alternatives exist say they have not sentenced *any* offender to an alternative program in the past twelve months.

Prosecutors and defense attorneys agree that judges infrequently sentence offenders to alternative programs.

PERCENTAGE OF FELONY OFFENDERS SENTENCED TO ALTERNATIVE PROGRAMS
(Base: Those who say alternative programs exist in their area)

Q. Thinking back over the past twelve months, in about what percentage of felony cases would you estimate you have sentenced (defendants have been sentenced) to alternative programs?

	Judges			Prosecutors			Defense Attorneys		
	Total (n=34)	Up-state (n=11)	Down-state (n=23)	Total (n=44)	Up-state (n=15)	Down-state (n=29)	Total (n=46)	Up-state (n=17)	Down-state (n=29)
	%	%	%	%	%	%	%	%	%
None	18	-	26	34	13	45	20	6	28
1 - 10%	47	64	39	43	53	38	57	53	59
11 - 25%	26	9	35	7	7	7	7	6	7
26 - 40%	6	18	-	-	-	-	2	-	3
41 - 50%	-	-	-	2	7	-	9	18	3
51 - 75%	-	-	-	7	20	-	4	12	-
76% or more	-	-	-	-	-	-	-	-	-
Not sure	-	-	-	-	-	-	-	-	-
Refused/no answer	3	9	-	7	-	10	2	6	-
Median %	7.4	8.4	7.2	3.7	8.0	1.0	8.1	8.8	4.6

C. *Restitution*

Most judges indicate that they have ordered restitution in connection with sentences to probation in the past twelve months. Only 18% of judges say they have never ordered restitution in the past twelve months. Among other judges 18% say they have usually ordered restitution, 26% say they have sometimes ordered restitution, and 36% indicate that they have hardly ever ordered restitution. The judges' responses coincide with the responses from assistant district attorneys. Only 20% of prosecutors report that restitution has never been ordered in connection with a sentence to probation in felony cases in which they have participated in the past twelve months. One-third (32%) say that restitution has hardly ever been ordered, 26% say it has sometimes been ordered, and 14% indicate that it has usually been ordered in conjunction with a sentence to probation in felony cases in which they have participated.

HOW OFTEN IS RESTITUTION ORDERED?

Q. In the past 12 months, how often have you ordered restitution (has restitution been ordered) in connection with a sentence to probation in felony cases you've participated in — usually, sometimes, hardly ever, or never?

	Judges (n = 50)	Prosecutors (n = 50)	Defense Attorneys (n = 50)
	%	%	%
Usually	18	14	18
Sometimes	26	26	26
Hardly ever	36	32	28
Never	18	20	26
Not sure	-	-	-
Refused/no answer	2	8	2

One reason why restitution is rarely imposed in felony cases is that, according to the judges, prosecutors and defense counsels, most defendants in felony cases do not have the financial or other means to provide restitution. Each group was asked to indicate in what percent of their cases in the past twelve months did defendants have the means to provide restitution. The median percentages are as follows:

— 5.3%, according to judges;

— 15.5%, according to prosecutors;

— 9.7%, according to defense attorneys.

Upstate judges, prosecutors and defense attorneys indicate a much higher percentage than do their downstate counterparts of cases where restitution is applicable. Restitution is possible in 36.5% of cases, according to upstate prosecutors, but in only 8.0%, according to downstate prosecutors.

PERCENTAGE OF CASES WHERE DEFENDANT HAD MEANS FOR RESTITUTION

Q. In what percentage of felony cases in the past 12 months do you believe the defendant has had the financial or other means to provide restitution?

	Judges			Prosecutors			Defense Attorneys		
	Total (n = 51)	Up-state (n = 20)	Down-state (n = 31)	Total (n = 50)	Up-state (n = 20)	Down-state (n = 30)	Total (n = 50)	Up-state (n = 20)	Down-state (n = 30)
	%	%	%	%	%	%	%	%	%
None	16	-	26	8	5	10	16	5	23
1 - 5%	31	25	35	16	15	17	26	35	20
6 - 10%	16	15	16	14	5	20	6	5	7
11 - 20%	6	15	-	6	5	7	12	15	10
21 - 40%	10	25	-	10	25	-	14	10	17
41 - 60%	-	-	-	4	-	7	8	15	3
61 - 80%	2	5	-	20	35	10	2	5	-
81 - 100%	10	5	13	2	5	-	8	-	13
Not sure	2	-	3	6	5	7	2	5	-
Refused/no answer	8	10	6	14	-	23	6	5	7
Median % of cases	5.3	15.5	3.5	15.5	36.5	6.0	9.7	12.2	9.3

Even though judges believe few defendants have the means to provide restitution, they say they order restitution in a median 90.2% of cases in which the defendant has the means or ability. Half of upstate judges (50%) say they order restitution in *all* cases (100%) where the defendant has the means, while 33% of downstate judges say likewise. However, 39% of downstate judges who indicate they have ordered restitution in the past twelve months say they order restitution in one in five cases or less where the defendant has the means.

PERCENTAGE OF CASES WHERE RESTITUTION WAS ORDERED
(Base: Presided over or participated in cases where restitution was ordered in past 12 months)

Q. Certain offenses may lend themselves to restitution as part of the sentence. In cases you have presided over (participated in) in the past 12 months where the defendant has had the means or ability to provide restitution, in about what percentage of those cases have you ordered (have you seen ordered) restitution as part of the sentence?

	Judges			Prosecutors			Defense Attorneys		
	Total (n=41)	Up-state (n=20)	Down-state (n=21)	Total (n=46)	Up-state (n=19)	Down-state (n=27)	Total (n=42)	Up-state (n=19)	Down-state (n=23)
	%	%	%	%	%	%	%	%	%
None	10	10	10	22	5	33	21	5	35
1 - 20%	17	5	29	20	16	22	10	5	13
21 - 40%	-	-	-	-	-	-	5	-	9
41 - 60%	5	5	5	11	21	4	17	16	17
61 - 80%	10	15	5	17	26	11	10	21	-
81 - 99%	7	5	10	13	21	7	10	21	-
100%	41	50	33	2	5	-	24	26	22
Not sure	-	-	-	2	5	-	-	-	-
Refused/no answer	10	10	10	13	-	22	5	5	4
Median % of cases	90.2	100.0	87.0	47.5	67.5	6.5	56.2	80.5	20.5

The main reason given by judges for not always ordering restitution where the defendant has the means is that restitution may not be ordered by statute in cases where the defendant receives a jail or prison term, cited by 33%, while 19% say it is inappropriate for some crimes. One judge, who has tried many homicide cases in the past twelve months, commented that "...you can't restore life." Another said that, for a repeat offender, "...restitution is like a license to go on committing larceny...(It is) not a sufficient deterrent to an offender."

Prosecutors most often mention the difficulty of enforcing restitution, cited by 25%. A prosecutor said that, "Judges often feel that to order restitution would make their courts collection agencies." Almost one in five (18%) said judges often do not seriously consider restitution. One prosecutor said that, "In the haste of imposing the sentence, he (the judge) just didn't think about it." Still another prosecutor complained that the judge was "not looking after the welfare of the victim."

REASONS WHY RESTITUTION WAS NOT ORDERED
(Base: Restitution not always ordered where defendant has means)

Q. What was the main reason why restitution was not always ordered as part of the sentence?

	Judges (n = 21)	Prosecutors (n = 40)	Defense Attorneys (n = 26)
	%	%	%
Convictions for crimes requiring incarceration	33	15	12
Inappropriate for some crimes, no personal gain	19	15	31
Inappropriate/non-productive sentence	14	3	-
Impractical to enforce, no structure for payments	10	25	42
Difficult to assess amount of damage	10	8	19
Losses often insured, victims don't request	10	3	8
Judges are reluctant to get involved, serve as a collection agency	5	8	4
Not a useful option, judges don't consider seriously	5	18	15
Oversight	5	5	-
Judges need uniform guidelines/ various applications	5	5	4
Double punishment	-	3	4
All other reasons	-	-	-
Don't know	-	3	-

APPENDIX E

Sentencing and Social Research: a Review of the Literature on Deterrence, Incapacitation and Rehabilitation

SENTENCING AND SOCIAL RESEARCH: A REVIEW OF THE LITERATURE ON DETERRENCE, INCAPACITATION, AND REHABILITATION

November 3, 1978

Timothy Bynum
Brian Forst
William Rhodes
Jean Shirhall

A Report to the
Executive Advisory Committee
on Sentencing

by the

Institute for Law and Social Research (INSLAW)
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SENTENCING AND SOCIAL RESEARCH: A REVIEW OF THE LITERATURE ON DETERRENCE, INCAPACITATION AND REHABILITATION

EXECUTIVE SUMMARY

This report reviews the literature of research on deterrence, incapacitation, and rehabilitation to provide a basis for decisions about sentencing policy. It also addresses basic philosophical issues that lie beneath the sentencing controversy, practical issues that shape sentencing policy, and proposals for reducing sentence disparity. Each chapter of this report is summarized below.

Chapter I

Sentencing policy has been widely acknowledged to rely largely on the happenstance of idiosyncratic decisions rather than carefully determined goals and scientific evidence. Empirical evidence has been used to support public policy both within and outside the courts, and has recently been called for to support sentencing policy.

Sentencing policy cannot ignore certain fundamental *philosophical* issues. One such issue has to do with the sppropriateness of crime control as a basis for sentencing policy. If crime control is regarded as appropriate, is it ethical to punish one person for the sake of averting crimes that *others* might otherwise commit? Is it ethical to incarcerate one person to keep him from committing crimes that we *predict* he would otherwise commit, given the imperfection of our ability to predict? If crime control is not an appropriate goal of sentencing policy, what is? Retribution? Rehabilitation? Suppose rehabilitation does not work? And regardless of our goal, how do we evaluate alternative sentencing policies in terms of the fairness of the manner in which each policy distributes costs and benefits across the various segments of society, including offenders?

Nor can the assessment of sentencing policy ignore *pragmatic* considerations. For example, what effect will a particular sentencing policy have on the resources of prisons, jails, courts, prosecutors, defense counsel, police, and so on? And what effect on plea bargaining? On the willingness of prosecutors to charge or juries to convict? Will the reduction of disparity improve information about sanctions and thus increase the deterrent effect? Will attempts to reform sentencing have unexpected by-products that create effects that are opposite of those intended? Examples are given that indicate the potential of such adverse consequences.

Next, the problem of *sentence disparity* is discussed. Disparity is to be expected in a system in which different judges impose sentences on the basis of different sentencing philosophies, different procedures for implementing given philosophies, different types of information on which to base their decisions, and different plea bargaining practices by prosecutors.

Several procedures are described that aim to reduce sentence disparity. One is the *sentencing council*, in which a group of judges make sentence recommendations to the sentencing judge, based on information contained in the presentence investigation report. Another is the *appellate review* process. While sentences have rarely been reviewable, calls for appellate review of sentencing have become increasingly common; limited appellate review exists in some states, including New York (although reversals have been almost nonexistant). Appellate review is not widely regarded as having much potential for reducing sentence disparity.

Perhaps the most widely recommended proposal for reducing sentence disparity is the *sentencing guidelines* approach. Sentencing guidelines would provide narrow bounds within which the judge would select a sentence for a defendant with a particular criminal record who is convicted for having committed a particular offense. The judge would have to justify any sentence lying outside those bounds.

One significant aspect of sentencing guidelines is that they provide a basis for mandating sentences that are related explicitly to the goals of sentencing. We outline in this section of Chapter I a general procedure for structuring guidelines, starting with actual sentencing norms, and then adjusting these norms to account for crime control effects (deterrence and incapacitation), public willingness to pay for incarcerations and "just deserts."

A proposal related to sentencing guidelines, except with no explicit latitude for the exercise of discretion in sentencing, is the *presumptive* or *flat time sentence*. The presumptive sentence has also come to be associated with the "just deserts" model—a person who is convicted of a particular offense is presumed to deserve a sanction of fixed severity that is related to the heinousness of the crime.

Chapter II

Deterrence is one of the most basic of all motives for sentencing. Under the theory of general deterrence, crime will be reduced, by way of *incentives*, from an increase in either the certainty or severity of

punishment. People will, presumably, be dissuaded from committing a particular crime upon learning either that the likelihood (*certainty*) of detection, capture, and conviction is sufficiently great or that the sanction imposed is sufficiently harsh (*severity*).

This theory has been subjected to numerous empirical tests, starting in the 1950s. More recently, these tests have been reviewed by Gordon Tullock (1974), Philip Cook (1976), and Daniel Nagin (1978). Tullock's review led to the conclusion that the overwhelming weight of empirical evidence supports the theory of deterrence. Tullock, reviewing studies by both economists and sociologists, put the matter in black and white terms: "we have to opt either for the deterrence method or for a higher crime rate."

Cook questioned Tullock's confidence in the deterrence theory as being "unwarranted...by the literature on which he bases his conclusion." Cook went on to review four quasi-experiments that focused on the effect of changes in sanctions on crime rates; he found some support for the theory of deterrence in only one of the four. Cook concluded: "the evidence is very spotty...we are far short of a reliable quantitative estimate."

Nagin's review of the empirical evidence was the most exhaustive of the three, a detailed assessment of more than twenty major empirical studies of deterrence. Like Cook, Nagin questioned Tullock's strong conclusion, setting forth several limitations in the methodology used in the studies that supported that conclusion. Nagin left the reader with the following opinion: "the empirical evidence is still not sufficient for providing a rigorous confirmation of the existence of a deterrent effect."

The caution urged by Cook and Nagin is clearly warranted by limitations both in the data from which the estimates are derived and in our ability to know about causality on the basis of evidence that does not grow out of a controlled experiment. The data problems in many studies tend to give the false appearance of a strong deterrent effect for the certainty of punishment and the false appearance of a weak deterrent effect for the severity of punishment. The magnitudes of these statistical biases, however, are not known.

An observed negative correlation between sanctions and crime rates may be attributable to phenomena other than deterrence and data errors. Increases in crime may lead to decreases in both the certainty and severity of punishment, rather than (or in addition to) the other way around. Or the negative correlation may be largely attributable to an incapacitation effect.

We conclude that the empirical evidence on deterrence is not yet sufficiently definitive to provide a sound basis for sentencing policy.

Chapter III

Even if incarceration has no deterrent effect, it does keep the offender from committing crimes against the community. Using *incapacitation* as a rationale for punishment, however, does involve *ethical* considerations. Is it morally appropriate to sanction an offender for crimes that he is likely to commit in the future? Is it ethical to sanction an offender on the basis of an imperfect recidivism prediction method?

A policy of incapacitation also revolves around important *empirical* questions. Do most offenders commit many or few crimes when they are not incarcerated? If a few, then the incapacitation effect will be small. The effect will be small also if most crimes are committed by persons who rarely get caught.

Estimates relating to incapacitation provide mixed answers to these questions. For example, whereas Marsh and Singer (1972) estimate that robberies would decline by 35 to 48 percent if convicted robbers were incarcerated for an additional year, Van Dine, Dinitz, and Conrad (1977) estimate that the violent crime rate would decline by only 4 percent under a five-year mandatory sentence policy. Some recent work by the Rand Corporation (1977), involving interviews with prison inmates, suggests that incapacitation effects are smaller than has been conventionally believed—a one year mandatory minimum sentence for any felony conviction would increase the prison population by 50 percent and reduce crime by only 15 percent. While it is difficult to estimate the value to society of such a policy, we estimate that the social value of one year of incarceration, in terms of the cost of crimes prevented by way of incapacitating those currently incarcerated, exceeds an amount in the neighborhood of $3,500 (ignoring the cost of psychic trauma to victims).

Chapter IV

Yet another commonly expressed purpose of sentencing is to *rehabilitate* the offender. Under the "medical" model on which the rehabilitation notion is based, criminal behavior is assumed to result from a pathological condition (typically, induced environmentally) that requires individualized treatment. The individual nature of this condition calls for an *indeterminant sentence*—an indefinite term of incarceration during which time it is determined by parole officials whether rehabilitation has yet been achieved. Critics have claimed both that correctional treatment has in fact failed to deliver on its

rehabilitative goal (e.g., Bailey, 1966; Lipton, Martinson, and Wilks, 1975) and that indeterminant sentencing is inhumane, having resulted in longer and more onerous prison terms (e.g., Mitford, 1971).

Assessing the rehabilitation goal requires the establishment of suitable definitions. Should rehabilitation be based only on recidivism, or should it be based as well on such factors as employment? In either case, how should we define recidivism?

Assessing rehabilitation also requires suitable empirical methods. Reviews of the research on rehabilitation have, in fact, revealed serious methodological problems with most studies.

The studies that have withstood methodological scrutiny have not supported the theory that any particular correctional alternative is more effective than any other. Recidivism appears to be neither significantly higher nor lower for persons sentenced to long terms of incarceration than for persons sentenced to short terms. Nor has the rate of recidivism been found to be lower for inmates participating in special educational, vocational, or other therapeutic programs. Nor has probation demonstrated the ability to produce a lower recidivism rate; nor any particular manner of supervision while on probation. Nor have community-based corrections, work release, diversion, or other forms of deinstitutionalization.

The primary consequence of these findings has been a movement away from indeterminant sentencing and the rehabilitative goal of the criminal sanctioning process, with a return to retribution or "just deserts" as a widely supported substitute.

Chapter V

While ambiguous research findings about deterrence and incapacitation, and negative findings about rehabilitation, are frustrating to those in search of solutions to the sentencing problem, the importance of empirical research in addressing aspects of this problem has been clearly demonstrated. Many of the deep questions about sentencing policy are moral issues, about which social scientists can have little to say professionally. However, as criminal justice data and the ability to analyze it definitively continue to improve, sentencing policy stands to benefit increasingly from the knowledge thus obtained. In the meantime, sentencing policy can benefit from the knowledge that the prevailing breadth of social scientific evidence supports neither those who argue for harsher sanctions nor those who advocate more leniency.

> We have in our country virtually no legislative declarations of the principles justifying criminal sanctions.
>
> - Judge Marvin E. Frankel

I. INTRODUCTION

In a land that prides itself as modern and just, it can be regarded only as extraordinary that we have invested so little to ensure that sentencing policy is based on a set of carefully established goals and systematically validated information. It is common knowledge that sentencing is based, instead, largely on happenstance. According to a former Attorney General of the United States, Mr. Justice Jackson (President's Commission, 1967):

> It is obviously repugnant to one's sense of justice that the judgment meted out to an offender should depend in large part on the personality of the particular judge before whom the case happens to come for disposition.

One can find no compelling reason for such a condition to persist. Indeed, scientific evaluation has been widely applied in most major sectors of public policy, including the courts. Beginning with Louis Brandeis' use of statistical findings in the Supreme Court to demonstrate that the 10-hour workday was detrimental both to the health of women and to the economic well-being of the community (*Muller v. Oregon*, 208 U.S. 412[1908]), the courts have heard persuasive evidence assembled by social scientists on topics as disparate as school desegregation (*Brown vs. Board of Education*, 347 U.S. 483[1954]) and the 6-person jury (*Williams v. Florida*, 399 U.S. 70[1970]). While the empirical evidence that has been brought forth to support the judicial process has at times been found not to withstand scholarly scrutiny, the use of social science in court is, clearly, on the rise (Horowitz, 1977). And according to one observer (Collins, 1978), "even though the use of social research in the courts has intensified, particularly in the past decade, sociolegal cooperation is nowhere near the realization of its full potential."

Scientific evidence has now been specifically called for in the area of sentencing. In his book *Criminal Sentences: Law Without Order*, Judge Marvin Frankel (1973:119) proposed that lawmakers enact "an

effective program of research" to provide a basis for laws and rules pertaining to sentences, corrections, and parole.

This report is intended to serve as a next step following Judge Frankel's proposal. It is designed primarily to review the literature on three issues of central relevance to sentencing policy—deterrence, incapacitation, and rehabilitation. The major part of this report (Chapters II through IV) is devoted to these utilitarian goals of punishment.

To set the stage for that discussion, we will consider in this chapter some basic philosophical issues in sentencing, such as the extent to which it is appropriate to use crime control and rehabilitation as underpinnings of sentencing policy. We will also consider some practical issues, such as the effect of alternative sentencing policies on court resources and prison capacity. Finally, we will address in this chapter the phenomenon that has given rise to much of the interest in sentencing reform—sentencing "disparity"—and some procedures that have been proposed to deal with it.

LIMITS TO THE CRIMINAL SANCTION: PHILOSOPHICAL

Tracts dealing with legal philosophy are voluminous, and although many perspectives are eloquently argued, no position is likely to have such overwhelming acceptance as to recommend itself as a guideline for a legislature contemplating sentencing reform. However, legal philosophers have raised issues of fundamental importance to sentencing philosophy, and these issues must be faced when reforming sentencing laws. Some major issues are summarized here.

The first issue has to do with the ethics of using a utilitarian calculus as a justification for punishment. According to the utilitarian logic, a sentence may be imposed *if* imposition of a sentence will reduce crime *and* if the cost of imposing the sanction is less than the benefit resulting from the reduction in crime. (*See* Mill, 1861; Bentham, 1823; Sidgwick, 1893; Becker, 1968; Posner, 1972; and Stigler.) A competing neoutilitarian position is that a just sentencing scheme must also consider distributional equity or fairness with respect to the way that the costs and benefits of punishment are allocated among members of this society. From this perspective, a net social gain is insufficient to justify punishment when sentencing will have perverse distributional consequences. (Hart, 1968; Packer, 1968; Buchanan, 1975; Coffee, 1978.) Still others (Reder, 1974) argue that distributional questions are important, but that distributional equity itself is subject to the utilitarian calculus and can be balanced against concerns for crime reduction. A final competing position seems

largely to reject utilitarian returns as relevant to sentencing, preferring that sentencing be based exclusively on a "just deserts" or a retributive logic (c.f. Von Hirsch).[1]

Consider a simple hypothetical example that illustrates the conflict between the "utilitarian" and "neoutilitarian" positions. Suppose John Jones has been convicted of burglary and that the law prescribes a sentence between zero years and life. Suppose, further, that a burglary always costs society $100 per offense and prison always costs $1,000 per man year. Should John Jones be imprisoned, and, if so, for how long?

More information is required to solve the utilitarian calculus, and we will consider three alternative contingencies that lead to different answers with respect to Jones' imprisonment. Suppose initially that (1) Jones would never commit another offense regardless of the sanction received for his present conviction, and (2) his punishment would deter no other potential offenders from committing crimes. Assuming, furthermore, that society does not benefit from pure retribution, the utilitarian calculus is unambiguous—Jones should be released. To do otherwise would not result in social benefits from reduced crime, but would cost $1,000 for every year that Jones is imprisoned.

Suppose next that exactly eleven crimes would be prevented by imprisoning Jones for one year, either because Jones himself is incapacitated or others are deterred by his exemplary sentence. Furthermore, assume that an additional year in prison would result in no additional reduction in crime. Under these new conditions the utilitarian calculus could be used to justify a one-year sentence to prison. The difference between the first and second example, of course, is that society benefits in the aggregate from Jones' imprisonment in the second example, but not in the first.

Finally, consider a third extreme in which Jones could be imprisoned for life (an estimated thirty years) with the result that well over 1,000 burglaries would be deterred. Thus the $30,000 in imprisonment costs would be offset by the $100,000 savings in crime reduction. Here the justification for a life sentence is straightforward using the utilitarian calculus. If this life sentence yields such a high return in terms of social benefits, then it can be justified provided no lesser penalty can be shown to be cost effective.[2]

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[1]These classifications are somewhat arbitrary. Mill, for example, was certainly concerned with distributional equity; Packer and Hart appear to allow some compromise of citizen right to promote utilitarian returns.

[2]Most utilitarian theorists accept a doctrine of "parsimony" by which the least severe punishment that will accomplish the prescribed end is to be preferred.

These three illustrations are transparent and suggest two objections to using the utilitarian logic as a normative standard in sentencing policy. In the first example, in which Jones received no sentence, it is possible to be left with the belief that Jones "deserves" at least some punishment; in the third, it is possible to believe that a life sentence was excessive given Jones' crime, regardless of the social usefulness of his punishment.

The first objection, then, is that offenders should receive their "just deserts." This is illustrated in the first example. The second objection is that the just deserts concept leads to a limiting principle whereby "deservedness" establishes an upper bound on the severity of the criminal sanction. A frequently argued derivation is that deservedness establishes an upper bound on the severity of the sanction, and the utilitarian logic presumably provides a lower bound.

The notions of "just desert" and "utilitarian returns to punishment" are useful in normative discourse, but two further complications limit their application. The first problem is that a great deal of uncertainty exists about the social returns from punishment. A second problem is that we lack accurate predictive tools to distinguish dangerous from non-dangerous offenders. Again, it is best to use Jones to illustrate these problems.

The imposition and extent of punishment for Jones may hinge on whether his punishment will deter other potential offenders from committing crimes. Note that the justification for this rationale involves the distributional question raised earlier: Jones has become a means to satisfy the ends of crime control. But the point being made here goes beyond this question of distributional equity. As Chapters II through IV will make clear, social scientists understand little about deterrence, at least too little to determine accurately the amount of crime deterred by Jones' incarceration. Thus Jones' incarceration is predicated not on a *known* amount of crime reduction, but rather on an *assumption* that the deterrent effect will be forthcoming.

Similarly, Jones' incarceration may be contingent on the crime reduction resulting from his incapacitation. Again, distributional issues arise concerning whether Jones should be punished for crimes that he might commit, but has not committed at the time of sentencing. Presuming resolution of this issue, it must be recognized that our ability to predict who is dangerous and likely to commit new crimes is strictly limited. At best (it is argued in Chapters II through IV), we can segregate offenders by their propensity to commit future crimes. Thus, if Jones is identified as a high-risk offender, his imprisonment would likely reduce crime by more than the imprisonment of a low-

risk offender. However, the error rate (the probability of classifying Jones as dangerous when he would, in fact, commit no new crimes) is high, requiring that many persons who would not recidivate would be incarcerated in order to assure that a significant number of those would commit new crimes if released are imprisoned. Consequently, Jones' incarceration is to be justified by an informed assumption that he would be dangerous if released, an assumption subject to a great deal of uncertainty.

These concerns with "just deserts," "limiting principle," and "uncertainty" ought to be practical concerns for legislators. If deterrence is a justification for punishment, should we impose heavy sentences with the expectation that other offenders will be deterred from committing crimes? If so, how much punishment can we justly expect a prisoner to endure once he has become a *means* to the *end* of crime control? Likewise, if incapacitation is a justification for punishment, can we justly incarcerate convicted offenders who would not commit future crimes just because our prediction tools are inaccurate at distinguishing non-offenders from future offenders? Can we demand that a convicted offender involuntarily subject himself to rehabilitation so that society can benefit from less crime?

Some critics have largely rejected a utilitarian justification for punishment in favor of what has become known as a principle of "commensurate deserts." Andrew von Hirsch (1976:379) asserts that:

> We think that the commensurate-deserts principle should have priority over other objectives in decisions about how much to punish. The disposition of convicted offenders should be commensurate with the seriousness of their offenses, even if greater or less severity would promote other goals. For the principle, we have argued, is a requirement of justice, whereas deterrence, incapacitation, and rehabilitation are essentially strategies for controlling crime. The priority of the principle follows from the assumption we stated at the outset: the requirements of justice ought to constrain the pursuit of crime prevention.

Von Hirsch prescribes a presumptive sentencing scheme. However, it appears that this scheme is similar to the neoutilitarian logic; von Hirsch goes on:

> While regulating the scale's internal composition in detail, the principle of commensurate deserts sets only certain outer bounds on the scale's magnitude. The upper limit, as we have seen, is: the scale may not be inflated to the point that the severe sanction of incarceration is visited on non-serious offenses. The lower limit is: the scale may not be deflated so much that the most serious offenses receive less-than-severe punishments. Within these limits, there remains considerable choice as to the scale's magnitude—where its overall deterrent effect may be taken into account (p. 385).

This penetration of utilitarian logic into von Hirsch's position is indicated by Goldstein (1977), who recognized the arbitrariness of the commensurate deserts principle in practice.

> The more severe, though fixed, punishments, for example, would be justified, not because of some "moral claim" (whose source and meaning are never revealed in the report's discussions of the principle of commensurate deserts), but possibly because the legislature is less willing to assume the "additional" risk of having any repeaters at large and/or because the legislature wishes to reflect the exacerbation of society's retributive feelings toward recidivists (p. 390).

Consequently, adoption of a commensurate deserts scheme is more likely to be an adaptation of the neoutilitarian position, rather than its refutation.

To repeat the point, questions about the application of criminal sanctions should turn on several issues. The first is whether the utilitarian calculus is sufficient to justify punishment. The second is whether we will recognize limiting principles, and whether these limiting principles are to be absolute, or can be traded off against utilitarian goals. Third, what obligation does society incur to show restraint in punishment when the effects of punishment are so poorly understood?

LIMITS TO THE CRIMINAL SANCTION: PRAGMATIC

In the previous section, we discussed ethical issues relevant to sentencing policy. But even if and when normative guidelines have been adopted—that is, once the utilitarian returns to punishment are known and questions of distribution and limits have been resolved—the problem remains whether a policy that appears optimal in law will be so in practice. It must be recognized that legislative intent will be reshaped by officials who implement legislative designs. A legislative package will come closest to having its desired effect if the reactions to its implementation have been anticipated and taken into account.

Some practical limits to sentencing reform arise from resource constraints. Obviously, there are a limited number of state prisons and local jails. Likewise, there is a limit to available rehabilitative resources in both institution or community settings, and there is a dearth of jobs for offenders on work release. In addition, in many settings criminal justice actors—prosecutors, judges, defense counsel, and so on—are severely constrained by limited resources. Sentence reform is bound to affect the way these limited resources can be used.

Beyond resource limitations are other organizational constraints on court operations. (Feeley, 1973; Blumberg, 1967; Rosett and Cressey, 1976; Eisenstein and Jacob, 1977; Cole, 1972; and Neubauer, 1974.) Prosecutors and judges are said to require plea bargaining options to clear congested court dockets. (Landes, 1971; Posner, 1972; Rhodes, 1976; and Church, 1976.) Police have been known to alter arrest patterns in response to changes in sentencing requirements, sometimes to the extent of refusing to arrest when criminal sanctions have been legislatively increased.[3] Juries frequently fail to convict when they perceive a penalty as excessive (Kalven and Zeisel, 1971). Additionally, courts are political institutions, and a sentencing scheme that is inconsistent with political realities is unlikely to be effective in constraining judicial behavior (Levin, 1977). For example, harsh penalties for the use of marijuana are unlikely to be imposed in communities in which drug use is tolerated.

These economic, social and political realities limit the potential for sentencing reform. It seems reasonable to suppose that legislative intent can be most closely approximated if these constraints are

[3]A recent Florida legislative enactment doubled the penalty for traffic infractions. According to newspaper accounts, police significantly reduced the rate of ticketing in response.

recognized. In fact, the need to recognize economic, sociological and political constraints may go beyond the desire to design effective policy; it may even be necessary to prevent perverse consequences that might otherwise result from legislative enactment. Two illustrations indicate the need to recognize the linkages between legislative intent and bureaucratic practice.

New York State has recently experienced the effect of organizational constraints on achieving policy effects intended by the legislature. In an attempt to reduce the incidence of illegal drug use, as well as the volume of street crime committed by addicts and habitual offenders, the legislature passed a law that became effective on September 1, 1973. One provision of the law stiffened criminal penalties for the sale and possession of many controlled substances; a second provision strictly limited sentence concessions resulting from plea bargaining. Additionally, the new law required mandatory prison sentences for repeat offenders.

A joint report issued by the Association of the Bar of the City of New York and the Drug Abuse Council (1977) questioned the efficacy of the new law in practice. The study found:

> If ways had been found to counteract administrative problems, and if the backlogs had not materialized, the new drug law would have led to approximately 560 more prison and jail sentences each year across the State than under the pre-1973 law. This would have meant an increase of about 36% over the 1,500 drug law sentences imposed in 1973.
>
> As a result of delays in processing new law cases—delays which were most pronounced in New York City—fewer drug cases were disposed of between 1974 and June 1976 than during a similar period of time under the old drug law. The State's felony courts imposed 2,551 sentences of incarceration in new drug law cases between early 1974 and mid-1976—about 700 fewer than would have been expected under the old law, or between 200 and 300 fewer per year. This was true even though the chances of incarceration after conviction rose considerably (p. 18).

With respect to the previous offender position, the study found:

> The 1973 predicate felony provision did have an affirmative effect in that it increased the rate of imprisonment of convicted repeat offenders.
>
> But offsetting this rise in the imprisonment rate was the fact that in New York City indictment was less likely to follow the arrest of a repeat felony offender after the 1973 law than it had been before.
>
> In addition, during this period there was a decline in convictions as a percentage of indictments of prior felony offenders.
>
> The combined effects of the higher rate of imprisonment after conviction and the lower likelihood of indictment and conviction after arrest yielded the following results: under the old law, 20% of the arrests in the sample eventually resulted in a sentence to State prison; under the 1973 predicate felony provision, only 13% of arrests of prior felony offenders ultimately resulted in a sentence to State prison...(pp. 23-24).

The study concluded:

> The key lesson to be drawn from the experience with the 1973 drug law is that passing a new law is not enough. What criminal statutes say matters a great deal, but the efficiency, morale, and capacity of the criminal justice system is even more of a factor in determining whether the law is effectively implemented (p. 25).

Given these findings, it is not surprising that the research failed to uncover any reduction in crime that could be attributed to the new sentencing provisions.

A second important study demonstrated that sentencing reform might not only be ineffective in combatting crime, but that in fact,

legislative intent might in practice become so twisted as to have a perverse effect.

An early effort at diversion was made in California in 1966 when the legislature implemented a program to discourage local courts from sentencing offenders to state prisons by diverting individuals into alternative community programs. County governments were granted a probation subsidy (approximately $4,000) for each offender who would normally have been sent to state custody if he was instead retained on local probation. This policy was expected not only to reduce total commitments, but it would also allow offenders to be "treated" in their home communities, thereby increasing their chances of successful rehabilitation.

Early reports from this project claimed success, but a thoughtful reanalysis of that part of the project dealing with juveniles, by Paul Lerman (1975), reveals several serious problems with the program's operation. According to Lerman, the project appeared to reduce state commitments; nevertheless, the total amount of institutionalization was not necessarily decreased. First, those individuals who were sent to state custody tended to be incarcerated for longer periods. Prior to the probation subsidy, the average length of time spent in state institutions was 8 months; following the probation subsidy program, the time increased to 11.2 months. Although the youth authority attributed this increase to the concentration of more serious delinquents in state custody, Lerman's findings did not support this assertion.

A second finding was that the use of county detention increased. While the use of state facilities decreased, additional local detention facilities were constructed and the number of individuals sent to these institutions expanded during the years of probation subsidy. Lerman devised a composite measure of the level of total confinement (both state and local) and concluded that there was little or no reduction in the number of days that California youth spent in institutions. Thus while a diversion for youthful offenders was in fact created, it appears that these individuals were diverted not so much to community treatment as to local incarceration.

Lerman also subjected the much heralded Community Treatment Project of the California Youth Authority to his reanalysis and found similar outcomes. This project, too, stressed the benefits of community treatment over institutionalization, emphasizing a minimal use of incarceration. In reality, this project instituted a practice of "short term detention" for minor misbehavior. Program participants were subject to detention for offenses such as sassing a teacher, missing a group meeting, or having an uncooperative attitude. So prevalent was

this practice that time in detention exceeded the time spent in direct treatment service by a factor of almost 10 to 1, leading Lerman to conclude that the main aspect of community treatment actually was short-term incarceration.

Thus, while some diversion programs propose to reduce the level of incarceration, in fact those involved in the program may experience institutionalization to an equal or even greater degree. Lerman's findings illustrate the perversion of a legislative program when implementation runs contrary to other organizational or local political interests.

The lesson to be learned from these two examples is that legislative intent with respect to sentencing reform will not necessarily be achieved if it is disruptive of existing institutional arrangements or organizational incentives. Nowhere is this problem more apparent than with respect to plea bargaining. Although state legislatures have infrequently attempted to influence plea bargaining (New York's drug laws constitute one exception), plea bargaining has been abandoned or restricted at the initiative of prosecutors in several jurisdictions. These "experiments" indicate what might be expected if the state legislature attempted to regulate this important aspect of criminal justice.

In New Orleans (Wessel, 1978), Alaska (Rubinstein, 1977), and Denver (King, 1978), plea bargaining has been sharply curtailed if not largely eliminated. Interestingly, the changes in criminal justice operation have been similar in all three locations. First, there have been increases in the number of trials, not an unexpected result given the familiar expectation that guilty pleas are entered with the expectation of a sentence concession. Second, the increase in trials has corresponded to a concomitant decrease in the number of cases filed although not necessarily in the number of arrests. The result has been that sentences have become stiffer, but fewer defendants are convicted (Rhodes, 1978).

Of course, the curtailment of plea bargaining may ultimately have an exemplary effect on justice administration, and this illustration is not presented to suggest otherwise. The real point is that police, prosecutors, judges and other criminal justice officials have a certain independence from the legislature. While the law limits their discretion, the above examples illustrate that it is unlikely to eliminate it, and changes in the law can possibly have unintended consequences. It seems important that persons drafting new legislation contemplate how sentencing reform will intrude on the criminal justice bureaucracy, and how this intrusion is likely to affect the operation of justice.

Clearly, anticipating the effects of sentence reform on criminal justice bureaucracy is a difficult job. An easier task is that of anticipating how sentence reform might alter the use of criminal justice resources.

Judicial impact statements are becoming more frequent, although the requisite technology remains at a rudimentary level. Work in progress at the Institute for Law and Social Research is attempting to measure the prosecutory cost of handling different types of criminal and civil matters. A comparable study by Gillespie (1976) has attempted to derive case weights for federal judges. Others have developed a methodology for assessing the impact that different sentencing formulas are likely to have on future prison populations (Petersilia, 1977; Blumstein and Nagin, 1976; Blumstein, Cohen and Miller, 1978; Bell, *et al.*, 1978). These types of studies are prerequisites for meaningful analysis of the implications of such sentencing reforms as mandatory minimum sentences, sentencing guidelines and judicial review of sentences.

These studies attempt to anticipate the requirements that legislative enactments may impose on criminal justice and correctional resources. While the technology required to make such impact statements is in its infancy, the issues addressed are important to legislators who must project the effect of proposed sentencing standards on criminal justice operations.

To summarize, sentencing reform is a formidable task, given: 1) the lack of a universally acceptable philosophy of punishment, and 2) existing ignorance about how sentence reforms will affect the operation of justice and the control of crime. Nevertheless, being aware of these problems is a first step in searching for solutions.

SENTENCE DISPARITY

An entirely different problem pertains to disparity in the imposition of sentences. By "disparity," it is meant that similar defendants who commit similar crimes are sentenced to significantly different types of sentences and/or sentences of significantly different lengths. This problem has been revealed repeatedly in studies of actual sentencing practice. (Chiricos and Waldo, 1977; Hagan, 1974; Green, 1964; Lotz and Hewitt, 1977; Burke, 1975; Eisenstein and Jacob, 1977; Rhodes, 1977; Dungworth, 1978; Tiffany, *et al.*, 1975.)

It is instructive to speculate about the origins of sentence disparity. One obvious explanation is that judges disagree about the weights that should be attached to factors held relevant to allocution. One judge

might think that a recent criminal record indicates that an offender is deserving of a severe sentence. A second judge might consider a previous sentence as having been sufficient punishment, so that criminal record is irrelevant to the present sentence decision.

Disagreement might arise because judges subscribe to different sentencing philosophy, or at least hold contrasting opinions about how an agreed upon philosophy should be operationalized. (Frankel, 1973; Hagan, 1975; Lemon, 1974; Johnson, 1973; Hogarth, 1971.) It is not surprising, therefore, that judges would disagree about "just deserts" and "utilitarian returns," and given the discretion wielded by judges in setting sentences, sentence disparity is to be expected.

The problem is compounded because judges receive little or no training in sentencing, and there are few provisions whereby on-the-job experiences can be communicated to colleagues on the bench. For these three reasons alone—disagreement about the goals of sentencing, differences about how these goals are to be operationalized, and failure to share opinions and knowledge about sentencing—sentence disparity would be expected.

There are, however, other reasons to anticipate sentence disparity. Decision makers are unable to process large amounts of information in reaching decisions (Wilkins, *et al.*, 1973). How, then, should a judge sentence our hypothetical defendant John Jones if he is told that Jones has committed a burglary in which $230 was stolen from a locked garage; that Jones was convicted of simple assault two years prior and had an earlier arrest for possession of a dangerous weapon; that Jones is separated from his wife but provides child support for three children; has been unemployed for two of the past six weeks; has an eighth grade education; and so on. The difficulty of considering each factor individually is obvious; the process of weighing them jointly becomes staggering. It is little wonder that judges differ among themselves in the sentences given typical offenders; also, there is no reason to expect even a single judge to impose sentences that are consistent with his own past decisions.

While most studies of sentence disparity have concentrated on the judge as the principal actor in the sentencing decision, explanations should not stop with the judge alone. One other responsible party is the probation officer, whose duties include writing the presentence report and, frequently, making sentence recommendations. The probation officer's behavior may be as likely as the judge's to be inconsistent and biased. Given the frequently observed willingness of judges to follow the recommendations of probation officers, disparity in PSI recommendations can translate into disparity in sentencing

(Carter and Wilkins, 1967). Thus, the locus of disparate sentence decisions does not rest with the judge alone.

Other institutional features, most notably plea bargaining and concessions awarded to cooperative defendants, lead some observers to identify as proper sentence concessions what others regard as disparity. This is most transparent when prosecutors negotiate for sentence reductions, but it is equally important to the charging decision. Prosecutors who reward defendants with charge reductions may cause offenders who have committed similar crimes under similar circumstances to receive radically different sentences. Again, then, the locus of responsibility for sentence disparity does not rest with the judiciary alone.

Several schemes have been proposed to reduce sentence disparity. Some have been implemented in different jurisdictions, with mixed success. We close this section by summarizing proposed sentencing schemes and their evaluations: sentencing councils, appellate review, sentencing guidelines, and presumptive sentncing.

Sentencing Councils

Diamond and Zeisel (1975) have assessed the effectiveness of sentencing councils, as used in the Northern District of Illinois and the Eastern District of New York federal courts, in reducing sentence disparity. Two other federal courts—the Eastern District of Michigan and the District of Oregon also have sentencing councils—but these two programs have not been evaluated.

Both the New York and Illinois courts hold weekly meetings (two to three hours per week) in which each participating judge is provided a copy of a presentence investigation report. Based on these PSIs, the judges record their sentence recommendations, which are discussed at the next meeting. Following this discussion the sentencing judge makes a final decision. It is important to note that the council is purely advisory.

In Chicago, participation in the council is voluntary; all judges actively participating in the councils are involved in every case recommendation. In New York participation is mandatory, but not all judges are involved in each decision. Instead, deliberations involve the sentencing judge and two colleagues assigned in rotation.

Diamond and Zeisel found that the sentencing council frequently caused the sentencing judge to change his original sentence: between 25 and 27 percent of the time in Chicago and between 20 and 27 percent of the time in New York. Still, the reduction in disparity was modest. For both courts the researchers concluded that "against an

effort of some two to three hours per week for each judge, the sentencing council cures not more than 10 percent of the disparity in the cases that come before it."

Appellate Review

Although sentences have traditionally been nonreviewable, the appellate review of sentences has been increasingly recommended, and limited sentence review exists in some states, including New York. Still, even where appellate review is used, few reversals are won. Hopkins (1976) reports 34 appeals submitted in New York during 1974, and another 59 submitted in 1975. Only 2 were reversed each year and 5 were modified over the two-year period. Given the reported amount of sentence disparity in criminal courts, appellate court review as it is currently practiced is unlikely to affect sentence disparity.

Zeisel and Diamond (1977) reached similar conclusions in a study of sentence review in Massachusetts and Connecticut. In these two states reviews were more frequent. In Massachusetts every defendant sentenced to state prison for 2.5 years or more, or to the women's reformatory for five years or more, has a right to apply for sentence review. In Connecticut every defendant sentenced to serve a term of one year or more in prison or the reformatory can apply for review of that sentence.

In Connecticut, about 18 percent of the eligible cases are appealed, with fewer than one in ten of these resulting in a sentence reduction. About 10 percent of the cases in which an appeal was filed have the appeal withdrawn. In Massachusetts, 13 percent of the cases are appealed and about 20 percent of these result in sentence reductions (2 percent result in sentences being increased). It is difficult to say whether this rate of appeals and reversals significantly reduces sentence disparity, but given the extensive disparity reported by critics, we remain skeptical.

Zeisel and Diamond were critical of the review procedure. First, they found that court records infrequently contained enough information to allow more than a subjective assessment of the appropriateness of the sentence imposed. As a solution, they recommended use of a guideline system that would more objectively establish the parameters for sentence propriety. Second, they note that: "The infinitely rarer contact of the trial judge with the review decision and the lack of specificity of reasoning in these cases make it highly improbable that many messages are received by the trial judge that will change his future sentencing patterns." Again, guidelines are seen as an ameliorative to this problem.

Sentencing Guidelines

Sentencing guidelines have been suggested, and in some courts employed, as a promising means of reducing sentence disparity. A pioneering effort by Wilkins, *et al.* (1978), offers a prototype with two noteworthy features. First, the guidelines attempt to systematize the way that judges sentence based on historical sentencing patterns:

> The guideline sentences were readily computed by giving assigned weights to particular aggravating and mitigating factors relating to pertinent characteristics of both the crime and the criminal, and locating those weights on a sentencing grid. The weights that resulted in an Offense Score (seriousness of the offense) were located on the Y axis and the Offender Score weights (prior record and social stability dimension) were located on the X axis. The cells of the grid contained the guideline sentence. By plotting the Offense Score against the Offender Score (much as one plots mileage figures on a road map), one is directed to the cell in the grid which indicates the suggested length and/or type of sentence (p. xv).

Second, the guidelines were not intended to eliminate judicial discretion. Rather they were intended to regulate disparate decision making, and to operationalize a solution to the problem stressed by Zeisel and Diamond, that appellate review of sentencing lacks specificity.

> It is important to keep in mind that, even when fully implemented, the guideline sentences are in no way intended to be binding, mandatory sentences. The judge as human decision-maker will still retain the discretion to override any suggested guideline. We are, however, suggesting that particularized written reasons be given when judges depart from the specific, narrowly drawn guideline sentence—and later when the guideline model system becomes fully operational—that judicial panels might perhaps

> be utilized in these more unusual cases. Moreover, the system we propose would feed back those departures into the data base used in constructing the guidelines, thus injecting a continuous element of self-improvement and regeneration into the guidelines. It is presently estimated that significant departures will amount to only a small percentage of the total number of cases (p. xvi).

This is not to suggest that a sentencing guidelines policy does not also lack specificity. Indeed, no one has yet designed a specific guidelines policy that has universal appeal. Questions persist about how broad the guideline boundaries should be, and about what factors are appropriate as determinants of guidelines. Questions also exist about the extent to which guidelines should be based on historical norms, or the opinions of experts regarding "just deserts," or on utilitarian goals of sentencing, such as crime reduction and rehabilitation.

It is in this regard—linking goals of sentencing to specific sentence guidelines—that a sentencing guidelines policy has a special appeal. Guidelines provide a unique opportunity to produce rational sentences formulated on the basis of informed judgment about what factors are suitable as determinants of guidelines (as determined, perhaps, by a survey of judges), together with the best available empirical evidence about the effects of sanctions on both criminal and noncriminal behavior (as reflected, for example, by the rate of employment).

Assuming that we could agree on the goals of sentencing (a dubious assumption) and assuming, further, that we knew the precise effects of sanctions on crime rates and on other relevant variables (we do not), one could in principle construct a framework that logically integrates these goals and effects toward the formulation of sentence guidelines. This process could begin along lines that have been adopted by Gottfredson, Wilkins, and Hoffman (1978)—guidelines based on historical norms. Thus we could provide a starting point for sentence guidelines by setting boundaries around the average sentence associated with crimes of given severity and involving a defendant with a given level of criminality (based on prior record, age, and other relevant factors).

These averages could then be adjusted upward or downward according to goals of sentencing. If, for example, a "just deserts" logic suggests that sentences have been unduly harsh for one crime and un-

duly lenient for another, as determined from a survey of selected authorities (perhaps, selected by the judiciary), then the guidelines based on historical norms could be adjusted accordingly. Or if we learn that a term of incarceration set at the preliminary guidelines level for an offender of type A, who has been convicted for crime B, can be expected to prevent crimes (through deterrence or incapacitation, or both) in an amount that the public is willing to pay X dollars to prevent, but at a cost of Y dollars for prison resources, then we will increase the guidelines if X is greater than Y, or decrease them if Y exceeds X, moving them up or down to the point where X equals Y, or not to surpass a just deserts constraint, whichever comes first.

These proposed guidelines could be further assessed by projecting their implications for prison populations and court case loads. The resulting guidelines, presented perhaps as a volume of tables, would provide both a means to reduce sentence disparity and sentences with a more rational foundation than appears to exist at present. They would also provide a basis for discussion among the appropriate authorities—including the judiciary and other criminal justice agents, as well as legislators.

Presumptive Sentencing and Other Considerations

Two other concerns deserve mention before closing this chapter. The first deals with the motivation for sentence reform. The second deals with the malleability of the new sentencing structure that might emerge.

With respect to the first concern there is a distinct movement away from the indeterminate sentences that were the product of yesterday's reforms. There is a good reason for abandoning this scheme. The assumption of rehabilitation, upon which the original reform was predicated, seems at best misguided, at worst difficult to defend ethically. At any rate, rehabilitation has largely been a failure and efforts to rehabilitate probably account for much of the sentence disparity with which we now struggle.

But the question arises: "If not rehabilitation and indeterminate sentences, then what?" One response has been a presumptive sentencing scheme based on just deserts or commensurate deserts, as discussed earlier. Such suggestions are attractive, especially in light of findings presented in Chapters II through IV that little is known about the deterrent and incapacitative effects of punishment.

A potentially serious problem with presumptive sentencing is that it is very difficult to envision how we can determine "just deserts." In

practice, legislatures can reach a consensus, declaring what is just and what is not. But we should heed Jack Gibbs' (1975) warnings that:

> Why make the normative beliefs of legislators the standard of retribution? Here we see the advantage of appealing to such notions as desert and vindication; these notions avoid recognition of normative dissensus, social conflict, and the political character of the criminal law (p. 246).

One might add that if legislators are to guess at retributive standards, they might as well make estimates of utilitarian returns. The point is that retributive standards are largely unknowable, and it might be poor logic to turn to a just deserts argument, to the exclusion of the utilitarian returns to punishment, if the choice is dictated solely by the belief that we know the former but not the latter. As Wilkins (in VonHirsch, 1976: 178) has put it, "It seems that we have rediscovered 'sin,' in the absence of a better alternative."

II
THE DETERRENCE MECHANISM

One of the most fundamental and commonly expressed reasons for punishing those who violate the law is to deter others. Deterrence is usually defined as the use, or threat, of legal sanctions to prevent criminal behavior and has been categorized into "special deterrence" and "general deterrence." Special deterrence refers to the potential effect that punishment has on the future behavior of the individual being sanctioned, to deter *him* from committing subsequent criminal acts. That subject is a focus of Chapter IV.

General deterrence is concerned with the effect of the imposition of legal sanctions on the behavior of others. It relies on negative incentives—fear of detection, arrest, conviction, or imprisonment—to keep citizens law-abiding. According to Zimring (1971:4), "the threat and example of punishment may play a role in reducing crime as an aid to moral education, as a habit-building mechanism, as a method of achieving respect for the law, and as a rationale for obedience."

CONCEPTUAL FRAMEWORK

Deterrence doctrine predicts that an increase in the severity of sanctions will decrease the propensity to commit crime of those not punished.[1] The doctrine was formally articulated in the 18th century by Cesare Beccaria (1764) and Jeremy Bentham (1789). According to Bentham (cited in Cook, 1976:13), "the profit of crime is the force which urges a man to delinquency: the pain of punishment is the force employed to restrain him from it." Recalling Bentham's statement, Cook (1976:14) postulates that "the threat of punishment is in effect a government-imposed tax on criminal activity—the higher this tax, the fewer the criminal opportunities which will be deemed worthwhile by potential criminals."

A prominent restatement of Bentham's theory of deterrence was offered nearly 200 years later by a labor economist, Gary Becker (1968). Following a standard economic theory of individual career choice, Becker postulated that individuals will participate in illegal activities according to a rational, although not necessarily explicit, calculus: If the net gain to an individual from participation in illegal activity ex-

[1]A fundamental objection to general deterrence as a basis for sentencing policy is the ethical premise that no offender should be punished so that another will be deterred. See Hart (1968), Packer (1968) and Rawls (1971).

ceeds the net gain from a legitimate occupation, the individual will increase the level of his participation in illegal activity. An important component in the calculation of net gain from illegal activity is the xpected cost of punishment (i.e., the sum of the products of the probability of each sanction times the cost to the individual of each sanction). As either the probability or the level of a sanction increases, the individual will be dissuaded from participation in illegal activity, other factors (especially job opportunities in the legitimate sector) held constant. Thus, acording to Becker, the theory of deterrence fits within a larger theory of rational behavior in the marketplace of jobs and people searching for jobs. As with other economic theory, a simplifying assumption is typically made that people operate with perfect information, in this case, about both the levels of expected returns from illegal activity and the probabilities and levels of associated punishments. Unfortunately, proponents of this theory have not yet fully developed the theory as it pertains to assaultive crimes that are not associated with a potential for material gain (e.g., aggravated assault, simple assault, rape, suicide).

Perhaps because of these limitations in the theory of deterrence—assumptions about information and perceptions, and questions about the relevance of the theory to assaultive crimes—many contend that we still lack an adequate theory of deterrence. Zimring (1978:164), for example, asserts: "our present knowledge of deterrence is singularly bereft of a general theoretical structure with which to incorporate and organize particular experimental findings." Gibbs (1975:5) maintains that:

> Although social scientists use the label "theory" indiscriminately, even that license would not justify identifying the deterrence doctrine as a theory. The doctrine is a congery of vague ideas with no unifying factor....

Meier and Johnson (1977:292) contend that "the deterrence doctrine, as formulated within criminology, is strikingly atheoretical both in its philosophical origins and in its historic inattention to developments in the social sciences."

Notwithstanding the shortcomings of present-day concepts of deterrence, the deterrence mechanism is recognized as having two major components: *certainty* (measured variously in terms of the probability or risk of apprehension, prosecution, conviction, imprisonment, and for capital crimes, execution) and *severity* (measured

in terms of the length of sentence imposed and actual time served). Some would add a third—celerity (measured in terms of the time that elapses between the commission of the offense and the imposition of the sanction).

We will return to the discussion of measures of certainty and severity in the next section of this chapter. Here it is important to reemphasize the role of public perceptions in the operation of the deterrence mechanism. If individuals are to be deterred from committing illegal acts, they must be aware of the severity of the penalties attached to different types of criminal behavior and of the likelihood of their imposition.

A particularly important question in the context of sentencing guidelines, and one that is little understood, is how public perceptions of the threat are formed.[2] Gibbs (1975:7) observes that: "prescribed or 'threatened' punishments (e.g., statutory penalties) do not deter individuals unless they perceive some risk." Most studies of the deterrent effect of punishment simply assume that the public accurately perceives changes in the threat; many further assume that a given threat is seen as equally severe by all members of the public.

Not only perceptions of the threat are important; the public's perceptions of the quality of the process that produces these threats appear also to matter. Meier and Johnson (1977), for example, found that among adult respondents to a survey in Cook County, Illinois, marijuana use increased with an increase in the perceived severity of penalties. They reported that:

> after examining the relationship between these same variables [in a group of five legal factors] in other jurisdictions with milder penalties, we were persuaded that this particular question [perceived severity of marijuana laws] probably tapped the sense of moral outrage and injustice that marijuana users attribute to these laws in general (p. 301).

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[2]Rhodes (1978:1) cites the lack of a general theory of deterrence that "accounts explicitly for both the perceptions of sanctions and the objective measurement of sanctions as being relevant to criminal choice." "In order to obtain reliable estimates," he continues, "it is important to specify a theory of how these perceptions of sanctions are formulated."

Cook (1976:41) notes yet another consideration: the lack of deterrent effect from an increase in the threat may result not from the failure of the deterrence mechanism but from the failure of a program to realize its objective. New York State's 1973 drug law, discussed in the introduction to this report, is a case in point. Despite its severe and mandatory penalties for narcotic drug offenses and for most serious offenses involving drugs, "the available data indicate that despite expenditures of substantial resources neither of the objectives of the 1973 drug law was achieved. Neither heroin use nor drug-related crime declined in New York State" (Association of the Bar of the City of New York, Drug Abuse Council, 1977:7). The Bar Association report attributed the failure of the law to the fact that "the criminal justice system as a whole did not increase the threat to the offender" (p. 13).

These issues have been discussed in a burgeoning literature that sets out to measure deterrence. We turn now to a review of this literature.

REVIEWS OF THE EMPIRICAL LITERATURE ON DETERRENCE

Serious impirical testing of the theory of deterrence did not emerge until the 1950's, an era that saw rapid improvement in both criminal justice data and computational technology. Studies of the deterrent effect of the death penalty by Thorsten Sellin (done in 1951, revised and published in 1959) and Karl Schuessler (1952) served as important precursors to an explosion in the analysis of deterrence that was to occur more than a decade later. The studies by Sellin and Schuessler were, however, somewhat primitive when compared with much of the deterrence research of the 1970s. Sellin and Schuessler based their conclusions on comparisons of crime rates in arbitrarily selected groups of adjacent states. They found no significant differences in crime for states with and without the death penalty, based on both visual inspection of graphs of the data and simple correlation measures.

A pathbreaking article by Isaac Ehrlich in 1972 carried forward this earlier work, using a sophisticated econometric methodology. The basic method employed by Ehrlich, and subsequently by many others, consists of the application of multiple regression analysis to data on crime rates, sanction levels, and factors that influence both crime and sanction levels. After analyzing fluctuations from state to state in crime rates and sanction levels, and accounting for the effects of other factors, such as the unemployment rate, Ehrlich concluded that the fluctuations he observed support the theory of deterrence. Subsequent

studies of both cross-sectional data, such as Ehrlich's and time series data (i.e., data with variation in the relevant factors over time rather than from jurisdiction to jurisdiction) have produced a wide variety of results, mostly consistent with the theory of deterrence.

Rather than review each of these several studies, and thereby add to an already burgeoning collection of reviews of the literature, we shall focus on three major reviews, and then provide a general critique of the research on deterrence.

The first of the reviews that we discuss, by Gordon Tullock (1974), claimed to find the overwhelming weight of evidence to support the theory of deterrence. Philip Cook (1976), the author of a second review, finds the evidence "highly uneven" and concludes that "descriptive evidence on human nature and criminogenic processes, and common sense will rightfully remain the principal source of evidence in the debate over criminal justice policy" (p. 54). And Daniel Nagin (1978), the author of a third review, takes the position that while the available evidence is "certainly not of sufficient accuracy or completeness for suggesting policy changes, it should not be construed to imply that deterrence is not operating, or that the evidence accumulated to date is without merit" (p. 98). We focus first on Tullock's assessment.

Does Punishment Deter Crime?

Tullock's review of the scientific literature (1950 to 1973) on the deterrent effect of punishment led him to the following conclusion:

> The empirical evidence is clear. Even granting the fact that most potential criminals have only a rough idea as to the frequency and severity of punishment, multiple regression studies show that increasing the frequency or severity of the punishment does reduce the likelihood that a given crime will be committed (p. 109).

Tullock's review included a number of studies of crime and punishment rates in each state in the United States (Leibowitz, 1965; Ehrlich, 1970 and 1973; Philips and Votey, 1969, 1972; and Reynolds, 1971). These studies took into account the severity of punishment (average prison sentence) and the probability of punishment (the rate at which offenders are caught and sent to prison), as well as other factors that might affect crime rates.

Tullock's assessment of Leibowitz's work, for example, was as follows:

> Leibowitz's findings revealed an unambiguous deterrence effect on each of the crimes studied—that is, when other factors were held constant, the states which had a higher level of punishment showed fewer crimes. Such crimes as rape and murder were deterred by punishment just as well as (indeed, perhaps better than) burglary and robbery (p. 105).

And Ehrlich's results, based on a "much more sophisticated and careful methodology...once again indicate that punishment does deter crime" (p. 105).

Turning his attention from economists to sociologists, Tullock reviewed the work of Gibbs (1968), Gray and Martin (1969), Bean and Cushing (1971), and Tittle (1969). These studies also led to the conclusion that punishment deters crime. Moreover, Tullock took the fact that these scholars used "statistical tools that were somewhat different from those that had been employed by the economists...as an independent confirmation of the economist's approach" (p. 107).

Tullock took issue, however, with the sociologists' interest in whether certainty or severity was the more important aspect of the deterrence measure. He considered the question not very important and recommended that the average sentence be divided by the frequency with which it is imposed to obtain a deterrent measure. "Leaving aside my theoretical objections," he wrote:

> I do not think the statistics are accurate enough for the results obtained from these tests to be of much value. Be that as it may, more often than not the researchers found that the frequency with which the punishment is applied is of greater importance than its severity (p. 108).

Finally, Tullock turned to a review of Ehrlich's study of the deterrent effect of the death penalty (eventually published in 1975) and questioned Ehrlich's finding that each execution prevents between 8 and 20 murders on the grounds that "the data available for this study were not what one would hope for." Earlier preliminary re-

search by one of Tullock's graduate students—using different statistics and different methods—showed that each execution prevented two murders, but Tullock cautioned that the data were poor and the "methods suitable for only preliminary exploration."

Tullock's discussion of the rehabilitation issue will be deferred to our review of that issue in Chapter IV. His conclusion as to the relative merits of the deterrent and rehabilitative goals of punishment is relevant to our discussion here and aptly sums up his position on the efficacy of the deterrent mechanism.

> It is clearly more appealing to think of solving the criminal problem by means that are themselves not particularly unpleasant than to think of solving it by methods that *are* unpleasant. But in this case we do not have the choice between a pleasant and an unpleasant method of dealing with crime. We have an unpleasant method—deterrence—that works, and a pleasant method—rehabilitation—that (at least so far) never has worked. Under the circumstances, we have to opt either for the deterrence method or for a higher crime rate.

Punishment and Crime

Cook (1976:2) prefaces his critique of the empirical deterrence literature with the statement that Tullock's "confidence in deterrence is not warranted...by the literature on which he bases his conclusion." His critique is divided into an assessment of (1) natural variation or "correlational" studies, i.e., analysis of the relationship between threat levels and crime rates across jurisdictions (cross-sectional) or over time (time-series) and (2) quasi-experiments, i.e., analyses of the impact of sudden dramatic changes in the law or criminal justice policy.[3]

As noted earlier, the principal method used in empirical studies of deterrence has been to measure the statistical association between crime rates and sanction levels based on fluctuations in both. Variations in both the certainty and severity of sanction levels, both

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[3]The studies reviewed by Cook include Gibbs (1968), Title (1969), Bean and Cushing (1971), Sellin (1967), Ehrlich (1975), Passell and Taylor (1975), and Forst (1976).

across jurisdictions and over time, have repeatedly been found to be negatively correlated with crime rate fluctuations from place to place and from time to time. These correlations have been interpreted as support for the recommendation that sanctions be made more certain and more severe.[4]

Cook (1976:39) concludes his critique of the correlational studies with this assessment:

> The accuracy of the deterrence effects estimated by the [statistical] technique is questionable due to the problems of distinguishing the deterrent process from other processes which may cause threat levels to be negatively related to crime rates, the problems introduced by inadequate and inaccurate crime statistics, and the problem of controlling for other criminogenic factors which may distort the deterrence effect.

All studies of the association between crime rates and legal sanctions confront these same problems and some researchers are more or less successful in dealing with them. [We defer a fuller discussion of data limitations and methodological problems to later in the chapter.]

We turn now to Cook's evaluation of empirical analyses of the impact of sharp changes in the law or criminal justice policy. His review focuses on four experiments. The first, the Kansas City Preventive Patrol Experiment (Kelling, *et al*, 1974), revealed no significant differences in crime rates as a result of changes in patrol patterns. Of 15 beats in a contiguous area, five received the routine amount of patrolling over a one-year period; another five received a "supernormal amount of patrolling"; and in the remaining five, patrols were suspended. Cook finds two plausible explanations for the failure of the Kansas City experiment: either crime is not responsive to changes in the threat level, or the program failed to increase the threat.

The New York City experiment in decreasing subway crime (Chaiken, *et al.*, 1974) by policing every subway station and train between 8:00 pm and 4:00 am reduced the number of felonies reported at night to about one-third the number for the previous year. Daytime

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[4]Three important exceptions are the work of Sellin (1967), Forst (1976), and Passell and Taylor (1975).

felony rates also fell initially and then began a return to former levels. This program would appear to have been successful in increasing the treatthreat—six years later nighttime subway crime had not returned to pre-program levels.

The New York City 20th Precinct experiment involved the use of increased manpower (an average increase of about 40 percent) as a deterrent force (Press, 1971) which led to a reduction in the number of "outside" felonies reported over a six-month period. At the same time, however, "inside" felonies increased by about the same number, perhaps for reasons not associated with the increased visibility of the police on the street. The authors point out that other factors could have been at work that led to an increase in the number of inside crimes and would have done the same for outside crimes had it not been for the increased police presence.

The British Road Safety Act (Ross, 1967) was an effort to increase the number of convictions for drunken driving by (a) giving the police greater authority to stop cars to administer breathalyzer tests to suspected drunken drivers, (b) performing more precise laboratory tests, and (c) by undertaking a major effort to convince the public that there was a high probability that an arrest for drunken driving would lead to loss of license for one year. In Cook's view (1976:51), the effects of the Act provide "the strongest evidence I know that a moderate change in governmental policy can, under the appropriate circumstances, produce an effect deterrent to illegal activities."

The fate of the British Road Safety Act is instructive in light of our earlier discussion of the importance of public perceptions of the threat to the operation of the deterrence mechanism. The British Government's efforts to convince the public that the new drunken driving law had some "teeth" to it were initially successful. Only one month after the Act went into effect, for example, road fatalities were 25 percent lower than in the previous month. Unfortunately, the police were lax in taking advantage of the Act's provisions and the public gradually became aware that although the penalties were more severe if one were arrested for drunken driving, the risk of arrest was no greater than it was before passage of the Act.

Although the last of these four experiments is the only one that bears directly on the deterrent effect of the punishment sanction, the four studies and others like them can provide valuable insights into the problems of implementing changes in the law or in criminal justice policies. The main problem with such experiments, however, as Cook notes, is that their results are not generalizable to other times and other places.

To sum up this review of Cook's study in his words (1976:53-4):

> the evidence on the effectiveness of the simple deterrence mechanism clearly precludes the flat claim that deterrence does not work...the evidence is very spotty...and we are far short of a reliable quantitative estimate of the responsiveness of various kinds of crime to change in the threat level.

General Deterrence

Nagin's (1978) "Review of the Empirical Evidence" was commissioned by the Panel on Research on Deterrent and Incapacitative Effects, established by the National Academy of Sciences (NAS). The Panel was convened "to provide an objective assessment of the scientific validity of the technical evidence; focusing on both the existence and the magnitude of any crime-reducing effects" (NAS, 1978:vii),[5] and Nagin's paper constituted a major input into the Panel's deliberations.

Nagin begins his review with a group of studies that used the 1960 National Prisoner Statistics (NPS) to examine the association between crime rates and two sanction measures: rate of imprisonment and mean or median time served. A number of this group of studies were concerned only with homicide rates; others extended their analysis to all index crimes. Although different analytic techniques were used in the various studies, the results were generally the same: a negative association was found between the sanction variables and crime rates, i.e., as sanction levels increased, crime rates decreased. Of the studies reviewed by Nagin, Gibbs (1968), Gray and Martin (1969), and Bean and Cushing (1971) found a significant negative association between the homicide rate and both the probability of imprisonment and the severity of the sentence. Antunes and Hunt (1973), Chiricos and Waldo (1970), Tittle (1969), and Logan (1971, 1972) also found a negative association between the two sanction measures and the homicide rate, but for the other index crimes, they found only the probability of imprisonment (number of commitments per reported crimes) had an effect on the index crime rate. Ehrlich (1973), whom Nagin cites as having done the "most extensive analysis of the '1960

[5]Members of the Panel were Alfred Blumstein (chairman), Franklin M. Fisher, Gary G. Koch, Paul E. Meehl, Albert Reiss, Jr., James Q. Wilson, Marvin E. Wolfgang, Franklin E. Simring, and Samuel Krislov.

data'," also found a negative and statistically significant association between the rate of imprisonment and the crime rate for each crime type examined. His findings on the association between time served and the crime rate were less conclusive, however. Ehrlich conducted a similar analysis using data from 1950 and 1940 and again found negative associations between the two sanction measures and the rates at which certain crimes occurred, but, as Nagin cautions, the crime statistics on which the 1940 and 1950 analyses were based are far less reliable than similar statistics available now. As we discuss in more detail below, errors in the crime and sanction data used in a deterrence analysis can lead to a negative association even if deterrence is not at work.

In his 1973 analysis ("Participation in Illegitimate Activities"), Ehrlich estimated that a 1 percent increase in spending on police would produce, by way of increased probability of punishment, a 3 percent decrease in the serious crime rate. This analysis has been used to support policy recommendations on the use of punishments to deter crime. Forst (1976), using data for 1970 within a similar analytic model, found the crime rate "to be virtually insensitive to cross-state variation in either the probability or severity of punishment" (p. 477).[6]

Nagin also reviewed several studies based on 1960 data on crime rates and sanctions in a cross-section of California cities and counties. In his analysis, Orsagh (1973), for example, treated crime rates and the probability of conviction (number of convictions divided by number of reported crimes) as being simultaneously related, i.e., the crime rate both influences and is influenced by the conviction rate. His analysis also led to the conclusion that crime rates and the probability of conviction are negatively associated.

The list of other studies examining the association between crime rates and sanctions reviewed by Nagin is quite long. (For example, he reviews, among others, Title and Rowe, 1974; Wilson and Boland, 1976; Sjoquist, 1973; Logan, 1975; Phillips and Votey, 1972; McPheters and Stronge, 1974; Swimmer, 1974; and Greenwood and Wadycki, 1973.) These studies use various techniques to measure different aspects of the association between sanctions and crime rates. Some use both the probability of arrest and the probability of conviction as the sanction measure; others use only one of the two variables to measure sanction levels. Some use all index crimes in the measure of

[6]Nagin urges that Forst's findings "be carefully weighed against the others, because it is one of the most thorough analyses" (p. 106).

the crime rate;, others focus on specific crimes (robbery) or crime groups (all property crimes). The results, however, are generally the same (although the statistical significance of the results does vary): crime rates are inversely associated with sanction levels.

Finally, Nagin reviews two widely publicized and conflicting studies of the deterrent effect of capital punishment—Sellin's 1959 study of the Death Penalty and Ehrlich's 1975 paper on "The Deterrent Effect of Capital Punishment: A Matter of Life and Death." Sellin studied six clusters of contiguous states, each cluster having at least one that had abolished it. Observing the variations in homicide rates in each group over a 43-year period, Sellin found that homicide rates were not lower in the states having the death penalty and he concluded that the death penalty did not deter homicides. Sellin's results cannot be taken as definitive, as Nagin points out, because he did not consider such factors as the frequency with which executions were carried out or the level of other sanctions e.g., incarceration and length of time served.

In his assessment of the association between homicide rates and execution rates in the United States, Ehrlich did control for the level of other sanctions, as well as a number of socioeconomic and demographic factors. Ehrlich's results are as well known as Sellin's, having been introduced in the Supreme Court (*Gregg v. Georgia*) as evidence to support the use of the death penalty as a legal sanction.

Ehrlich's finding that each execution prevented eight homicides, on average, during the period 1933 through 1969 has, however, been subject to sharp criticism. Three major reviews of this study (Bowers and Pierce, 1975; Passell and Taylor, 1975; and Klein, *et al.*, 1978) raised serious doubts about the validity of Ehrlich's methods. Hans Zeisel (1977) has characterized these critiques as having produced the "evaporation of Ehrlich's deterrence claim" (p. 333). Zeisel went on to cite further evidence that "the deterrent effect, if it exists at all, can only be minute" (p. 342).

METHODOLOGICAL LIMITATIONS

Cook and Nagin (and to a lesser extent, Tullock) pay serious respect to our limited ability to draw strong inferences about the deterrent effect of sanctions on crime, based on previous empirical research. These limitations fall along two distinct lines—data problems and problems associated with drawing inferences about causality in the absence of a well-controlled experiment.

The data problem is of considerable importance. Correlations between measured variables are typically smaller than (in the jargon,

"biased downward" with respect to) their real-world counterparts, due to measurement errors. In the case of the observed correlation between crime rates and the certainty of punishment, however, the tendency has been noted for the appearance of deterrence to be greater than the reality (e.g., Nagin, pp. 112-14). This can be seen by noting that the numerator of the crime rate variable—the number of offenses—is identical to the denominator of the rate at which offenses result in arrest, conviction, or incarceration, the rate that represents the "certainty of punishment." To the extent that offenses are underreported more in some places (or at some times, in the case of time-series analysis) than in others, the crime rate will be artificially lower and the probability of punishment or certainty variable artificially higher than for observations with less underreporting. Thus, variation in crime reporting rates will produce an artificial negative correlation between the crime rate and the certainty of punishment.

On the other hand, the observed negative correlation of the crime rate with the severity of punishment (as measured by term of incarceration, for example) is likely to be *smaller* than its real-world counterpart, due to measurement errors. Hence the observation "certainty deters more than severity" may be primarily a result of measurement errors.

The potential for such errors is, indeed, substantial. Police records of the number of reported offenses and the number of crimes cleared by arrest are subject to considerable error and even manipulation. Reported offenses, as collected and published in the FBI's *Uniform Crime Reports*, are known to understate the actual amount of crime committed. Moreover, both reported offenses and the number of crimes cleared by arrest are highly sensitive to variations in police practices within and across jurisdictions. Even without ascribing to the police any interest in deflating reported crimes or inflating clearance rates, the number and kinds of reported offenses will be influenced by police practices in regard to the recording of offenses and the determination of the seriousness of the reported offense. The number of offenses cleared by arrest will be influenced by police practices in regard to arresting suspects and encouraging suspects to admit to other crimes they may have committed. Variation in these practices across jurisdictions or within a given jurisdiction over time can distort the data and bias any observations that are based on them, as we have discussed.

The sanction we are most concerned with in this report—sentencing—is usually measured in terms of the risk of imprisonment. While the recording of the number of convicted offenders who are im-

prisoned is relatively straightforward and should not be subject to much variation across jurisdictions or over time, the accuracy of imprisonment rates based on reported offenses or crimes cleared by arrest will also be affected by the practices discussed above. Again, a negative association between crime rates and imprisonment rates could result even when a deterrent effect is absent.

Data problems are not the only source of error in the estimates of the effect of sanctions on crime rates include both general deterrent and incapacitative effects (pp. 129-35). They may also include special deterrent (recidivism) effects. While general deterrence could be the predominant factor beneath a finding of a negative correlation between crime rates and sanctions, it is really misleading to refer to such a finding as a "deterrence estimate," as is common practice.

More importantly, a negative correlation between crime rates and sanction levels does not necessarily imply that the application of a more certain or more severe punishment leads to a reduction in crime. It may imply to no less an extent that large increases in the crime rate tend to weaken the ability of law enforcement institutions to apply sanctions, so that the probability of capture and conviction declines and the average term of incarceration grows shorter. More crime could lead to less certainty of punishment by taxing existing police, prosecutor, and court resources; thus a negative correlation between the crime rate and the likelihood of punishment could have nothing to do with deterrence. And more crime could lead to more incarcerations, even if the incarceration rate declined. To the extent that prison capacity is constant, an increase in the number of incarcerations will correspond to a decline in the average term of incarceration. Thus, again, a negative correlation between crime and punishment need not imply the existence of a deterrent effect.

In short, there are many explanations other than the theory of general deterrence behind the existence of a negative correlation between crime and punishment.

This is not at all to deny the existence of a deterrent effect. Indeed, we all have had an experience of having actually been deterred—for example, from walking in front of a rapidly approaching truck. Thus, one cannot refute the notion that people respond to negative incentives. And most of us sincerely do not wish to be arrested or imprisoned. But this personal experience does not imply the existence of a strong deterrent effect of punishment. This point has been made clearly by Anthony Amsterdam (1977:47):

> The real mainstay of the deterrence thesis, however, is not evidence but intuition. You and

> I ask ourselves: Are we not afraid to die? Of course! Would the threat of death, then, not intimidate us to forbear from a criminal act? Certainly! *Therefore*, capital punishment must be a deterrent. The trouble with this intuition is that the people who are doing the reasoning and the people who are doing the murdering are not the same people. You and I do not commit murder for a lot of reasons other than the death penalty. The death penalty might perhaps also deter us from murdering—but altogether needlessly, since we would not murder with it or without it. Those who are sufficiently dissocialized to murder are not responding to the world in the way that we are, and we simply cannot "intuit" their thinking process from ours.

Amsterdam's point applies, of course, no less to sanctions other than the death penalty.

Clearly, some people are deterred and some are not. Some may even be provoked to commit crimes because of sanctions (for example, killing witnesses so as not to get caught). It is simply not evident, on balance, what effect any particular sanction has on a particular offense.

III. INCAPACITATION

On its surface, the argument in favor of reducing crime by incarcerating convicted offenders appears incontrovertible. Those offenders who are locked up cannot commit new offenses against members of the community. *Ipso facto*, incarceration is an effective form of social control by way of "incapacitation."[1]

This truism, nevertheless, is insufficient to justify using prison to prevent crime. In the first chapter, it was argued that the use of incapacitation as a sentencing goal requires that we be willing to incarcerate some people who we erroneously predict would have recidivated had they not been imprisoned. That argument will be renewed in this chapter, accompanied by an assessment of the adequacy of tools used to distinguish between persons who would not commit new crimes if released following conviction and those who would continue to break the law if it were not for their incarceration. The chapter then turns to a second issue, namely, how much crime is prevented through incapacitation. Important considerations in this second section will be the extent to which a small group of offenders commit a large share of the serious crimes, and the cost of incarcerating convicted offenders relative to the cost of crimes prevented by incapacitation. The latter consideration is addressed more fully in Appendix B.

NORMATIVE ASPECTS OF PUNISHMENT

Several ethical questions must be faced prior to considering the efficiency of incapacitation as a strategy for the control of crime. First, is it fair to punish an offender for crimes he might commit in the future, based on the present crime for which he is convicted, as well as other indicators of dangerousness? This difficult question is unlikely to be settled by further polemic, but its resolution precedes basing public policy solely on the issue of whether incapacitation works in reducing crime.

Second—assuming that the first question has been answered in the affirmative—is it ethical to detain a potential offender when the tools used to predict his future behavior are imprecise. An answer to this question likely depends on just how good prediction tools are at

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[1] We recognize that many offenses are committed by incarcerated persons against other inmates; thus "incapacitation" as we use it has meaning only with respect to the society outside prison.

distinguishing recidivist from non-recidivist. Presumably, we would be less inclined to adopt incarceration as a crime control strategy if the risk is high that detained persons would not commit future crimes if released. Using the jargon of social researchers, a person predicted to be dangerous who, in reality, would commit no crimes is known as a *false positive*. There is, of course, another side to this prediction coin. We are more likely to incline toward incapacitation as a strategy if those persons released because they are predicted to be non-dangerous commit new crimes at a high rate. Such a persson is known as a *false negative*.

Third, does it make a difference whether incapacitation is a general policy or a selective policy? In the former, all convicted offenders who satisfy some criterion (such as a felony conviction record) are incarcerated. The incapacitative effect follows from having included some dangerous offenders along with all others. Using a selective policy, only offenders identified as likely to recividate are detained in prison. What they have done in the past is not so important as what they will do in the future. Of course, in practice general and selective incapacitation might closely resemble each other.

Several researchers have assessed the accuracy of predictive tools based on clinical judgments, actuarial scores, or a combination of both. Some of these assessments can be summarized here.

In a recent review commissioned by the National Academy of Sciences, John Monahan (1978) summarized eight contemporary studies attempting to predict dangerousness. These studies were based both on natural experiments in which appellate courts ordered 'dangerous offenders'' to be released from correctional facilities and hospitals for the criminally insane, as well as on statistical studies of routine release decisions made by correctional and mental health authorities. Table III.1 reproduces some of Monahan's findings.

TABLE III-1. Research Studies on the Prediction of Violence

Study	% True Positives	% False Positives	N Predicted Violent	Follow-up Years
Wenk et al. (1972) Study 1	14.0	86.0	?	?
Wenk et al. (1972) Study 2	0.3	99.7	1630	1
Wenk et al. (1972) Study 3	6.2	93.8	104	1
Kozol et al. (1972)	34.7	65.3	49	5
State of Maryland (1973)	46.0	54.0	221	3
Steadman (1973)	20.0	80.0	967	4
Thornberry and Jacoby (1974)	14.0	86.0	438	4
Occozza and Steadman (1976)	14.0	86.0	96	3

Source: John Monahan, "The Prediction of Violent Criminal Behavior: A Methodological Critique and Prospectus," in *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates*, ed. Alfred Blumstein, Jacqueline Cohen, and Daniel Nagin (Washington, D.C.: National Academy of Sciences, 1978): 246.

What is startling is the extent to which persons predicted to be violent were not, in reality, found to be violent following release from various institutions. Monahan warns that these studies are not strictly comparable, but despite this he is able to conclude:

> The conclusion to emerge most strikingly from these studies is the great degree to which violence is overpredicted. Of those predicted to be dangerous, between 54 and 99 percent are false positives who will not, in fact, be found to have committed a dangerous act. Violence, it would appear, is vastly overpredicted, whether simple behavioral indicators or sophisticated multivariate analysis are employed and whether psychological tests or thorough psychiatric examinations are performed (p. 250).

On the positive side, the more recent studies did correctly predict future violent behavior for 15-20 percent of those offenders judged to be dangerous. Still, this meant that 80-85 percent of the offenders predicted to be dangerous actually proved safe when released.

Monahan was concerned with dangerous offenders, that is, persons who were likely to commit violent acts. It is well known that the prediction of rare events is more difficult than the prediction of more frequent ones; the high rate of false positives could be reduced if the behavior to be predicted were serious criminal behavior, including violent acts as well as crimes against property.

In this regard, Williams (1978) has reported findings from analysis of recidivism in the District of Columbia. Williams analyzed the rearrest patterns of 4,703 defendants over a four and one-half year period. She weighted arrests both by time at risk (i.e., time on the street rather than in prison or jail) and by the seriousness of the offense alleged in the new arrest. Then she used a sophisticated statistical model to predict who would recidivate.

To determine how well her predictions identified the most serious recidivists, Williams compared the actual "worst" 1,176 recidivists to

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Others have remarked on a similar overprediction of dangerousness for civil commitments, see: Carol Warren, "Involuntary Commitment for Mental Disorder: The Application of California's Lanterman-Petris-Short Act," *Law and Society Review* 211, no. 4 (Spring 1977): 629-50; Virginia Miday, "Reformed Commitment Procedures: An Empirical Study in the Courtroom." *Law and Society Review* II no. 4 (Spring 1977): 651-66.

the recidivists identified as being the "worst" by her model. She repeated this exercise selecting first 1,176 of her original cohort (the 25 percent of her sample predicted to be most dangerous), then 1,568 of her original cohort (the 33 percent of her sample predicted to be the most dangerous), and finally 2,353 of her original cohort (the 50 percent of her sample who were predicted to be the most dangerous). In the first case she was able to identify 48 percent of the targeted, hard-core recidivists, in the second 58 percent, and in the third, 77 percent.

Translating these numbers into false positives and false negatives, Williams identified 562 hard-core recidivists correctly with 614 false positives, using a 25 percent cutoff. Consequently, she also had 614 false negatives. In the second case, she identified 679 hard-core recidivists correctly, with 873 false positives and 497 false negatives. In the final case, she identified 901 serious recidivists, with only 275 false negatives, but 1,451 false positives. In summary, the implications of Williams analysis is consistent with that of Monahan's; as expected, her model was more accurate, but it was still incapable of identifying a majority of serious recidivists without a concomitant high incidence of erroneous predictions.

Although not inclusive of all studies attempting to predict recidivism, this survey has been representative and reflects the state of the art for legislators favoring incapacitation to combat crime. The findings indicate that many offenders who are likely to be serious recidivists can be identified. However, tagging dangerous recidivists is a costly job because for every true recidivist tagged, a larger number of nonserious recidivists and persons who would not commit future crimes are bound to be mistakenly identified as future offenders.

These studies provide an overview of the seriousness of this prediction problem; it remains the responsibility of the legislature to assess whether this error level is consistent with existing notions of fairness, as well as whether the dollar costs of imprisoning a large volume of "safe" offenders is commensurate with the dollar and psychic returns from imprisoning their "dangerous" counterparts. Resolution of this issue might depend on the amount of crime prevented through incapacitation, a topic to which we now turn.

CRIME REDUCTION THROUGH INCAPACITATION

The answer to how much crime is prevented by the incapacitation of convicted offenders depends on several considerations. For one, the benefits of incapacitation will be greater the more crimes the average criminal commits. On the other hand, if a large number of persons are

responsible for a few crimes each, incapacitation is unlikely to be effective in reducing crime. Second, our ability to reduce crime through incapacitation is greater the higher the probability that frequent and serious offenders are caught and incarcerated relative to the probability that infrequent and less serious offenders are more subject to the criminal sanction. That is, if habitual offenders are more skillful than infrequent offenders at avoiding apprehension, then the impact of incapacitation on crime rates is likely to be correspondingly less. Third, the effectiveness of incapacitation is contingent on our ability to identify frequent and serious offenders in order to concentrate prosecutorial and correctional resources on the group most likely to recidivate. Selective incapacitation will be more effective than general incapacitation, but as discussed in the previous section, the requisite predictive capability is at this time limited.

How much crime is prevented by the incarceration of convicted offenders? On the surface, the potential seems impressive. Wolfgang, Figlio, and Sellin (1972) found that for juvenile offenders a small proportion of defendants account for a large proportion of arrests.[3] Williams (1978) reported that a small number of adult offenders account for a disproportionate number of arrests, and by inference, for a disproportionate amount of crime. In her study of recidivism in the District of Columbia she reported:

> The majority of arrests involved defendants who were arrested at least twice during the period of the study. Thirty percent of the defendants were arrested two or more times, and they accounted for 56 percent of the arrests. Almost one-quarter of the arrests involved only 7 percent of the defendants (. II-9).

Although Williams' findings pertain to arrests and only indirectly measure the hidden amount of crime assumed to correspond to these arrests, studies conducted by RAND (Petersilia, 1978) were based on self-reported criminal behavior and reached similar conclusions.

> ...a small number of chronic recidivists account for a large amount of serious crime. Estimates

[3] Williams' findings were consistent with those of Wolfgang, Figlio and Sellin.

> show that perhaps only 10 percent of the criminal population accounts for 60 percent of all crime.

Thus, the potential seems to exist for reducing crime by imprisoning known offenders, a potential that led Wilson (1975) to conclude:

> The purpose of isolating—or, more accurately, closely supervising—offenders is obvious: Whatever they may do when they are released, they cannot harm society while confined or closely supervised. The gains from merely incapacitating convicted criminals may be very large. If much or most serious crime is committed by repeaters, separating repeaters from the rest of society, even for relatively brief periods of time, may produce major reductions in crime rates. Yet we have pursued virtually the opposite policy. During the 1960s, while crime rates were soaring, there was no significant increase in the amount of prison space and there was an actual decline in the number of prisoners, state and federal, from about 213,000 in 1960 to 196,000 in 1970. In New York State the chances of the perpetrator of a given crime going to prison fell during this period by a factor of six. To an astonishing degree, judges and prosecutors have used their discretion to minimize the incapacitative value of prisons. In Los Angeles County, for example, the proportion of convicted robbers with a major prior record who were sent to prison in 1970 was only 27 percent. It is no defense of this policy of deprisonization to say that criminals, if sent to prison, would, on their release, merely resume the commission of crimes. Many no doubt would, but the gains to society from crimes not committed while they were in prison would be real and substantial, and if the policy of prison sentences were consistently followed, even with relatively short (one or two year) sentences, the gains would be enduring (p. 173).

Although these statistics imply a significant potential for reducing crime by incapacitation of likely recidivists, measuring the amount of crime reduced through incapacitation has been no simple task, primarily because of a lack of reliable estimates of how much actual crime is committed per arrest and conviction. In a recent review for the National Academy of Science, Jacqueline Cohen (1978) reviewed five studies that attempted to estimate the benefits of the general incapacitation of offenders. Each study was based on a mathematical model of crime and crime control, and each was forced to make assumptions both about the amount of crime committed by the average offender, as well as the distribution of the probability of arrest throughout the population. The estimates derived were shown to be very sensitive to the assumptions made, and thus, provide only rough approximations.

Cohen reestimated the incapacitation effects reported in these five studies using an alternative set of assumptions that appeared more reasonable than those employed by the original researchers. In reestimating the findings reported originally by Clark (1974), she found that the crimes averted by the incapacitation of juveniles are about 18 percent of all reported index crimes. Assuming that incarcerated offenders would commit, on the average, ten index crimes per year if released, Greenberg's model (1975) indicates that crime would be about 24 percent greater if it were not for prisons. Shinnar and Shinnar (1975) estimated the increase in crime to be about 25 percent, while estimates using Ehrlich's model (in Becker, 1974) project the incapacitation effect to be about 26 per cent of the current crime rate.

A recent study by Van Dine, Dinitz and Conrad (1977) claimed these estimates were too high. These authors attempted to show that even a draconian penal policy of incarcerating *all* convicted offenders for several years would reduce crime by at least a few percentage points—a five-year mandatory sentence would reduce violent crimes by only 4 percent. These estimates have been recalculated separately by Boland (1978) and Palmer and Salimbene (1978), who concluded that the incapacitative effect of imprisonment is slightly greater than (but similar to) those estimates reported in the Cohen survey.

Whether these estimates indicate a large or small social return from incapacitation is a matter of judgment. It is, however, interesting to consider Cohen's assessment of the ability of public policy to further reduce crime by expanding prisons, jails and community correctional facilities. She concluded:

> California, New York and Massachusetts must increase their prison populations more than 150

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> percent in order to achieve a 10 percent reduction in index crimes through incapacitation (p. 225).

It is necessary to be cautious about the accuracy of these projections that are, after all, predicated on earlier studies that employed tenuous assumptions about crime and crime control. These figures do, however, indicate that incapacitation is likely to make only a dent in crime rates even as large public expenditures in terms of prison usage are applied.

These estimates lead to a pessimistic conclusion about the potential for reducing crime through incapacitation, but they may significantly underestimate this potential. Some calculations by Marsh and Singer (1972) suggested that by imprisoning for one additional year all offenders convicted of robbery in New York City, it would be possible to reduce robberies by between 35 percent and 48 percent of the total robberies in one year. These more optimistic estimates follow from an assumption that it is the most serious, rather than the average, offender who is more likely to be caught and incarcerated. Thus, the estimated amount of crime prevented increases in direct proportion to the amount of crime committed by serious repeap offenders.

Marsh and Singer's work indicates how estimates of incapacitation are sensitive to assumptions made about criminal behavior. The key assumption pertains to how much crime would have been committed by those persons who are arrested, convicted and incarcerated. Given offenders' incentives to hide their criminal behavior, and given the lack of interest by police and prosecutors in linking current convictions with reported crimes, it is obvious that informed estimates of the real rate at which convicted offenders commit crimes is difficult to acquire. Estimates of incapacitation suffer correspondingly.

An improvement over past techniques has been made in recent research conducted at RAND. Based on self-reported criminal behavior obtained in interviews with 49 respondents in the Criminal Career study (Petersilia, *et al.*, 1977) and 624 respondents in the Inmate Survey (Stambul, *et al.*, 1977), it was concluded that:

> The picture that begins to emerge from these empirical data is not one of a large number of dedicated criminals consistently pursuing a pattern of serious crimes. Rather, the majority of incarcerated offenders appears to commit serious crimes at relatively low rates and in an

> unspecialized fashion. Less than a third commit crimes at a sufficient rate that their imprisonment will lead to any significant reduction in crime (Greenwood, *et al.*, 1978:7).

These findings are consistent with a modest ability to be able to predict dangerousness. Although all persons sentenced to prison may appear dangerous, a majority of incarcerated offenders are unlikely to be dangerous in fact.

Using their derived sketch of criminal behavior patterns, in conjunction with a mathematical model created by Avi-Itzhak and Shinnar, the RAND researchers (Greenwood, *et al.*, 1978) reached important policy-relevant conclusions about the effectiveness of imprisonment on the control of crime:

> ...a three year commitment for all convicted defendants, if applied exclusively to burglary, would result in a 500 percent increase in the number of offenders incarcerated for this crime and a 50 percent decrease in the burglary rate. A similar policy for robbery (three year sentence for everyone convicted) would result in a 20 percent reduction in robberies and a 70 percent increase in the number of robbery defendants incarcerated. A 50 percent reduction in robberies would require at least a 200 percent increase in the incarcerated robber population and average terms exceeding five years.
>
> ...A special data file which was prepared in Denver, Colorado allowed us to examine the potential incapacitation effects of various mandatory-minimum sentencing policies.
>
> ...An analysis of various mandatory-minimum sentence lengths and target groups revealed results which are quite consistent with our California analysis in that *very large increases in prison populations are required in order to achieve significant reductions in crime.* A one year mandatory-minimum for any felony conviction would result in a 50 percent increase in

> the prison population and a 15 percent reduction in crime. Three year minimum sentences would increase the prison population by 225 percent and reduce crime by approximately 35 percent (pp. 22-23).

Although these estimates of the trade off between crime and imprisonment by way of incapacitation effects (i.e., ignoring deterrence) are more optimistic than those provided by the earlier studies, they still reinforce what appears to be an emerging consensus: incapacitation can be used to combat crime, but it can be effective only if we are willing to tolerate a significant increase in both the pecuniary and social costs of expanded prisons. Whether the higher cost of new prisons is offset by the value of crimes prevented is a question that we address in Appendix B. We estimate that the social value of one year of incarceration, in terms of the average cost of crimes prevented by way of incapacitating those currently incarcerated, exceeds an amount in the neighborhood of $3,500 (ignoring the psychic costs to victims).

We close this chapter by noting that this incapacitation and cost calculus is based on estimates about those *currently* incarcerated. It may be that both the incapacitative effect and the social value of our current case processing and sentencing policies are much smaller than they could be. If prosecutors and judges were to adopt incapacitation as a primary objective, they might give less emphasis to policies that result in long sentences for older offenders with long criminal records, offenders who may now be relatively inactive, in favor of shorter sentences for the more active youthful offenders who, primarily by virtue of their age, have not yet had time to build up long records.[4] The precise effects of such a policy change, however, are unknown.

Hence, it remains an important research objective to estimate incapacitation effects by age and other potentially influential variables. In the meantime, the wide range of estimates pertaining to incapacitation in the aggregate provides a weak basis for argument in favor of either longer or shorter sentences than now exist for offenders in general.

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[4] Results reported in numerous studies (for example) Wolfgang, *et al.*, 1972; Petersilia, *et al.*, 1977; Petersilia and Greenwood, 1978; Collins, 1977) indicates that younger offenders are, indeed, more criminally active. Other work indicates that judges sentence persons with longer criminal records more severely (e.g., Wilkins, *et al.*, 1978).

IV
REHABILITATION AS A CORRECTIONAL GOAL

Recent correctional practice has been dominated by the view that rehabilitating offenders is the best method of preventing future crimes. This view is based on a behavioral assumption about man and crime, known as the medical model, which holds that criminal behavior is a product of some pathological condition of the individual offender. The analogy with medical science is not meant to imply a biological cause of crime; however, from this view, crime is seen as a disease that should be treated following a medical model. It is important to note that supporters of this view insist that crime not be viewed as a unique disease with a single treatment. Rather, proponents of the rehabilitative model view each offender as unique, and therefore, each offender's treatment must be individually prescribed. This leads us to an important element of the rehabilitative model, the indeterminate sentence. Since incarceration should promote rehabilitation, and since all offenders are different, varying lengths and types of treatment are required. Moreover, since judges are not trained in medicine or in the behavioral sciences, they cannot be expected to know the optimum time for release. Thus in the rehabilitative approach, individuals are committed to the correctional facility for an indefinite period of time until the "cure" has taken effect, with this release date being determined by correctional officials.

Recently indeterminate sentencing has come under attack by those challenging the behavioral model upon which it is based (Kassebaum, *et al.*, 1971; Martinson, 1974). Critics have claimed that the indeterminate sentence has resulted in longer and more inhumane prison terms (American Friends Service Committee, 1971; Mitford, 1971); and that correctional treatment has failed to live up to its own lofty goals (Lipton, *et al.*, 1975; Greenberg, 1977; Logan, 1972). In spite of these critiques, adherents to the rehabilitative philosophy urge us not to forsake the promise of correctional treatment. In the following sections, we summarize major studies of the effectiveness of correctional techniques and the controversy that has arisen from these findings.

THE ABILITY OF CORRECTIONS TO CORRECT

Evaluating the effectiveness of a correctional system is a difficult task. As we have seen, there is a great deal of disagreement about the primary goal of the correctional system. (For recent defenses of the rehabilitative model, see Palmer, 1975; Adams, 1976; Reid, 1976; Warren, 1977; Halleck and Witte, 1977.) Even if we recognize that

rehabilitation is a goal, there are monumental problems in defining the criteria upon which to assess the rehabilitative effort. The most common measure of effectiveness of correctional treatment is recidivism; there are, however, great problems with obtaining a suitable definition as to what constitutes recidivism. Is recidivism to be measured by the number of arrests or the number of convictions? Should the nature and seriousness of the offense be considered in computing recidivism; that is, if a burglar is rearrested for driving while intoxicated is he to be considered a recidivist? Are state or federal figures more appropriate in determining this rate? To illustrate the importance of thiss definitional issue, in their study of work release Waldo and Chiricos (1977) defined eighteen different methods of computing recidivism. Employing these definitions, recidivism varied from 19 percent (reincarcerated) to 70 percent (rearrested). Both figures represent recidivism rates but clearly measure entirely different concepts.[1] Further difficulty arises from the definition of an "acceptable rate" of recidivism. Is a rate of 40 percent indicative of program success or failure? Thus, the lack of a standard by which to judge effectiveness further confounds correctional evaluation.

Others argue that even a consistent definition of recidivism would fail to reflect program effectiveness accurately. That is, an individual may benefit from program participation, as reflected by improved self-concept, higher educational level, and so on, even though he returns to the criminal justice system (Tittle, 1974). An additional argument can be made that some types of program participants are "corrcted" but that the use of an overall measure of recidivism masks the effectiveness of the program with this type of offender (Palmer, 1975).

In addition to this definitional dilemma, correctional research has suffered qualitatively as indicated by the title of Daniel Glaser's (1965) article "Correctional Research: An Elusive Paradise." Correctional research commonly has analyzed the rehabilitation of individuals involved in a certain treatment group without using a control or comparison group, despite the obvious bias in the selection of those receiving treatment (Hood, 1967). Classical experimental designs that would allow more definitive statements concerning program effectiveness have been relatively rare.[2] This lack of methodological sound-

[1] Lipton, *et al.* (1975:604-607) provide further discussion of problems presented by the definition of recidivism.

[2] A classical experimental design randomly assigns subjects to treatment and control groups in order to ensure that the outcomes obtained are not a result of uncontrolled factors in the selection criteria (e.g., type of offense, offender characteristics).

ness is revealed by the fact that Lipton, *et al.* (1975), in their comprehensive review of evaluative research in corrections were able to uncover only 231 studies (using recidivism as the measure of success) completed between 1945 and 1967 that satisfied minimal methodological criteria.[3] Using more rigorous methodological standards, Logan (1972:380) reports in his review of this literature:

> None of these studies of correctional or preventive effectiveness can be described as adequate. There is not one study that meets all of the criteria proposed in this paper as the minimal methodological requirements of a scientifically sound test of effectiveness.

Thus, in the review that follows of relevant evaluations of correctional treatment, it is necessary to ask ourselves continually: What is the study measuring (definitional issues) and how well is it measured (methodological concerns)? There have been a number of recent "evaluations of evaluations" that have attempted to assess the "correctional effects of corrections." The following sections will draw from those investigations, as well as additional studies not cited by those reviews.

THE EFFECT OF IMPRISONMENT ON RECIDIVISM

Two major questions arise when addressing the effectiveness of imprisonment: Does the length of time incarcerated have any impact on recidivism? Does participation in a particular institutional treatment program have any further impact on the individual's future criminality? The effect of the length of incarceration is considered first.

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[3] Lipton, *et al.* (1975:4), used the following criteria in selecting studies for inclusion in their review: (1) The study must represent an evaluation of a treatment method applied to criminal offenders. (2) The study must have been completed after January 1, 1945. (3) The study must include empirical data resulting from a comparison of a treatment group with control group(s) or from a comparison with some comparison group(s). (4) These data must be measures of improvement in performance on some dependent variables, which include recidivism, parole or probation performance, institutional adjustment, educational achievement, vocational adjustment, personality and attitude change, drug and alcohol reduction, and cost benefit. (5) Specifically excluded are after-only studies without comparison groups, prediction studies, studies that only describe and subjectively evaluate treatment programs, and clinical speculations about feasible treatment methods.

An interesting "natural experiment" occurred when the *Gideon v. Wainwright* (372 U.S. 335 [1963]) decision caused the release of a large number of Florida prisoners. Those who were released early were matched with similar offenders serving a substantially larger proportion of their sentence. Eichman (1966) found that those released early had a significantly lower recidivism rate (13.6 percent compared with 25.4 percent, recidivism defined as reconviction for a serious offense). Other matching studies performed by the California Department of Corrections reported that those offenders serving longer sentences have higher (or identical) failure rates than similar offenders serving shorter terms (Mueller, 1965; Full, 1967; Jamon and Dickover, 1969). Based on these studies, Robinson and Smith (1971:71) conclude:

> It is difficult to escape the conclusion that the act of incarcerating a person at all will impair whatever potential he has for crime-free future adjustment and that regardless of which "treatments" are administered while he is in prison, the longer he is kept there the more likely is it that he will recidivate. In any event, it seems almost certain that releasing men from prison earlier than is now customary in California would not increase recidivism.

Summarizing a larger body of studies completed prior to 1967, Lipton, *et al* (1975), come to a different conclusion. These authors assert that a curvilinear relationship exists between time served and recidivism. Individuals serving relatively short sentences (1-3 months) and individuals serving longer sentences (2 or more years) may have higher success rates than those serving sentences of intermediate length. The authors note that this result may be partially a result of the fact that inmates serving longer sentences aged while incarcerated and thereby are less likely to return to criminal behavior after release. In this regard, Glaser (1964) reports that the older an inmate is at the time of release the less likely he is to recidivate (regardless of the amount of time served). A number of other studies have reached identical conclusions, making this "burning-out" process one of the few consistent findings in criminological research (Lipton, *et al.*, 1975).

More recent studies have both failed to confirm this curvilinear relationship (perhaps because the subjects of these later studies have been longer term felons) and have failed to find a negative association

between length of incarceration and recidivism. These findings are especially interesting because these recent studies, which have employed experimental designs and advanced statistical techniques, have been more methodologically sound than earlier work.

In their study of group counseling in one California prison, Kassebaum, *et al.* (1971), report that time served in the institution was not significantly related to "parole survival." Another California study (Berecochea, *et al.*, 1973) found that prisoners paroled six months early had a recidivism rate identical to those individuals released at their regular time (Greenberg, 1977).

Using a nationwide sample of paroled burglary offenders released in 1968;69, Babst, *et al.* (1972:100), concluded that:

> The number of months served showed no consistent relationship to parole outcome for any classification. This study does not assess imprisonment as a punishment devise (sic) or as a means of custody. It does suggest that the vast sums being spent on correctional institutions as a crime reduction devise (sic) need further evaluation if we are to stem the growing crime rate.

Gottfredson, *et al.* (1977:2), in a study of men paroled in Ohio between 1965 and 1972 reached a similar conclusion:

> There clearly is no consistent pattern of increasing parole success with time served; rather, in general, success rates decrease or remain fairly consistent with increased time served in prison. Beck and Hoffman (1976) determined the effect of incarceration length upon recidivism for all male prisoners released from federal institutions in 1970. There was some evidence that as time in the institution increased, the percentage of offenders having favorable outcomes decreased slightly. However, this difference exceeded 10 percentage points in only one of five groups, and in no case were these differences statistically significant.
>
> Although these more recent and more

methodologically sound studies do not completely refute nor support earlier studies, we may offer the following summary:

- Inmates serving longer terms apparently do no better than similar inmates serving shorter terms.

- There is some evidence that inmates serving shorter sentences will tend to do better, or at least no worse than those serving longer terms.

THE EFFECTIVENESS OF INSTITUTIONAL TREATMENT

The rehabilitative model maintains that individually prescribed therapeutic treatment will enhance an inmate's ability to lead a crime-free, more productive life after release from the institution. A wide range of programs have been designed to correct educational, vocational, and psychological deficiencies of the individual inmate.

The existing research on the effect of institutional educational programs with adult males leaves much to be desired methodologically. Most studies have utilized no control group or have employed only crude matching procedures (Greenberg, 1977). Lipton, *et al.* (1975), report four studies comparing prisoners who did not receive educational services. Two of these studies (Schnur, 1948; Saden, 1962) report that those involved in prison education programs had a recidivism rate slightly less than that for those not participating. Two later studies (Coombs, 1965; Glaser, 1964) found that there was either no difference in recidivism rates or that those taking part in the educational program actually did worse than those not enrolled. Glaser (1964) found that, overall, those not participating in educational programs tended to do better than those enrolled (recidivism rates of 33 percent and 39 percent, respectively). He did find, however, that some groups of offenders appeared to benefit. Those offenders enrolled in academic classes who had been incarcerated more than three years did better than similar offenders not participating. Enrolled inmates who were released from medium-security institutions did significantly better than their counterparts. Unfortunately, those inmates completing the ninth grade or higher did significantly worse than their comparison group. Only 5 of the 21 comparisons made in Glaser's study achieved an acceptable level of significance (Lipton, *et al.*, 1975).

A Pennsylvania study (Lewis, 1973) utilized a matching procedure to evaluate a college education program in the humanities conducted at the correctional institution at Camp Hill. The recidivism rate (return to prison) for both program participants and nonparticipants was approximately the same—30 percent (Greenberg, 1977).

While there are isolated and inconsistent reports of the effectiveness of prison education programs, it appears that formal education gained in prison has little relationship to post-prison success.

Aside from acquiring a better basic education in prison, the rehabilitative model suggests that the prison should provide vocational training so that the ex-offender can obtain a better job upon release, thereby reducing his propensity to commit a crime.

A comprehensive vocational education program in Washington state was evaluated by Gearhart (1967). This program sought to provide training in office machine repair, auto mechanics, barbering, body and fender repair, machinist work, carpentry, drafting, dry cleaning, electronics, shoe building, and machine operation. After a follow-up period of three years, no significant difference was found in the parole violation rate of program participants (43 percent) and nonparticipants (39 percent). Among those receiving training, those obtaining jobs related to their training program were more likely to succeed. Twenty-three of 36 (64 percent) who obtained employment related to their training did not violate parole, while 35 out of 66 (53 percent) who did not obtain employment in their field did not violate parole. Although one should exercise caution in interpreting these findings, because uncontrolled variables may have influenced certain members of the experimental group to obtain employment, these findings point to the importance of matching training programs to occupations in which the offender can expect to find employment after release (Lipton, *et al.*, 1975).

An Alabama program combining vocational training, basic education, and behavior modification was found to make little difference in the number of parole violations during a three-year period after release (Jenkins, *et al.*, 1974, cited by Greenberg, 1977).

Several California studies have reported that those inmates having training in bakery or body and fender repair did worse than would have been expected according to their base expectancy scores[4] while a

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The risk or base expectancy score is a statistical prediction of the probability of parole violation that is based on twelve offender characteristics taken primarily from pre-prison data and computed by multiple regression techniques. (See Gottfredson and Ballard, 1965.)

matched group of parolees not receiving vocational training had failure rates comparable to those that would have been expected according to their scores (Greenberg, 1977).

A later and more comprehensive California program sought to provide training in the following areas: auto mechanics, body and fender repair, mill and cabinet work, culinary arts, meat curing, baking, dry cleaning, welding, machine shop work, landscaping, refrigeration and air conditioning work, electronics, general shop work, silk screening, sewing machine repair, offset printing, and office machine repair. At six and twelve months after release from this program, the parole violation rates of those receiving training was no different from what was predicted by the base expectancy scores (Dickover, *et al.*, 1971).

On the basis of these and other such evaluations, the California Department of Corrections was led to conclude:

> ...profiting from the experience of history, the Department of Corrections does not claim that vocational training has any particular capability of reducing recidivism. (Dickover, *et al.*, 1971, quoted in Greenberg, 1977.)

Such findings have led others to challenge the basic premise on which these programs are based. Martinson (1974:28), after his review of evaluations of institutional educational and vocational training programs concludes:

> It is possible, then, that skills development programs fail because what they teach bears so little relationship to an offender's subsequent life outside the prison...one can be reasonably sure that, so far, educational and vocational programs have not worked. We don't know why they have failed. We don't know whether the programs themselves are flawed, or whether they are incapable of overcoming the effects of prison life in general. The difficulty may be that they lack applicability to the world the inmate will face outside of prison. Or perhaps the type of educational and skills improvement they produce simply doesn't have very much to do with an individual's propensity to commit a crime.

The medical model assumes that an offender's criminality may be caused by a psychological or personality disorder amenable to treatment through individual or group therapy. This review was unable to uncover any adequate study (or reference to such a study) using individual therapy with adults as subjects. With respect to group counseling, Lipton, *et al.* (1975), report of a series of California findings (Harrison and Mueller, 1964) that a stable group counseling experience (the same group leader for at least one year) was associated with lower recidivism rates after a one-year follow-up period. In the same established (existing for longer periods) programs, however, and after a two-year follow-up, those having stable group counseling experiences did not do significantly better than those in unstable groups. Thus, while some modest success was claimed for this program, it seemed to wear off shortly after release; also, established programs entrenched in institutional routine seem to be less effective than newer programs.

Greenberg (1977) cites two studies of the group therapy provided inmates at the California Medical Facility at Vacaville. The first of these studies (Jew, *et al.*, 1972) involved inmates diagnosed as mentally ill (epileptic, drug addictive, or mentally abnormal). The 257 such inmates who participated in stable group counseling relationships were matched according to base expectancy scores with a like number of nonparticipants. For the three-year period following release, the percentage of individuals remaining on parole was, first year, 74 percent and 67 percent; second year, 55 percent and 51 percent; and third year, 46 percent and 44 percent for the experimental and control groups, respectively. Each difference is substantively small and none is statistically significant.

A second study (Jew, *et al.*, 1975) followed a similar procedure for 736 group therapy participants and obtained similar results. Although significant differences were claimed, these differences are substantively small (first year, 51 percent and 44 percent; second year, 36 percent and 30 percent). In addition, program participants were selected for their motivation to change their behavior, the selection criteria thus confound results and limit generalizations.

In a rare example of methodologically sound correctional evaluation, Kassebaum, *et al.* (1971), used an experimental design to assess group counseling at California Men's Colony East, a medium-security institution. This evaluation design was implemented concurrently with the opening of the institution and allowed for the random assignment of newly admitted inmates to one of five treatment or control groups. The authors concluded that (regardless of the existence of a stable counseling relationship) participation in group coun-

seling did not reduce inmate hostility toward staff, the number of disciplinary infractions in the institution, nor the parole violation rate.

The conclusion seems indisputable. In spite of wide correctional emphasis, group counseling appears to have failed to demonstrate its rehabilitative efficacy.

THE EFFECTIVENESS OF PROBATION[5]

Prior to passing judgment on the effectiveness of imprisonment in reducing recidivism, we must compare this strategy with other alternatives. Several studies have attempted to compare the recidivism rates of incarcerated offenders with similar offenders given probationary sentences.[5]

Babst (1965) in his analysis of standard probation supervision and imprisonment (and subsequent parole) of Wisconsin felony offenders found that probationers had a significantly lower violation (technical violations as well as reconvictions) rate, 29 percent, than parolees, 39 percent. Unfortunately, this difference is misleading: It arises from the fact that among first offenders those sentenced to probation had a failure rate that was significantly lower than those sentenced to prison (25 percent compared with 33 percent). There was little difference in recidivism rates between those having one prior felony (42 percent for probationers and 44 percent for parolees) and those having two or more such convictions (52 percent for probationers and 49 percent for parolees). Regardless of whether they are sent to prison or given probation, first offenders have a lower violation rate than recidivists. This relationship holds when controls are introduced for the type of offense and the marital status of the offender. However, the total violation rate was influenced more by the offense classification than by the number of prior offenses, marital status, or sentence to probation or prison (Lipton, *et al.*, 1975).

Beattie and Bridges (1970) analyzed the recidivism of individuals sentenced to jail and probation from superior court in California's thirteen largest counties. These authors report a significantly higher "success rate" after a one year follow-up for probationers (66 percent) compared with those sentenced to local jails (49 percent), controlling individually for sex, age, prior record, type of offense, and county (Levin, 1971). Other findings from the Beattie and Bridges study tend to confirm those reported earlier. Regardless of jail or

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[5] In addition to previously cited reviews, see Levin (1971) for a review of studies evaluating the effectiveness of probation.

probation assignment, the greater the number of prior convictions the more likely the individual is to repeat, and the older the offender is at the time of release the less likely he is to become a recidivist (Levin, 1971).

Hopkins (1976) employed a different strategy in his study of the relative effects of probation and imprisonment. By focusing on the differential sentencing patterns of Connecticut judges he was able to isolate a group of offenders sentenced by a harsh judge to imprisonment who, had they been sentenced by a more lenient judge, would have been placed on probation. In matching these incarcerated offenders with a group of individuals receiving probation, Hopkins discovered that those incarcerated had a recidivism rate of 70 percent, compared with 32 percent for those receiving probation. The author cautions the reader not to make wide generalizations from these findings—only a small number of observations were available (11); hence, these estimates may vary a great deal from actual probabilities.

These studies seem to indicate that, in general, probation is more effective than incarceration in reducing recidivism. Nevertheless, several offender characteristics are strongly associated with success (e.g., age, prior offenses). In addition, there may be other factors causing this apparent relationship between recidivism and treatment. In comparing probationers and parolees, it must be remembered that these two groups are being supervised (in most cases) by different agencies. Any difference in philosophy, policy, or operation of these agencies may account for differential rates of success. Thus, differences in the recidivism rates of probationers and parolees may be a consequence of "system" differences rather than any behavioral change on the part of the subjects (Lipton, *et al.*, 1975).

A most serious problem that arises in attempting to assess the relative effectiveness of probation as compared with incarceration is the comparability of subjects. That is, even though care is taken to match subjects on crucial variables, a difference in their pretreatment probability of recidivism may cause apparent differences to emerge. This issue leads Levin (1971:30) to state that:

> This general finding of lower recidivism rates for those granted probation, even when these other factors are controlled, does not necessarily indicate that the lower rates are a function of this type of treatment. Instead, this relationship may be largely an artifact on the court's decision making process. It is possible that those granted probation have lower recidi-

> vism rates because, first, those individuals with "favorable" offenses and characteristics (e.g., the absence of a prior record) are generally granted probation and, second, those individuals with these "favorable" offenses and characteristics are most likely to have lower recidivism rates.

Martinson (1974:42) states this issue more forcefully:

> ...the personal characteristics of offenders—first offender status, or age, or type of offense—were more important than the form of treatment in determining future recidivism. An offender with a "favorable" prognosis will do better than one without, it seems, no matter how you distribute "good" or "bad," "enlightened" or "regressive" treatments among them.

Although these studies may suffer from methodological weaknesses, it appears that the fact of going to prison (as opposed to being placed on probation) is of more importance in determining future recidivism than how long the offender is incarcerated, or what treatments he experiences while in prison.

A number of other investigations have studied the effect of the "intensity" of probation supervision. Only one study (Lohman, 1967) involved a random assignment of subjects to different levels of supervision. The adult federal probationers involved in this study were assigned to either "intensive" supervision (20-man case loads with an average of 6.7 contacts with the probation officer per month), "ideal" supervision (50-man case loads with 2.7 contacts), or "minimal" supervision (contact only when initiated by the offender, an average of .48 contacts per month). Findings suggested a higher violation rate for those receiving intensive supervision (37.5 percent) than those receiving ideal (24 percent) or minimal (22 percent) supervision.

This violation rate, however, includes both new offenses and revocations for technical reasons. Since technical violations involve the decision of the agency to revoke probation or parole, this measure is also contaminated with policy effects. Upon closer scrutiny of the above findings, an interesting distribution of the reasons for revocation emerges. As intensity of supervision increases, the proportion of offenders whose parole was revoked for the commission of a

new offense decreases (minimal, 22.2 percent; ideal, 21.6 percent; intensive, 15.6 percent) and the proportion involved in technical revocations increases (minimal, 0; ideal, 2.7 percent; intensive, 21.9 percent). Such a finding may suggest the relevance of the "policy effect" phenomenon; but it also raises the issue of whether the apparent reduction in the rate of new offenses is worth the cost of the increase in technical violations (Lipton, *et al.*, 1975).

Is there something about the nature of intensive supervision apart from the effect of treatment that influences the outcome? Evaluations of other intensive supervision projects suggest limitations in our ability to assess the impact of community supervision.

Although this review is primarily concerned with programs for adult offenders, the evaluation of several programs designed to deliver probation services to juveniles is instructive. The Community Treatment Project (CTP), a program developed in California in the early 1960s, attempted to group juvenile offenders according to their interpersonal maturity level and to match the groups with the prescribed treatment methodology. Subjects were assigned to either an institutional or community treatment program. The community phase of the program emphasized extremely small case loads, approximately 10 youthful offenders per probation officer. From initial reports, the Community Treatment Project was proclaimed an immediate success; after fifteen months, 30 percent of the male experimentals had violated parole, compared with 51 percent of the control group. After 24 months this difference remained 43 percent to 63 percent in favor of the experimental group.

Once again we must be skeptical because the violation rate contains both new offenses and technical violations. On closer examination, other investigators have found that the probation officers working with the experimentals adopted a different revocation policy than their colleagues working with the control group (Robinson and Smith, 1972; Martinson, 1974; Lipton, *et al.*, 1975; Lerman, 1975). Although it appears that the experimentals had a lower failure rate, the experimentals actually committed more offenses per offender than the control group (an average 2.8 offenses for the experimental boys compared with 1.6 offenses for the control boys). Some observers have attributed this finding to increased supervision; that is, as the contact between the probation officer and the offender is intensified, a greater number of offenses are discovered by the supervisor (Robinson and Smith, 1975). However, if this were the case, one would expect the control group to have had a higher success rate than the experimentals. Martinson (1974:44) indicates that what was found:

> ...was not so much a change in behavior of the experimental youths as a change in the behavior of the experimental probation officers, who knew the "special" status of their charges and who had evidently decided to revoke probation status at a lower than normal rate. The experimentals continued to commit offenses; what was different was that when they committed these offenses, they were permitted to remain on probation.

Additionally, this experimenter effect may not last long.[6] Johnson's (1962) study of the effects of intensive supervision allows policy and treatment effects to be separated. As in the Community Treatment Project studies, an experimental design was employed to assign subjects to small case loads, but in this evaluative effort the experiment was performed at two separate times, on two separate populations. The first time the experimental group had a slightly lower recidivism rate; the second time it actually did worse than the control group. In addition the advantage initially enjoyed by the first experimental group disappeared after 18 months. From this evidence, Martinson (1974:45) concluded:

> What was happening in the Johnson experiment was that the first time it had been performed—just as in the Warren study (CTP)—the experimentals were simply revoked less often per number of offenses committed, and they were revoked for offenses more serious than those which prompted revocation among the controls. The second time around, this "policy" discrepancy disappeared; and when it did, the "improved" performance of the experimentals disappeared as well. The enthusiasm guiding the project had simply worn off in the absence of reinforcement.

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[6] Political or ideological pressure for program success may, however, extend the initial period of apparent success. See Takagi (1967) for a discussion of how political pressure can be used to give the appearance of program success.

> One must conclude that the "benefits of intensive supervision for youthful offenders may stem not so much from a "treatment" effect as from a "policy" effect—that such supervision, so far as we now know, results not in rehabilitation but in a decision to look the other way when an offense is committed.

Such a finding is not without precedent in correctional research; after showing initial success, programs tend to become institutionalized in the traditional correctional apparatus, so that their effectiveness diminishes. Murton (1976) indicates that efforts at prison reform often begin in a direction of positive change but forces opposing such alterations (both internal and external to the prison) thwart meaningful change. In his summary of the effectiveness of institutional counseling programs, Martinson (1974) concludes that these programs seem to work best when they are new.

Another California project, the Special Intensive Parole Unit (SIPU), involved a 10-year effort to ascertain the effect of reduced case load size on the recidivism of adult parolees. Despite this monumental effort, the project discovered that reducing case loads made little impact on recidivism. (Robison and Smith, 1972; Lipton, *et al.* (1975). In their reanalysis of the data from this project, Lipton *et al.* (1975), discovered an interesting outcome apparently precipitated by differing parole revocation policies. In the northern district of the state (San Francisco), parolees had a significantly lower rate (24 percent compared with 31 percent) than those supervised in the southern region (Los Angeles). There was little difference in the arrest rates for new offenses, consequently this discrepancy appears to be a product of differing return to prison rates. Contrary to previously noted "policy effects" that served to lower failure rates by a more lenient revocation policy, in phase III of this project a more harsh return to prison philosophy was associated with a lower rate of new offenses. In the northern region, a program of high contact between parole officer and his parolees (35-man case loads) when combined with a policy of high return to prison produced a significantly lower recidivism rate than a program in the southern region with the same level of intensity but with a more lenient revocation policy. Lipton, *et al.* (1975), state that this combination created a "realistic threat" that was effective not through its rehabilitative nature but through a deterrence mechanism. Although the commission of new offenses may be reduced through such a policy, there is a social and economic cost in-

volved in the revocation of parole for relatively minor (technical) violations (Lipton, *et al.*, 1975). In addition, the effectiveness of this policy could be the result of its incapacitative rather than its deterrent effect; reincarcerating marginal parolees shortens their "at-risk" period.

Due to the failure to separate policy and treatment effects, the unknown relationship between them, and the failure of many studies to attempt to differentiate between new offenses and technical violations, assessment of the effectiveness of probation (and parole) is difficult. Similar to our conclusions regarding imprisonment, it appears that the fact of a probation disposition and the characteristics of the individual offender are more important in determining future criminality than the type of treatment strategy that is employed.

THE EFFECTIVENESS OF COMMUNITY-BASED ALTERNATIVES

While we have not discovered that probation is any more effective than imprisonment in reducing recidivism, there is little indication that it is any less effective. Martinson (1974:48) indicates that:

> even if we can't "treat" offenders so as to make them do better, a great many of the programs designed to rehabilitate them at least did not make them do worse...the implication is clear: that if we can't do more for (and to) offenders, at least we can safely do less.

Floyd Feeney (1976:93) makes a similar point in his response to Paul Lerman's critique of the Community Treatment Project.

> ...the project remains one of immense significance. It played an important historical role in demonstrating that many offenders could be safely released to the community. The fact that these offenders did not do better than their counterparts who had been incarcerated seems less important in my view than the demonstration of no worse performance.

Recently, progressive correctional administrators have encouraged a transition to a community-based emphasis in correctional practice.

The virtues of programs of diversion, work release, community treatment centers, and halfway houses have been extolled by a number of national commissions and correctional leaders (President's Commission, 1967; National Advisory Commission, 1973). According to advocates, not only do such programs reduce recidivism by maintaining the offender's positive ties to the community, they are also more humane and economical. Although research in this area is not extensive, a number of preliminary findings and crucial issues have emerged.

Earlier, we used Paul Lerman's study of California's Probation Subsidy Program and the Community Treatment Project of the California Youth Authority to illustrate how community-based treatment programs can actually result in an increase, rather than the intended decrease, in social control. Other community-based alternatives have been found to exhibit similar behavior.

Traditional diversionary alternatives seek to intervene in the criminal justice process prior to a formal adjudication of guilt and to divert the offender from what are seen as negative consequences of involvement with the criminal justice system. Informal processing is instituted in order to provide

> a means of (1) reducing the volume of persons going through the entire process of arrest, arraignment, trial, conviction, and sentencing while at the same time (2) "doing something" to interrupt the cycle of recidivism among certain offenders without imposing the handicap of a criminal record (Klapmuts, 1974:110).

Thus, this type of process is seen to have therapeutic, economic, and humanitarian justification. For this program to fulfill its economic and humanitarian goals, two basic and often overlooked program assumptions must be met. First, those clients participating in the diversion alternative must be those for whom the program was intended, i.e., those who would otherwise have been more harshly treated. Second, the total cost of time spent in community treatment must be less than that of institutionalization.

Some diversion programs operate in the belief that many individuals who are presently incarcerated could more safely and more efficiently be handled in the community. Thus, it is maintained that present levels of incarceration are unnecessary, and a certain type of offender could be diverted to community treatment. Advocates of

other types of diversion argue that official processing by the criminal justice system is in itself criminogenic, and certain types of offenders would benefit from a more informal process in which prosecution of the offense is held in abeyance while treatment is administered under an informal type of probation agreement. Both types of programs recommend less harsh forms of criminal justice processing.

Other preliminary research findings suggest that program operation may often vary from these assumptions. In his study of the Vera Institute's widely heralded Manhattan Court Employment Project, Zimring (1974) found that program participants were subjected to a greater degree of control than they would have been had they, alternatively, been processed in the usual manner. Thus, instead of selecting participants who would most likely have been prosecuted, the program served those who most likely would have received more benign dispositions in the pre-project period. With regard to diversion of youth from formal processing, Blomberg (1977) discovered a similar trend. Norval Morris (1974:10) warns us of this potential by-product in the effort to make the criminal justice system less oppressive:

> The present danger is that the regulatory and licensing techniques that will supplant the over-reaching criminal law in the areas of complaint-less crimes, and the diversionary techniques that will protect offenders from the greater rigors of imprisonment, may lead to a substantial extension of social control by official state processes rather than a reduction.

Morris' fears are apparently borne out by the findings of a recent nationwide assessment of juvenile correctional alternatives:

> A state can arrive at a high level of deinstitutionalization either by adding to the number of offenders in community settings, or by reducing its institutional population. Our findings suggest that deinstitutionalization is more often achieved through the first approach (Vinter, 1975).

Thus, although it is conceivable that participants in diversion programs may benefit from the services that are provided, there is

reason to doubt that these services are in fact delivered to the intended target population.

We also recall that diversion programs are justified on the basis of their economic advantages over traditional criminal justice practices. It is apparent that diversion is less expensive than traditional court and correctional alternatives.[7] However, in many instances, the real alternative to conventional court processing in the absence of diversion may be case rejection by the prosecutor; in this event this additional processing results in increased expenditure. Also, daily expenditure per offender is less in community types of treatment than in custody settings, but if an individual spends more time in community programs than he would alternatively have spent in the institution, these cost savings may be attenuated. Such a process occurred in California's Community Treatment Project. Pre-program savings were calculated on the basis of each youthful offender spending 8 months in intensive community supervision. However, after program implementation the supervisory period was extended to 36 months, thereby eradicating the economic advantages of this approach (Lerman, 1975). While cost savings are possible in diversion programs, they will be realized only if program participants would normally have gone to a more expensive alternative and if the cost of the time that would have been spent in the institution is greater than the cost of time spent in the alternative treatment.

Our major concern in this chapter has been the effectiveness of various correctional alternatives in the reduction of recidivism. Let us return to this issue by reviewing studies concerned with this aspect of community-based treatment.

As in other areas of correctional evaluation, the research that has concerned community-based correctional alternatives suffers from a number of methodological weaknesses. Primary among those weaknesses is the lack of an unbiased (i.e., random) selection process for program participants. If those selected for program involvement are, in fact, individuals who would not have been in the justice system previously, then recidivism comparisons with institutional or formal probation populations are clearly invalid. Second, the enthusiasm and the rhetoric that often surround the creation of diversion or community correctional alternatives often discount the advisability of research on a program that makes such "good sense" and is "known

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Since the percentage of cases terminated through guilty pleas is uniformly high, the apparent savings from reduced court time are most likely exaggerated.

to work."[1] Two independent assessments (Rovner-Pieczenik, 1974; Mullen, *et al.*, 1974) of 15 of the best-known and funded pretrial diversion projects both concluded that although many projects claimed increased employment and reduced recidivism these statements are of questionable validity due to inadequate research designs.

The effectiveness of another type of community-based correctional program, work release, has been evaluated more rigorously. Although many work release programs operate from institutional settings, they emphasize attributes (decreased recidivism, economic advantages to both the client and society, and utilization of community resources) that are common to community-based correctional projects. While work release programs may provide certain economic advantages (e.g., when the inmate pays for his own room and board), there is little evidence of its rehabilitative effectiveness.

Several studies of work release in California jails (Rudolf and Esselstyn, 1973; Jeffrey and Woolpert, 1975) offer modest claims of success. Rudolf and Esselstyn (1973) matched 100 program participants with similar nonparticipants and found that those not on work release were rearrested twice as often as program participants, 23 percent had no arrests and 43 percent had no convictions, compared with the control groups in which 13 percent had no arrests and 23 percent had no convictions. Unfortunately, these differences declined over time. In addition, California judges would often sentence an individual directly to a work release program thereby allowing him to keep his present job. Jeffrey and Woolpert indicate that one-half of their work release group received placements in this matter; yet, there was not effort to analyze the influence of this potentially important factor.

Also employing a matching procedure, a study of both felony and misdemeanant work release participants in Washington, D.C. presents inconclusive results. Although program participants had a failure rate lower than nonparticipants (18 percent to 30 percent), when one also includes all those exposed to work release treatment who did not complete the program (i.e., in-program failures), the failure rate for work releases exceeds that of the controls (Adams, 1975).

Another matching study of a work release program in North Carolina discovered no significant differences in rearrest or reconviction rates between the work release and the control group (Witte, 1975). A Massachusetts study (LeClair, 1973) compared inmates on

[1] See Roesch (1978) for an excellent descriptive account of the development of such a project and the systematic exclusion of a research component from project operation.

work release with those who were denied admission to the program, as well as with those who would have been eligible for work release but were discharged prior to program implementation. It found virtually identical recidivism rates (Greenberg, 1977).

Perhaps the strongest research design used in work release evaluations was employed by Waldo and Chiricos (1977) in their assessment of the work release program in Florida. In this experimental study, program eligibles were randomly assigned to participate either in work release or routine prison assignments during the final six months of their sentences (a statutory maximum). Using a wide variety of recidivism measures, the authors demonstrated that participation in work release has little or no bearing on the likelihood of post-release success.

In conclusion, work release programs have proliferated widely and may be effective in a fiscal sense, but they have generally failed to demonstrate their effectiveness as a rehabilitative mechanism in terms of recidivism.

Other community-based correctional alternatives have not been as thoroughly researched. Few rigorous evaluative attempts have been made in the study of halfway houses or other community-based treatments. Recently, Fishman (1977) has attempted to evaluate the rehabilitative success of community-based correctional efforts in New York City. Eighteen projects providing rehabilitative or diversionary services were included in his analysis. Fishman (1977:299) concluded that "rehabilitation by the projects was considered to be a failure"; many offenders recidivated by committing serious crimes. Citing a finding of an overall recidivism rate of 41 percent, Fishman concluded that the diversion and community-treatment approach should be abandoned.

Although Fishman is to be commended for a thoughtful analysis of such a difficult problem, methodological problems lead us to draw a more cautious conclusion. Only 18 of 53 operating projects were included in the analysis, and the selection process was not systematically performed according to predetermined criteria. In addition to the bias in selection of programs, program participants apparently were not selected so as to be representative (Collins, 1978). Perhaps the major weakness, and one which severely limits our ability to draw meaningful conclusions from this analysis, is the lack of a method by which to compare the level of recidivism that would have been expected had participants in fact not participated in these projects (Zimring, 1975). While debate over the Fishman study continues,[9] we are as yet

[9] See Collins (1978) for a critique of Fishman's work.

unable to speak definitively of the effectiveness of community-based alternatives; however, it appears safe to state that the rehabilitative potential of this alternative may have been overestimated by initial proponents.

As with other correctional innovations, we have not found evidence that community-based correctional treatments are any more or less effective. However, Martinson (1974) warns us not to confuse the recidivism rate with actual levels of crime. That is, even if the recidivism rate remains unchanged by these programs, as more offenders are placed in the community, the number of crimes committed will increase. For example, if the recidivism rate is 40 percent and a program is established that will release twice as many offenders to community supervision with no expected changes in the recidivism rate, then we might expect twice as many crimes to be committed. In our search for "effective treatments," we should not lose sight of the social cost involved both to the offender and to the community in choosing between correctional alternatives.

SUMMARY OF EMPIRICAL FINDINGS

Summarizing available knowledge on the rehabilitative effects of corrections is a difficult task. Certainly additional studies could have been included in this review; however, their inclusion would not substantially alter our conclusions. For the most part, we have found that correctional efforts, as currently administered, have demonstrated little rehabilitative effect on their participants. Such a conclusion does not appear as an isolated or unfounded proposition. Other reviews of correctional treatment have reached similar conclusions. From Bailey's (1966:160) early conclusion that

> it seems quite clear that, on the basis of this sample of outcome reports with all of its limitations, evidence supporting the efficacy of correctional treatment is slight, inconsistent, and of questionable reliability.

to Robison and Smith's (1971:79) view that

> there is no evidence to support any program's claim of superior rehabilitative efficacy.

to Martinson's (1974:25) controversial statement that

> with few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism.

to Greenberg's (1977:140) recent conclusion that

> much of what is now done in the name of "corrections" may serve other functions, but the prevention of crime is not one of them. Here and there a few favorable results alleviate the monotony, but most of these results are modest and are obtained through evaluations seriously lacking in rigor. The blanket assertion that "nothing works" is an exaggeration, but not by very much.

There appears to be a growing consensus that rehabilitative efforts in corrections have been unsuccessful. The problematic nature of such a conclusion lies not in its assertion of negative findings, but instead in its implications for public policy. While some have interpreted these findings as signaling the death of the rehabilitative model, others have called for a redoubling of efforts and less lofty correctional expectations. The following sections will explore various interpretations of these findings.

IMPLICATIONS OF NEGATIVE FINDINGS OF TREATMENT EFFECTIVENESS

What does it mean to state that correctional treatment programs have failed to rehabilitate offenders? What interpretations and conclusions are to be drawn, and what policies are to be implemented, as a response to such findings? Although negative findings have appeared with a great deal of consistency, there are differences in the interpretation and the policy implications of such findings.

As previously noted, definitional and conceptual confusion plague the evaluation of correctional treatment. The lack of clarity with respect to the proper goals of the penal sanction (i.e., retribution, incapacitation, deterrence, or rehabilitation) is especially problematic. A single correctional treatment involves elements of each of these goals, and to say that corrections is ineffective as a rehabilitative technique says nothing about its performance in these other areas.

Even if a correctional program is deemed "effective," it cannot necessarily be said that this effectiveness results from rehabilitation, for this apparent reformation may be a product of special deterrence or other inhibiting factors resulting from incarceration.

Aside from this confusion over correctional goals, the actual meaning of the term rehabilitation is imprecise. If we take rehabilitation to mean the "correction of a personal deficiency," then it is conceivable that one may return to crime in spite of being rehabilitated. That is, correction of individual inadequacies may have little to do with the individual's propensity to commit crime. Conversely, if rehabilitation is seen as the absence of future criminality (as measured by low recidivism rates), then much of this reformation could be accounted for by factors other than correctional treatment. Ex-offenders may lead law-abiding lives without the benefits of correctional counseling or increased vocational or educational abilities (Tittle, 1974). Thus a post-correctional, crime-free life may be independent of correctional treatment.

In addition, how do we interpret the findings that correctional treatments are "inferior" to other rehabilitative techniques. Such a statement begs the question "Inferior to what?" To state that the outcome of one correctional alternative is not significantly different from another does not demonstrate that either program is ineffective (nor does it imply that either is effective). We generally lack knowledge of what happens when offenders receive no intervention whatsoever. Rarely can experiments be designed that would allow this important element to be addressed. It is inconceivable to think of randomly assigning convicted offenders to conditions of imprisonment, probation, and no treatment. Such experimentation would ethically be intolerable, yet it is the only method to answer this question in a final, definitive way.

Thus, not only do we lack an unambiguous measure of treatment effectiveness, but we also lack a relative standard by which to judge treatment effectiveness. Consequently, our position is similar to the age old dilemma of "is the glass of water half empty or half full?"

Some have called for a termination of treatment efforts based on the absence of a finding of treatment superiority. Fishman cites the findings of Lipton, *et al.* (1975) as evidence that efforts at rehabilitation should be abandoned and a more punitive philosophy adopted.[10] Citing similar findings, Tittle (1974:390) indicates that since the majority of inmates do not return to prison, and most

[10] Wilks and Martinson (1976) have responded to this conclusion and indicated their displeasure at what they see is an unwarranted extension of their findings.

parolees do not return to serious crime, "prisons do a remarkably good rehabilitative job."[11]

Others have responded to Martinson's (1974) conclusion by calling for a redoubling of rehabilitative efforts. In fact, some cite the work of Lipton, *et al.* (1975), as indicating such efforts are in order. Following the reference in this work to certain types of individuals as "treatment amenables," Palmer (1975) calls for further refinement of the individual treatment model by employing a more careful matching of the type of offender with the type of treatment. According to Palmer, the use of gross measures of recidivism implies an unwarranted search for a "cure-all" type of correctional treatment. Palmer (1975) and others (Warren, 1977; Halleck and Witte, 1977) hold that this is too rigid a standard of success. A correctional treatment program may be effective for specific types of offenders, but not for others; however, using an overall measure of recidivism as a success criterion would not reflect this difference. Referring to this position as the "differential effectiveness perspective," Warren (1977) indicates that to expect one treatment to be effective with all offenders contradicts the basic premise of the individualized treatment model.

> The rebuttal being considered here is that treatments to be effective for some, need not be effective for all, and that effective treatment may be best identified by asking which type of treatment method is most effective with which type of offenders, and under what conditions or in what type of setting,[12] (Warren 1977:360.)

In this regard, Halleck and Witte (1977) argue that while "personality-changing" types of correctional programs have not demonstrated success, those efforts emphasizing "opportunity-changing" activities appear to have more promise for future development particularly for offenders convicted of economically related crimes.

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[11] Following our previous argument, it is impossible to determine if these results are a consequence of rehabilitation, deterrence, or incapacitation.

[12] Martinson (1976) responds to Palmer's criticism and the suggestion of more careful matching of offenders and treatments by indicating that to think solely in terms of recidivism rates and treatment effects is to ignore the larger and substantively more important issue of the effect of correctional efforts on the overall crime rate. Martinson further comments that even if Palmer's suggestions are to be followed, we presently know very little of what methods work with what offenders.

In spite of these optimistic positions, the rehabilitative model is unlikely to soon regain the prominence it once enjoyed. Aside from the debate over the effectiveness of correctional treatment, a number of other issues have arisen which question the viability of the continuation of this approach. These objections to current correctional practices center around the individualized treatment model and the consequences of its implementation.

To say that criminal offenders will be treated individually implies a discrepancy between the type and duration of sanctions to be imposed on offenders convicted of similar crimes under similar conditions. Such disparity has been the focus of numerous recent criticisms of the rehabilitative model and forms the basis for current reform proposals. At the center of this controversy is the indeterminate sentence. This practice is seen as precipitating disparities in both the judicially imposed sentence as well as the actual time served.

Under the rehabilitative philosophy, a number of sentencing options are usually available to the judge. Since judges differ in their individual sentencing philosophy,[13] similar cases may receive widely disparate dispositions. Without sentencing guidelines indicating which aspects of the sentencing decision are to receive the greatest attention and which are to be excluded, the predilictions of each individual judge bear sharply on the decision rendered.

Not only is there great variation in the sentences imposed, but there is also much disparity in time actually served in prison. In most states commitment to the state correctional agency is in the form of an indeterminate sentence, often with a large interval between the legislatively determined minimum and maximum terms. Release of the offender from such a sentence is to occur when the parole authority determines that the individual has been sufficiently rehabilitated. Several adverse byproducts of this practice have been noted.

The first of these concerns the psychological effect on those serving such sentences. Upon entering the institution, an individual does not know when he is to be released (a frustrating situation in itself), and he is unsure of what is necessary for his release. Just as the sentencing judge lacks guidelines specifying the variables to be emphasized in sentencing, the inmate and parole board often lack a framework specifying release criteria. In the Kassebaum, *et al.* (1971), study of institutional treatment over one-fourth of the interviewed inmates did not know what was the most important thing that would help them get

[13] See Gaylin (1974) for an in-depth descriptive presentation of differing sentencing philosophies of judges.

paroled, and over one-half felt that the most annoying thing about doing time was the "never knowing system of the indeterminate sentence".

In addition to the psychological aspects of the indeterminate sentence, evidence suggests that time actually served has increased under this practice. Rubin (1973) indicates that a higher percentage of inmates serve shorter terms under a determinate sentencing system. Likewise, the American Friends Service Committee (1971) reports that the average time spent in California institutions increased under the indeterminate sentencing structure. Morris (1974) indicates that such findings should come as no surprise. If wide discretion is granted to parole boards, and if we tend to evaluate their performance on the absence of serious crime by those that they release, then these decisions will, quite naturally, be conservative.

A basic and often unexamined assumption of the rehabilitative model concerns early release from custody. While this practice states that offenders will be released at the peak of rehabilitative effectiveness, it is doubtful that we have either the knowledge or the ability to predict either when this time occurs or the future success of individual prisoners. Francis Allen (1959) noted the problematic nature of this assumption, and there is little evidence to suggest that our predictive abilities have improved in the last twenty years.

Using either clinical or statistical methods of prediction matters little in our ability to avoid a high rate of false positives, that is, the retention of "safe" offenders in a correctional setting. Wenk, *et al.* (1972), report that a parole decision maker using past violent offenses as his sole predictor of future violent behavior would be wrong in 19 out of 20 such predictions. Using statistical prediction models incorporating several variables associated with violent behavior improves our predictive ability, but only to a factor of eight-to-one, false-to-true positives (Wenk, *et al.*, 1972). That is, using these statistical techniques for every one correct prediction of violent behavior there will be eight mistakes. To prevent one violent crime, nine individuals must be incarcerated.

Using extensive testing and examinations by a team of psychiatrists, psychologists, and social workers, Kozol, *et al.* (1972), were unable to reduce the high rate of false positive predictions of future violent behavior. With 65 percent of those identified as dangerous not committing such an offense, Kozol and his colleagues were wrong in two of every three predictions of dangerousness.[14] Although we are well

[14] These outcomes are not directly comparable with those of Wenk, *et al.*, since Kozol's estimates came from a population that was more prone to violent behavior.

aware that some offenders will recommit violent offenses, we are generally unable to predict which individuals will do so. We are unable to improve to any significant degree on the simple prediction that none of the offenders will commit violent acts in the future. In the area of prediction and prevention of future violent criminal behavior, a revision of the old adage may be in order to indicate that it requires a "pound of detention to replace an ounce of cure."

PROPOSALS FOR CORRECTIONAL REFORM

A large amount of the current criticisms of correctional practice has concerned the issue of the rehabilitative function of this aspect of the criminal justice system. We have seen that the effectiveness, humanitarianism, and methods of the rehabilitation effort have all been challenged. Consequently, reform proposals have centered around the revision of correctional expectations and a deemphasis of the rehabilitative function. A major factor in this debate is the purpose of the penal sanction and the philosophy that guides the sentencing of criminal offenders. The once heralded exemplar of progressive thinking about sentencing, the Model Penal Code, has been the focus of much of this criticism. Section 7.01 of the draft version of the Model Penal Code proposes the following conditions under which a sentence of imprisonment should be imposed:

> (a) There is undue risk that during the period of suspended sentence or probation the defendant will commit another crime,
>
> (b) The defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution, or
>
> (c) A lesser sentence will depreciate the seriousness of the defendant's crime (quoted in Morris, 1974:77).

Two aspects of the first of these conditions are especially troublesome for those espousing sentencing reforms. The calculation of "undue risk" implies a predictive ability that we do not presently possess. The second, more fundamental objection to this proposal is that it authorizes punishing an individual for what he might do rather

than what he has done. This extremely positivist statement "sticks in the craw" of those reformers urging a return to classical principles. The Committee for the Study of Incarceration in outlining their guiding assumptions notes that,

> to sentence people guilty of similar crimes to different dispositions in the name of rehabilitation—to punish not for act but for conditions—violates, this book argues, fundamental concepts of equity and fairness (Von Hirsch, 1976:xxxviii).

Von Hirsch (1976:6) notes:

> To our surprise, we found ourselves returning to the ideas of such enlightened thinkers as Kant and Beccaria—ideas that antedated notions of rehabilitation that emerged in the nineteenth century. We take seriously Kant's view that a person should be punished because he deserves it. We argue, as both Kant and Beccaria did, that severity of punishment should depend chiefly on the seriousness of the crime. We share Beccaria's interest in placing limits on sentencing discretion. If returning to these concepts seems a step into the past, it may be some consolation that the ideas underlying the Bill of Rights are no younger.

Criticism of the second and third principles of the Model Penal Code proposal form the basis for alterations. Typically, opponents reject rehabilitation as a justification for punishment, demanding instead that the seriousness of the crime (as implied by the third principle) be of primary concern.

Proposing what he terms the "justice model," David Fogel (1975:204) insists that we revise our view of the purpose of the prison, arguing that

> The period of incarceration can be conceptualized as a time in which we try to reorient a prisoner to the lawful use of power. One of the more fruitful ways the prison can teach non

> law-abiders to be law-abiding is to treat them in a lawful manner. The entire effort of the prison should be seen as an influence attempt based on operationalizing justice. This is called the justice model.

There are internal and external aspects of the implementation of such a system. Policies and programs suggested for the administration of a prison under the justice model include inmate self-governance, legal aid and ombudsman services, and revised institutional policies based on a principle of fairness (e.g., policies governing good time and grievance matters). A major focus of Fogel's proposal concerns external system changes that will make justice a reality. Primary among these suggestions is a proposal to abolish the indeterminate for the determinate sentence. Fogel suggests that imprisonment be used sparingly, but when a sentence of incarceration is imposed, it should be for a uniform period of time determined by the seriousness of the offense. While terms of imprisonment would be legislatively fixed, judges could specify matters in aggravation that would raise the term of incarceration; or matters in mitigation that would shorten the sentence. In no instance, would this alteration be allowed to exceed one-third of the fixed term.

Von Hirsch (1976), writing for the Committee for the Study of Incarceration, emphasizes similar concerns in advocating a sentencing philosophy based on "just deserts," with the sentencing decision being determined by the seriousness of the present offense and the number (and seriousness) of previous convictions. Again, a parsimonious use of imprisonment is advocated with commitments being for relatively short (maximum of five years except for murder) fixed periods.

Recognizing the political impracticality of abolishing parole, Norval Morris (1974) has proposed a "middle range" alternative. Morris advocates a legislatively determined maximum sentence (based on desert), but judges would be free to cite mitigating circumstances that would warrant a lesser penalty. In an attempt to formulate a "common law of sentencing," Morris (1974:60) presents the following conditions that must exist for a sentence of imprisonment to be imposed.

Imprisonment is the least restrictive (punitive) sanction appropriate in this case because:

(a) any lesser punishment would depreciate the seriousness of the crime(s) committed,

(b) imprisonment of some who have done what this criminal did is necessary to achieve socially justified deterrent purposes, and the punishment of this offender is an appropriate vehicle to that end, or

(c) other less restrictive sanctions have been frequently or recently applied to this offender, and

(d) imprisonment is not a punishment which would be seen by current mores as undeserved (excessive) in relation to the last crime or series of crimes.

Thus desert is seen as a limiting constraint, and imprisonment on the grounds of rehabilitation or incapacitation is prohibited.

Although indicating the failure of rehabilitative efforts as they are currently practiced and recommending the elimination of treatment as a justification for imprisonment, Morris does not advocate the abolition of rehabilitative efforts in penal institutions. The fallacy of rehabilitative treatment, according to Morris, has been in its coercive nature, that is, meaningful change cannot occur without a desire on the part of the individual to change. By removing the major coercive aspect of present practice, the link between the length of incarceration and participation in rehabilitative programs, Morris argues that we can establish a system based on "facilitated change" rather than the present "coerced cure." Unlike the previous proposals, Morris would retain the parole apparatus, but he argues that since few prison-related variables (e.g., major infractions) are related to parole success, release dates can be determined shortly after admission to the institution. To this extent, Morris advocates retention of the indeterminate sentence with parole boards continuing to determine the actual length of incarceration.

While the Fogel and Von Hirsch suggestions rely on legislatively

determined sanctions and Morris supports administratively determined sentences, the sentencing guidelines approach (Wilkins, *et al.*, 1978) advocates judicial determination of sentence length. This proposal suggests that for each jurisdiction guidelines be devised that would reflect the average sentence that was imposed in similar cases, with seriousness of offense and offender characteristics as the major determinant of similarity. We return to this proposal in the concluding chapter of this report.

V. CONCLUSION

This report started by making a case for the need to move away from an existing condition of sentencing based on happenstance. We argued that sentencing policy should, instead, be based increasingly on well-established goals and improved criminal justice data. We then proceed to show that the available evidence on incapacitation and deterrence is too ambiguous to provide a basis for sentencing policy, and further, that the existing evidence does not currently provide support for rehabilitation as an effective goal of sentencing policy.

On its face, it would appear that these negative findings betray our recommendation that sentencing be based more on the findings of social research. In fact, however, such research findings have already had a substantial impact on sentencing policy in the United States. The promise of rehabilitation under a policy of indeterminant sentencing simply has not held up under the scrutiny of scientific evaluation. However distressing this may be to those of us who believe in the fundamental goodness of all people and the potential for transformation of the behavior of individuals who violate the law, the knowledge that we have not yet found a formula for rehabilitation that works has, in fact, stimulated a reform in sentencing policy.

However, while this reform is clearly moving away from the policy of indeterminant sentencing, we are left in a quandry about the precise direction that sentencing policy should take. Should we have sentencing guidelines, with some opportunity for the exercise of judicial discretion in sentencing, or should we have presumptive sentences, with little or no such opportunity? Or should sentencing disparities be reduced through the mechanism of the sentencing council? or appellate review?

And regardless of the structure of the sentencing decision process, what should be the fundamental principles on which sentences shall be based? Crime control? Just deserts? How much should we continue to invest in the search for a rehabilitation formula that works?

These questions cannot be answered by social scientists, who are typically not ordained to decide, for example, the extent to which just deserts should be a goal of sentencing.

However, to the extent that crime control is to be a principle on which sentencing policy will rely, social science can continue to contribute to sentencing policy. The techniques of scientific inference have improved steadily, as have criminal justice data. Our estimates of both deterrence and incapacitation are sure to become more definitive than they are at this time. The State of New York can contribute to

this by continuing to improve the quality of its criminal justice data.

Moreover, while social scientists cannot themselves determine a "just" sanction, they can elicit opinions of those who can and thereby assist in drawing a consensus about acceptable sentences. The survey commissioned by this Sentencing Committee is an important step in this direction.

As these inquiries continue, we can do well to acknowledge the obvious: Social research is both limited and useful. It cannot answer all the questions in the controversy about sentencing. But it has already contributed to sentencing policy and will surely continue to do so. For the present, sentencing policy can benefit from the knowledge that the prevailing breadth of social scientific evidence supports neither those who argue for harsher sanctions nor those who advocate more leniency.

APPENDIX A

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