SENTENCING PRACTICES AND ALTERNATIVES TO INCARCERATION IN HAWAII

A Report to the
Hawaii State Legislature

HAWAII CRIME COMMISSION

December 1982

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by the
HAWAII CRIME COMMISSION
State Capitol
Honolulu, Hawaii 96813

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Chairman

December 1981

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This report is respectfully submitted to the Legislature, State of Hawaii, pursuant to Act 16, First Special Session, Ninth Legislature, State of Hawaii, 1977 as amended.

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Purpose.

The purpose of this report is to provide the legislature with an overall assessment of sentencing in Hawaii. A special focus is on alternatives to incarceration. A growing public concern with crime in general and sentencing in particular has led the legislature to amend Hawaii's sentencing laws in recent years. These changes have been directed at particular problems, and have not addressed the entire sentencing process. It is the intent of this report to provide such an overview, and to present information on recent progressive programs elsewhere in the nation.

Method.

Sentencing data, parole release data, and interviews with professional staff in all areas pertinent to sentencing provide the basis for this study. In addition, a study of programs in other states was conducted to gather information on the problems and possibilities of revisions in sentencing practices. This work was supplemented with an extensive review of current literature.

Historical background.

Historically, offenders were punished by either death or exile. Punishment was a utilitarian means of displaying the power of the society. In colonial America, other punishments such as whipping and public confinement in stocks were also used. Lengthy prison terms were not common practice. Only in the 1830's did prisons, renamed penitentiaries, come into widespread use in America. The penitentiary was a revolution

in sentencing, the beginning of the rehabilitation concept. Religiously based, the penitentiary sought to reform the prisoner by isolation, prayer, and honest labor so that he could be returned to society.

The spirit of rehabilitation is still the basis of America's sentencing system today. During the first two decades of the twentieth century, the modern practices of probation, parole, and indeterminate sentence came into use. A move away from this scheme began in the 1970's. Several states have reevaluated their sentencing laws and converted to a determinate sentencing system.

Purposes of sentencing.

The purposes of sentencing are usually divided into four categories--punishment, deterrence, incapacitation, and rehabilitation. Punishment is the imposition of unpleasant consequences upon an individual found guilty of a crime. Deterrence means to "frighten off." The sentencing system hopes to prevent crimes from occurring by imposing sanctions on those who are convicted. Incapacitation refers to preventing offenders from committing further crimes by removing them from society. Finally, rehabilitation means altering the behavior of offenders, through various methods, so that they are no longer inclined to commit crimes. Hawaii's current indeterminate sentencing system is primarily based upon the premise of rehabilitation.

National trends.

Sentencing procedures are in the process of change in many states. The trend is toward determinate sentencing systems with mandatory sentences for specific offenses and a general limitation on judicial discretion. Discretion can be limited or structured through mandatory incarceration sentencing guidelines or parole guidelines. Many such programs are in effect or

being considered in several states at the present time. Minnesota has been a leader in this movement. California has enacted a determinate sentencing scheme with sentences fixed by statute for each specific crime.

Alternatives to incarceration.

A special focus of this study has been alternatives to incarceration. Many jurisdictions across the country have sought to make sentencing more flexible and meaningful by providing their courts alternatives to prison. These include restitution (repaying the victim) and community service (performing useful work for the community). This type of sentence is usually given to first time offenders and persons convicted of less serious crimes. It is both therapeutic and constructive, with most people involved in these sentences showing satisfaction.

Hawaii's sentencing system.

Hawaii currently operates under a hybrid sentencing system. Although the system is basically indeterminate, certain offenders are required by statute to receive mandatory terms of incarceration. Repeat offenders, class A felons, and felons committing certain gun offenses are given mandatory prison sentences. All others are sentenced at the judge's discretion to either a suspended sentence, deferred acceptance of guilty plea, probation, or incarceration for a set maximum term. The parole board then sets the minimum for all those sentenced to prison term and decides on the release date.

There were 593 persons convicted of felonies in Honolulu in 1978. The sentences given these persons generally reflected the seriousness of the crime and the persons's prior criminal record. About 50 percent were given either prison or jail, with the rest receiving probation or suspended

sentences. As most mandatory sentencing provisions were not yet in effect in 1978, there was more judicial discretion. Despite the moderating influence of the presentence investigation recommendations, there appears to have been a certain amount of judicial disparity. Generally, however, those who committed serious offenses and those who had previous records usually went to prison. First time offenders and those who committed minor crimes were usually given a break.

Hawaii's law allows for restitution and community service. Restitution is administered by the Adult Probation Division and is usually a condition of probation. Community service is directed by a volunteer group--Volunteers in Public Service to the Courts. Restitution is used quite often for both felony and misdemeanor offenses. About one-half of those ordered to make restitution payments as part of their probation fulfill that obligation. Community service is used frequently in district court but only rarely for felons. The success rate for community service sentences is high--about 90 percent.

Hawaii's sentencing system lacks cohesion. The condition which has most contributed to this is the absence of a unifying philosophy of sentencing. Another factor has been the dispersal of discretion among many agencies. Inadequate communication and cooperation among agencies has also undermined cohesion. Another factor has been the failure to make important policy decisions concerning sentencing. All in all, there can be no unity of action without a shared sense of purpose, which does not currently exist.

Conclusions.

The large amount of concern about sentencing by both the public and criminal justice system professionals indicates that there are problems in our sentencing system. The same is evident throughout the nation, where significant changes have been made in several states during the past decade. Hawaii has been gradually modifying its system but in a less concerted fashion. Our present system is neither chaotic nor in a state of crisis, but there are areas in need of improvement. Making the policy decisions which will improve our system before a crisis develops seems the most reasonable step to take at this time.

Recommendations.

The Crime Commission recommends the establishment of a statewide sentencing and guidelines commission made up of criminal justice professionals and citizens. The mandate of the commission would be:

* to reduce sentence disparity by developing guidelines,
* to clarify and standardize sentencing criteria,
* to study the existing indeterminate sentencing practices.

Such a commission would be the fastest, surest, and least costly way to address these important areas of concern in a systematic fashion.

The Commission also recommends the following:

Probation

* Strengthen adult probation by adding staff.
* Make conditions of probation more realistic.
* Develop more formal levels of probation.
* Develop standardized written guidelines for the presentence investigations report.

Alternative sentencing

* Expanded use of community service.
* A careful reconsideration of the use of restitution.

Prison camps

* Develop prison farms to use instead of idle incarceration and to partially offset costs.

I. GENERAL INTRODUCTION

I. GENERAL INTRODUCTION

This study began as an examination of alternatives to incarceration for adult felons. Crime Commission staff researchers focused specifically on the alternative sentences of restitution and community service. As the study progressed, it became evident to the research staff that it was necessary to make a more complete study of sentencing before the issue of alternatives could be properly addressed. Although this shifted the emphasis of our study to the larger topic of general sentencing practices, the staff has attempted to maintain an emphasis on alternatives to incarceration.

There are several issues which must be confronted when sentencing practices are discussed. Justice is a major issue in sentencing. We would like our sentencing practices to provide maximum justice to both the community and the offender. Achieving this balance is the difficulty. Humane treatment of the convicted offender is another important topic. We do not wish to use our sentencing practices to inflict extreme forms of mental or physical punishment on individuals who have been convicted. Another issue involved in sentencing is the emotional responses to crime. Many people express strong feelings of vengeance towards those who have been convicted. Those who hold these feelings tend to support schemes which involve harsher forms of sentencing, such as incarceration for more offenses, longer sentences and mandatory incarceration. Many people also look to sentencing practices as a primary form of crime control. They believe that harsh sentences will reduce the crime rate. Ensuring public safety is a major objective of sentencing. Most agree on this point; the

disagreement arises in deciding which offenders are threats to public safety.

Another major sentencing issue is discretion. Since the statutes do not, in most instances, spell out each specific step which must be taken in the complex sentencing process, or which specific sentence must be given, someone must exercise some discretion. The question of who should exercise the bulk of this discretion creates a sentencing issue. Others would eliminate it altogether by implementing mandatory sentences for most offenses.

Closely related to the discretion issue is the issue of disparity. Judges, exercising their personal judgment, sometimes give disparate sentences to offenders with similar cases and backgrounds. Supporters of the current system view disparity as the natural working of our human system of enforcing the law. Those who would change the system argue that justice is not served by such disparity. (See pages 64-67.)

Truth in sentencing is yet another major issue. Our present system requires that a judge, when sentencing an offender to incarceration, give the maximum term as set by law. The paroling authority then sets the minimum term and eventually decides when the offender shall actually be released. Time served for a 20-year maximum term may vary by many years. Neither the public nor the offender is exactly aware of the length of sentence to be served. Truth in sentencing would require that the actual sentence be made explicit at the beginning. It would also clarify the purposes of sentencing. Under our present statutes, offenders are sentenced for the primary purpose of rehabilitation. Those who argue for truth in sentencing believe that incarceration is primarily a punishment

and ought to be labeled as such.

The questions surrounding truth in sentencing, with reference to both the length and purpose of sentences, have given impetus to a return to what is known as determinate sentencing. The system currently in use in Hawaii is an indeterminate sentencing scheme, with release dependent upon rehabilitation. Under a determinate system, an offender is given a specific prison sentence at the time of sentencing, with encouragement for good behavior in the form of a percentage of time off--"good time." Those who argue in favor of this scheme point to its essential clarity as a major strength. Opponents say that it would fill the jails, since it is parole release that can serve as a safety valve on prison population.

The complex nature of sentencing gives rise to numerous issues and opinions. There is little contention over the desired ends of justice and public safety; the discussion focuses on the means necessary to achieve the desired ends. This study attempts to clarify some of these issues and to recommend some steps toward this common goal.

II. PURPOSE OF SENTENCING

A. Introduction.

Any decision about the disposition of a convicted offender is a decision to inflict punishment. This holds true if we consider punishment to be the imposition of unpleasant consequences imposed upon an individual as a result of the person's conviction for a crime. The purpose of that punishment may then vary according to a variety of influences: the particular crime, the individual offender's background, and any mitigating or aggravating circumstances which might apply to the situation.

The selection of the punishment is a policy decision which is made according to the values of the society. Since values do change, it is necessary to reexamine the scheme of punishment from time to time. Hawaii and other states are in this process of reexamination at the present time. Some of our previous assumptions about crime and punishment, especially incarceration, are being looked at closely. Rising crime rates and increasing institution populations provide enigmatic indicators of a social problem. Legislatures and the citizens whom they represent want sentencing to reduce the amount of crime in society. With institutions full and the crime rate continuing to rise, it is time to reconsider the relationship between incarceration and crime control. This section will examine some of the basic purposes of sentencing with this problem in mind.

For the sake of clarity, the discussion will be divided by topic--punishment, deterrence, incapacitation, and rehabilitation. Any sentencing scheme necessarily incorporates several or all of these elements. It is

important, however, to separately consider the motivation and success of each of these sentencing goals.

B. Punishment.

Punishment is any sanction imposed by the state on a convicted offender which produces unpleasant consequences as the result of being convicted of a crime. This definition can operate best in conjunction with the concept of "just desserts"--the severity of the unpleasant consequences should be commensurate with the severity of the offense.

Since punishment is a basic purpose of a criminal sentence, it is worthy of our careful consideration. A major complaint with the whole scheme of indeterminate sentencing has been that it promises rehabilitation but has not produced the desired results. Critics point out that many rehabilitation programs actually provide punishment in a more subtle and pernicious form. Straightforward punishment, they argue, is a more honest and humane means of handling offenders. A sociologist made this point well in a recent study of prisons:

> The main purpose of imprisonment, however, should be punishment. We are dishonest and foolish if we do not admit that punishment is basic in our responses to crime. This is not a brutish retributive atavism in human beings; it is an essential part of the bargain that we make to live by rules. When they are breached, particularly in a manner producing extreme harm to others, we want something done. When nothing is done, the rules lose their meaning and persons lose their social commitment.[1]

A concern exists that the conscious focus on this more primitive aspect of sentencing will eliminate the focus on other stated purposes of

[1]John Irwin, Prisons in Turmoil, Little, Brown & Co., Boston, 1980, p. 238.

sentencing. This is not necessarily the case. Rather, the coercive element will be removed from rehabilitation, which might allow it to be more successful. Also, whatever amount of deterrence or incapacitation that takes place will continue to take place. Openly admitting that we do sentence offenders to punish, setting reasonable determinate sentences which allow for good time, and maintaining noncoercive programs for rehabilitation can put our system on a solid footing of directness and clarity.

C. Deterrence.

The etymology of the word "deter" is the Latin, deterrere, to frighten off, which is exactly what the criminal justice system attempts to achieve with criminal sanctions and sentences. By identifying behavior that is prohibited and what sentence will be meted out to those who exhibited that prohibited behavior, society hopes to let the potential offender know the possible result if he commits an offense. Proponents of deterrence believe that if a person is contemplating committing a criminal offense, that he will weigh what the cost will be if he is caught against the benefits gained by the criminal behavior.

In an attempt to measure and predict the deterrent effect of criminal sanctions, economists in the past decade have developed economic models. Many have used the imposition of jail or prison sentences as the cost and based their analysis on a population of convicted offenders and their subsequent criminal behavior. One such study was done by Joan Petersilia and Peter W. Greenwood of the Rand Criminal Justice Program. They used a sample population of 625 persons to estimate the relationship between

sanctions and crime rates. The findings indicate that mandatory minimum sentences can reduce the crime rate, but by doing so they may increase prison populations to an unacceptably high level. They state that if all convicted felons, regardless of prior record, were sentenced to 1.2 years in prison, then the crime rate would be reduced by 20 percent and the prison population would increase by 85 percent.[2]

Besides this high cost, there is another adverse consideration of incapacitation for deterrence. For deterrence to work there must be some assurance of arrest and conviction. However, at the present time, only a small percentage of offenders are ever arrested, convicted, and sentenced.

Impose harsh sanctions, the deterrence argument runs, and this will significantly reduce the crime rate in two ways--first by confining the offender and second by deterring other potential offenders. The flaw in this argument lies with detection. Since a large percent of crimes are not reported to the police, sentencing practices will have no effect on them. Additionally, since a large portion of those crimes which are reported do not result in an arrest, the effect is diluted again. Furthermore, of those arrested, only a small percentage actually either plead guilty or are found guilty. Matthew Yeager, at the 1976 U.S. Conference of Mayors, provided this information in graphic form.

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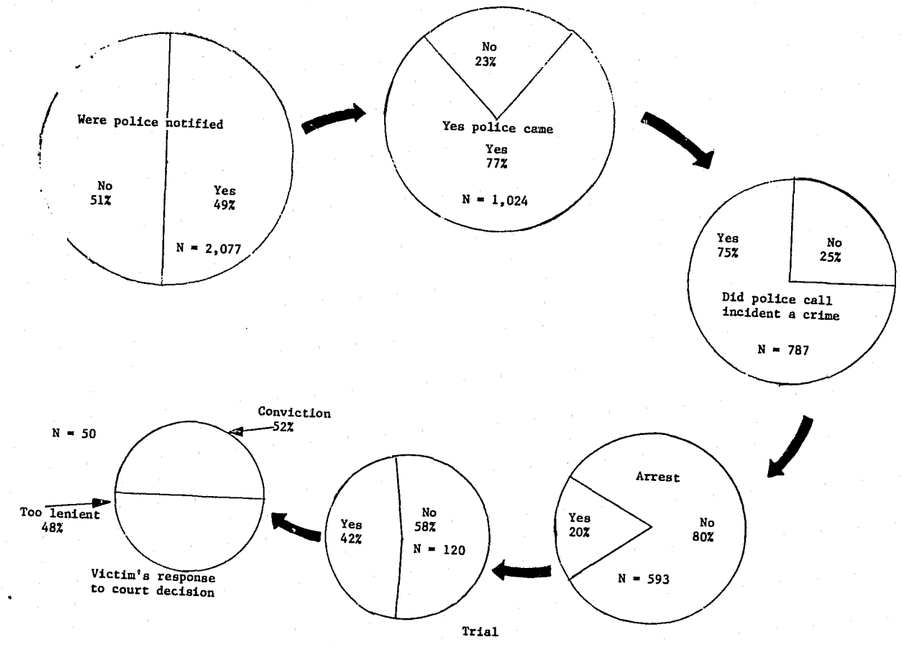
[2]Joan Petersilia and Peter W. Greenwood, Mandatory Prison Sentences: Their Projected Effects on Crime and Prison Populations, Criminal Justice Program, The Rand Corporation, Santa Monica, October 1977.



N = Number of cases

The data for the chart shown above was gathered nationally. Yeager summarized this information in the following manner:

> . . . almost 50 percent of most violent crimes are never reported to the police; the majority of criminal offenses are never solved and only a small number of those arrested are later convicted for their crimes. Hence, two fundamental assumptions must be called into question: first that the incarceration of those violent criminals who are apprehended will significantly reduce violent crime; and second, that harsh prison sentences will deter those offenders who are never caught.[3]

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[3]Matthew Yeager, Do Mandatory Prison Sentences for Handgun Offenders Curb Violent Crime?, U.S. Conference of Mayors, 1976.

Both Yeager and Petersilia raise serious doubts as to the effectiveness of deterrence. It may work for those who are incarcerated, but harsh sentences have a negligible impact on crime in general. Sentencing to incarceration is a policy decision about how to treat those who are convicted. It may or may not be a way to reduce crime.

D. Incapacitation.

An offender who is incarcerated is prevented from committing further criminal acts in the community. This is the basic notion of incapacitation. The desired outcome is the same as that of deterrence, crime control. As with deterrence, first the offender must be apprehended and convicted before any incapacitation is possible. Therefore, the capability of incapacitation to control crime is limited. There is little question that the individual felon who is in prison is prevented from victimizing the community at large and to the extent that the community is protected, incapacitation serves a useful function.

Cost is also a serious consideration when considering incapacitation. It costs about $20,000 to keep a single person incarcerated for one year and more than $50,000 to build a single cell. At this rate, we would be well advised to consider any alternatives.

Selective incapacitation is the use of incapacitation against certain classes of criminals. Hawaii currently has statutes which require that all class A felons be incarcerated. This is selective incapacitation, which assures separation from society of the most serious offenders.

Many researchers indicate that most prisoners come out more violent than when they went in. Thus, the incapacitation idea seems less of a

bargain. Some convicted felons must be separated from society for the safety of the community and some of them for extended periods of time. However, it is well to bear in mind the limited effectiveness of a blanket policy of incapacitation, the cost involved, and the possible negative effects of eventually releasing persons into the community who are more violent and crime prone than when they left it.

E. Rehabilitation.

There is an element of ambiguity about the meaning of rehabilitation. Generally, it is considered to be any means by which the behavior of an offender can be changed so as to exclude criminal activity. The breadth of this definition has paved the way for an array of programs designed to achieve the desired end. Success for any program has usually been measured in terms of recidivism, the rate at which participants return to criminal activity.

Rehabilitation is the historical root of the American prison system. The first prisons established by the Quakers in Pennsylvania were specifically designed to rehabilitate offenders instead of inflicting physical punishment on them. The indeterminate sentence is based upon the premise of rehabilitation. An offender can be released sooner if he can prove he has been rehabilitated. This is the catch that has never been eliminated--how to determine when a prisoner is rehabilitated. There are many theories in existence, but essentially, no one knows how to measure rehabilitation. In addition to this fundamental problem, rehabilitation can give a misleading sense of beneficence to a harsh system of punishment.

The above limitations notwithstanding, many offenders do not repeat

their crimes, or at least are never caught again. Consequently, most writers feel that there is great worth in the idea of rehabilitating offenders. It is a benign policy, deserving of an enlightened government. The problems arise with implementation--determining when and if someone has been rehabilitated and predicting future risk--and the danger is always present that the idea will be used to mask an unpleasant reality. What cannot be measured can never be properly evaluated.

Ideally, the problems which are attached to rehabilitation should not signal our defeat, but a challenge to be met with creativity and humanity.

F. Summary.

None of the above purposes of sentencing is complete and sufficient. Criminal sentences do fulfill all of these purposes to some extent. The continuum effect will always operate in this instance. The closer that we can align our practices with our stated purposes, the better we can serve the ends of justice and truth.

III. HISTORICAL BACKGROUND

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In any human society, some portion of the population will commit acts which are considered criminal by the majority. Historically, serious offenders were punished either by death or exile. Punishment was a utilitarian means of displaying the power of the society. The object of such punishment was to eliminate the offender. These reasons for punisbment--the display of social power and the elimination of the offender from society--continued to be applied as recently as the colonial period in America.

In colonial America, criminals were either whipped or put in stocks for relatively minor offenses. If the crime was considered serious, then the offender was hanged. Lengthy terms of imprisonment were not within the scope of consideration. The few institutions of incarceration which existed were considered last resorts used primarily for holding those convicted until their sentences were executed.

The Jacksonian Era in American history (1830's) has been termed the Age of the Asylum. American became famous because of its new innovation, the penitentiary. The penitentiary differed fundamentally from the earlier prison which was seldom used, solely punitive, and merely another means of exile--removing the offender from society. The whole philosophical basis of the penitentiary was different. Religiously based, it sought to reform the prisoner by giving him the time and environment to do penitence. Isolation, prayer, and honest labor were intended to convince the offender to repent and change his way of life so that he could be returned to society.

A major innovation at the time was the shift in thinking regarding the cause of crime. Less emphasis was placed on the role of the individual and more emphasis was placed on the environment as the cause of criminal behavior. David Rothman, in his The Discovery of the Asylum, makes this point clearly:

> Americans' understanding of the causes of deviant behavior led directly to the invention of the penitentiary as a solution. It was an ambitious program. Its design--external appearance, internal arrangement, and daily routine--attempted to eliminate the specific influences that were breeding crime in the community, and to demonstrate the fundamentals of proper social organization. Rather than stand as places of last resort, hidden and ignored, these institutions became the pride of the nation. A structure designed to join practicality to humanitarianism, reform the criminal, stabilize American society, and demonstrate how to improve the condition of mankind, deserved full publicity and close study.[4]

Thus, by the 1830's, the philosophy of sentencing had changed from punishment and permanent exile to rehabilitation and temporary exile.

The great tragedy of the American prison system is that this rehabilitative spirit died early, but the institutions remain with us a century and a half later. The first generation of prison administrators firmly believed that the control and discipline of the prison environment would change the individual offender in a positive manner. The next generation merely occupied the buildings and maintained the routines. It lost sight of the larger goals of rehabilitation in its concern for the custodial aspects of prison administration. A 1867 report to the New York State

[4]David Rothman, The Discovery of the Asylum, Little Brown, Boston, 1971, p. 79.

Legislature on prison conditions indicated that the letter of the law remained while the spirit had fled:

> There is not a state prison in America in which the reformation of the convicts is the one supreme object of the discipline, to which everything else is made to bend. [By this standard] there is not a prison system in the United States, which . . . would not be found wanting. There is not one, we feel convinced . . . which seeks the reformation of its subjects as a primary object . . . They are all . . . lacking in the breadth and comprehensiveness of their scope; all lacking in the aptitude and efficiency of their instruments; and all lacking in the employment of a wise and effective machinery to keep the whole in healthy and vigorous action.[5]

Numerous other reports echoed the same conclusions during the second half of the nineteenth century.

David Rothman aptly sums up this situation:

> Both the failure of the asylums and their persistence had common causes. The elements that transformed the penitentiary and the mental hospital, the alsmhouse and the reformatory into places of custody also insured their perpetuation. The environmental concepts of the asylum founders at once helped to promote and disguise the shift from reform to custody. The post-Civil War asylum keeper all too predictably succumbed to the fallacy that in administering a holding operation he was still encouraging rehabilitation, that one only had to keep inmates behind walls to effect some good. Since the fact of incarceration was so easily confused with the improvement of the inmate, wardens and superintendents often relaxed their vigilance and allowed abuses to creep into the routine. Yet neither they nor the public at large confronted these changes.[6]

The nineteenth century witnessed the rise of that humanitarian sentencing institution, the penitentiary. The degeneration of this

[5]Rothman, op. cit., p. 241.

[6]Rothman, op. cit., p. 238.

humanitarian reform into what might be seen as a human warehouse led to a new series of reforms in the early twentieth century.

The first two decades of the twentieth century were the next major period of transition in American sentencing practices. Practices which are prevalent today can be traced to this period. Parole, probation, and the indeterminate sentence, all still based on rehabilitation, began to be used around 1900. By 1923 half of the states employed these practices.

Probation for adult offenders began as early as the 1850's, when a Boston shoemaker named John Agustus convinced some judge to give him custody over juvenile offenders. However, it did not come into vogue until the beginning of the twentieth century. In 1900, only six states had provisions for probation. In 1915, 33 states either began or enlarged their probation systems, and by 1920, all states had juvenile probation while 33 had adult probation.[7]

The most recent reform movement in sentencing, triggered by a loss of faith in rehabilitation, has been away from indeterminate sentencing. The movement toward determinate sentencing with a focus on punishment became fashionable in the mid-1970's. As has happened with other reform efforts, the first wave exhibited more enthusiasm than careful planning. The first three states to adopt determinate sentencing schemes (California, Illinois, and Indiana) faced problems accordingly. The second wave of determinate sentencing schemes (e.g., Minnesota) was more sophisticated,

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[7]U.S. Attorney General, Survey of Release Procedures, Volume 2, Probation, Washington, D.C., 1939.

and seems to be less problematic. See Section V of this report for a discussion of these trends.

The inherent humanitarianism in our sentencing history is commendable. The cruelty and inhumanity which has often resulted from the misapplication of this spirit should be avoided when possible. Continuous monitoring of our sentencing ideals and practices seems to be the best way to maintain justice with humanity.

IV. SENTENCING IN HAWAII

It is the intention of this section to provide an overview of sentencing as it presently functions in Hawaii. There are five parts in this section. The first of these is a description of the statutes which establish Hawaii's sentencing practices. The second section contains data collected to provide an accurate picture of current sentencing and releasing practices. Next is a description of the workings of restitution and community service sentences. The fourth section contains information gathered in interviews with the professionals who work in our criminal justice system and confront sentencing on a daily basis. The final segment contains a brief summary of the entire section.

A. Statutes.

The sentencing options available to the judge vary with the crime committed, the criminal history of the defendant, and the defendant's state of mental and physical health.[8] Except for the provisions relating to murder, attempted murder, and class A felonies, the court may suspend imposition of sentence on a convicted person, may order the convicted person to be committed in lieu of sentence, or may sentence the convicted person as follows:[9]

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[8]See, Commentary on §706-610 (1976): "The chapter [disposition of defendants] takes the general position that authorized sentences must take into consideration two things: (1) the seriousness of the crime, and (2) the character of the defendant."

[9]Haw. Rev. Stat. §706-605 (1976 and 1980 Supplement).

1) to be placed on probation;

2) to pay a fine;

3) to be imprisoned for a term as authorized by the penal code;

4) to pay a fine and to be placed on probation, or to pay a fine and to be imprisoned, but not to be placed on probation and to be imprisoned--with certain exceptions;

5) to make restitution or reparation to the victim or victims of the crime in an amount the convicted person can afford to pay. The court may order restitution in addition to the convicted person being placed on probation, imprisonment, or paying a fine or performing community service.

6) to perform services for the community under the supervision of a governmental agency or charitable or community service organization. The court may order the convicted person to be placed on probation and to perform community service.

After a defendant is convicted for a felonious offense, a presentence investigation report (presentence correctional diagnosis and report) is prepared by the Intake Service Center for the outer islands and by Adult Probation for Oahu. A report is prepared for every felon and youthful offender unless the requirement is waived by the judge, defendant, and prosecutor.[10] The court may order a presentence investigation report for any other case. This report is to provide the court with "sufficient and accurate information so that it may rationally exercise its discretion"[11]

[10]Haw. Rev. Stat. §706-601.

[11]See, Commentary on §706-601 (1976).

in sentencing the defendant.

The content of this report is specified by statute. Section 706-602 requires that the report include:

1) an analysis of the circumstances attending the commission of the crime;

2) the defendant's history of

   a) delinquency or criminality,
   b) physical and mental condition,
   c) family situation and background,
   d) economic status and capacity to make restitution or to make reparation to the victim or victims of his crimes for loss or damage caused thereby,
   e) education,
   f) occupation, and
   g) personal habits;

   and

3) any other matters that the reporting person or agency deems relevant or the court directs to be included.

A presentence psychiatric examination may also be required by the judge.[12]

Because the presentence investigation report and examination are so important to sentencing, certain adversary provisions were included in the law. Copies of the report and/or examination must be submitted to the defendant or his counsel and the prosecutor, and opportunity be given for specific findings to be disputed.[13]

1. Civil commitment.

Civil commitment is an option available to the judge but only where the offense charged is a class C felony or lesser grade of crime

[12]Haw. Rev. Stat. §706-603 (1980 Supplement).

[13]Haw. Rev. Stat. §706-604 (1976).

and the person so charged is (1) a chronic alcoholic, (2) a narcotic addict, or (3) a person suffering from a mental abnormality.[14] In these cases, prosecution can be set aside completely. The court is required by statute to issue such an order of commitment and dismissal of prosecution only if it will further the defendant's rehabilitation and will not jeopardize the protection of the public.

This section does not create the authority for the involuntary hospitalization of certain types of offenders. Instead, it allows the court to order hospitalization in lieu of prosecution or sentence in cases where the defendant is subject by law to involuntary hospitalization. In order for the court to order hospitalization, the crime committed does not have to be directly related to the defendant's mental or physical condition but only tangentially related.[15]

2. Suspension of sentence and probation.

Other alternatives available to the judge are probation and the suspension of sentence. The penal code specifically states that a prison sentence is not to be imposed on a convicted person unless:

1) there is undue risk that the defendant would commit another crime during the period of a suspended sentence or probation;
2) the defendant is in need of correctional treatment best met by defendant's commitment to an institution; or
3) a lesser sentence will depreciate the seriousness of the defendant's crime.[16]

The judge is to be guided in his decision to grant probation or suspended sentence by giving due consideration to a set of factors.[17] Nine conditions are enumerated in the statute. These include the conditions surrounding the crime (the defendant's conduct caused no serious harm, the defendant was strongly provoked, the victim was partly to blame, the circumstances tended to excuse or justify defendant's criminal conduct); and the defendant's character and background (the defendant has no prior criminal record or has been a law-abiding citizen for a substantial period of time before the commission of the crime, the crime was the result of circumstances unlikely to recur, the defendant is unlikely to commit another crime, the defendant will respond well to a program of restitution or probation, or incarceration will cause excessive hardship on defendant or his family).

Once the decision has been made not to sentence a convicted person to a term of imprisonment, the penal code states a preference for placing a defendant on probation if he is in need of the supervision, guidance, assistance, or direction that the probation service can provide.[18]

When the court suspends the imposition of sentence or imposes probation on a convicted person, the court also sets down conditions to insure or to assist the convicted person in leading a law-abiding life.[19]

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[14] Haw. Rev. Stat. §706-607 (1976).

[15] See, Commentary on §706-607 (1976).

[16] Haw. Rev. Stat. §706-620 (1976).

[17] Haw. Rev. Stat. §706-621 (1980 Supplement).

[18] Haw. Rev. Stat. §706-622 (1976).

[19] Haw. Rev. Stat. §706-624 (1976 and 1980 Supplement).

Although the imposing of certain conditions is in the court's discretion, the court is limited to those conditions authorized by the statute.[20] The court may require the defendant:

1) to meet his family obligations;
2) to be employed;
3) to undergo medical or psychiatric treatment, or to enter and remain in a specified institution for that purpose;
4) to attend school or vocational training program;
5) to avoid certain disreputable places or persons;
6) to refrain from the possession of firearms or other dangerous instruments;
7) to make restitution or reparation;
8) to remain within the jurisdiction of the court and to notify the court or the probation officer of any change in address or employment;
9) to report to the court or probation officer; or
10) to satisfy any other conditions reasonably related to the rehabilitation of the defendant which is not unduly restrictive of his liberty nor incompatible with his freedom or conscience.

The period of suspension or probation is five years upon conviction of a felony, one year upon conviction of a misdemeanor, or six months upon conviction of a petty misdemeanor unless the court discharges the defendant at an earlier time.[21]

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[20] Id.

[21] Haw. Rev. Stat. §706-623 (1976).

In addition to placing a defendant on probation, the court may also sentence a person convicted of a misdemeanor to serve a term of imprisonment not more than six months as an additional condition. In the case of a felony conviction, the term is not to exceed one year. The court may also order that the term of imprisonment be served intermittently (for example, serving the period of confinement at nights or on weekends).[22]

During the term of the probation or suspended sentence, the court may modify the requirements imposed on the defendant or may add further requirements.[23] Anytime before the discharge of the defendant or the termination of the period of probation or suspended sentence, if the defendant fails to comply with a substantial requirement imposed as a condition of probation or suspended sentence, or if the defendant has been convicted of another crime, the court may revoke the suspension or probation and sentence the defendant.[24] If the defendant has been convicted of a felony, the court is required to revoke the suspension or probation. When such a revocation occurs, the court is empowered to impose any sentence that might have been imposed originally for the crime of which the defendant was convicted.[25]

3. Fines.

The court may also impose a fine on a convicted defendant. Section 706-640 sets forth the maximum fine authorized for any offense

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[22] Haw. Rev. Stat. §706-624(3) (1980 Supplement).

[23] Haw. Rev. Stat. §706-625 (1976).

[24] Haw. Rev. Stat. §706-628 (1980 Supplement).

[25] Id.

according to the class and grade of the offense:

Class A or B felony	$10,000
Class C	5,000
Misdemeanor	1,000
Petty misdemeanor/violation	500.

The court may also order the defendant whose offense involved a pecuniary gain to pay a fine that is double the amount of the gain derived from the offense.

The penal code also sets forth criteria the court must use to impose fines.[26] One of the criteria is that the court is not to routinely impose a fine on a defendant where other types of disposition are authorized. The fine is to be measured in terms of the defendant's ability to pay and his ability to make restitution or reparation to the victim(s) of the offense.[27] The statute also requires that unless the court makes a determination that "the fine alone suffices for the protection of the public"[28] the court cannot impose only a fine. In addition, the court cannot sentence a defendant to pay a fine as well as to a sentence of imprisonment or probation unless:

1) the defendant has received a pecuniary gain from the crime, or
2) it is the court's opinion that the imposition of a fine will act as a deterrent or correctional function.

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[26]The court is also to consider the financial resources of the defendant and the burden a fine will impose on a defendant in determining the amount and method of payment of a fine. Haw. Rev. Stat. §706-614(4) (1976).

[27]See, Commentary on §706-641 (1976).

[28]Haw. Rev. Stat. §706-641(1) (1976).

4. Imprisonment.

a. Murder, attempted murder, class A felonies. According to the Commentary on §706-605, the offense of murder (and because of a recent statutory change, attempted murder and class A felonies) is the only offense which the penal code excludes the possibility of suspension of sentence or probation.

For the offenses of murder and attempted murder, the court does not have the discretion in choosing a sentencing alternative other than imprisonment. And, because of a change in the law, the court no longer has the discretion in choosing between life or 20 years' imprisonment. According to the House S.C.R.,[29] the 20 years' imprisonment option was deleted from the provision because the offense of murder, being the most serious offense, warrants a greater sentence than 20 years (the maximum for a class A felony). Likewise, the sentence for murder and for attempted murder is now the same--life imprisonment.[30] Under previous law, attempted murder was treated as an ordinary class A felony.[31] According to a House S.C.R.,[32] this change was made to account for the lack of any real difference between the two offenses since the intent to kill is the same for both.

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[29]House Standing Committee Report No. 944 (1981).

[30]This is with or without possibility of parole, depending on the type of case. See Haw. Rev. Stat. §706-606 (as amended by Act 27, 1981 Haw. Sess. Laws) and Act 26, 1981 Haw. Sess. Laws.

[31]Commentary on §706-502 (1976)

[32]House Standing Committee Report No. 772 (1981).

In 1980, the legislature amended the section relating to the sentence of imprisonment for class A felonies. This change provided for an automatic sentence of imprisonment of 20 years without the possibility of suspension of sentence or probation when a person is convicted of a class A felony.[33]

b. Other classes and grades of offenses. The following are the maximum terms of imprisonment for the other classes and grades of offenses:[34]

Class B	10 years
Class C	5 years
Misdemeanor	1 year
Petty misdemeanor	30 days

[33]Under previous law, the judge had the option of prison, suspended sentence or probation. If the judge opted for prison, he had to impose the maximum sentence--20 years. However, there has been at least one case where the judge did not sentence the defendant to the required maximum. In this case (which involved kidnapping), the judge imposed a five-year sentence instead of 20 years on the defendant. The judge stated that to give the maximum sentence would be unfair and unjust due to the unusual circumstances of the case. (State v. Miller, Cr. No. 50583).

In a more recent case involving the current law on class A felonies, the judge placed the defendant on probation instead of imposing a 20-year term as required. The judge ruled that the 20-year maximum constituted cruel and unusual punishment when applied to persons convicted of class A felonies who:

1) have no prior criminal record,
2) did not use threats or violence in the perpetration of the crime,
3) does not require treatment in a correctional institution,
4) is highly unlikely to commit another crime,
5) engaged in the activity leading up to the offense on a casual basis;

and where:

1) incarceration would pose a substantial risk of danger to the offender's life or person, and
2) the criminal conduct did not involve the particular harm in the degree contemplated by the statutory provision.

(State v. Kido, Cr. No. 54957).

[34]Haw. Rev. Stat. §706-660 (1980 Supplement) and §706-663 (1976).

For misdemeanors and petty misdemeanors, the court has the discretion to choose a shorter period of confinement within the statutory maximum.

For class B and C felonies, if the court decides on imprisonment, the court is required to sentence the defendant to the maximum length.

c. Other considerations for imprisonment.

1) Use of firearm in a felony.[35] Under the terms of this statute, the court may sentence a person who used a firearm in the commission of the criminal offense for which the person is convicted to a mandatory term of imprisonment. The length of the term depends upon the class of felony involved.[36] Also, the person imprisoned under this provision must serve the full term imposed for the firearm conviction before being eligible for parole.

This section also provides that for second and subsequent firearm felony convictions, the court has to sentence the person to a mandatory term of imprisonment of 10 years if the offense involving the firearm for which the person was convicted was a class A felony or a class B felony.

The firearm provision was designed to deter the use of firearms in the commission of offenses. According to the findings and purpose section of the Act which codified the use of a firearm statute:[37]

> Recent statistics and studies indicate that the use of firearms in the commission of criminal activities has progressively increased to the point where a significant percentage of felony cases have involved the use of

[35]Haw. Rev. Stat. §706-660.1 (1976).

[36]For class A felony--up to 10 years; for class B--up to 5 years.

[37]Act 204, 1976 Haw. Sess. Laws.

a firearm. Until strict firearms control laws become a reality, the high risk of injury to victims of criminal action will continue to exist. The legislature finds that alternative methods of discouraging the use of firearms such as stronger and more certain penalties should be instituted. It is the purpose of this Act in view of the increasing use of firearms in criminal actions to provide a deterrent effect against such use for the protection of the people in this State.

2) Extended terms of imprisonment. The court may also sentence a person convicted of a felony to an extended term of imprisonment if it finds that commitment for an extended term is necessary for the protection of the public and one or more of the following grounds exist:

(a) The defendant is a persistent offender who has been previously convicted of two felonies committed at different times when the defendant was 18 years or older;[38]

(b) The defendant is a professional criminal and the circumstances of the crime show that the defendant's major source of livelihood and income or resources is derived from defendant's participation in criminal activity;

(c) The defendant is a dangerous person and the defendant has been subjected to a psychiatric exam resulting in the conclusion that his condition makes him a serious danger to others;

(d) The defendant is a multiple offender and the defendant has been sentenced to two or more felonies and the maximum terms of imprisonment for each of the defendant's crimes, if made to run consecutively, would equal or exceed the length of the maximum extended term imposed (or 40 years if for a class A felony);

(e) The defendant is an offender against the elderly or handicapped who inflicted serious bodily injury upon

[38]For the purposes of this subsection, a conviction of a crime in another jurisdiction constitutes a previous conviction and a felony if sentence authorized was death or in excess of one year imprisonment. See Haw. Rev. Stat. §706-665 (1976).

a person the defendant knows to be 60 years of age or older, blind, paraplegic, or quadriplegic and the defendant commits or attempts to commit murder, rape, robbery, felonious assault, burglary, or kidnapping.[39]

If the court finds that a convicted felon fits into any of the above enumerated categories, the court may sentence such a felon to an extended indeterminate term of imprisonment:[40]

Class A felony	Life
Class B felony	20 years
Class C felony	10 years.

This imposition of imprisonment is not mandatory upon the court but lies within the discretionary power of the court. Likewise, the grounds upon which the court must base its findings are not mandates, or even guidelines, but are limitations on the court's exercise of discretion.[41]

3) Repeat offenders. Any person who has a prior felony conviction and who is convicted again of certain serious crimes within the time of the maximum sentence of the prior conviction must serve a mandatory minimum term of imprisonment before being eligible for parole.[42] These certain crimes are murder, assault in the first degree, kidnapping, criminal coercion involving dangerous weapons, rape or sodomy in the first

[39]Haw. Rev. Stat. §706-662 (1980 Supplement), as amended by Act 166, 1981 Haw. Sess. Laws.

[40]Haw. Rev. Stat. §706-661 (1976).

[41]See, Commentary on §§706-661 and 662 (1976).

[42]Haw. Rev. Stat. §706-606.5 (1980 Supplement), as amended by Act 69, 1981 Haw. Sess. Laws.

degree, extortion involving dangerous weapons, burglary or robbery in the first degree, promoting dangerous drugs in the first or second degree, or promoting harmful drugs in the first degree. The mandatory minimum term to be served without possibility of parole is five years for the second conviction and ten years for the third conviction.

In addition, if a person is convicted of less serious felonies listed in the statute within the time of the maximum sentence of any prior conviction, and the person also has a prior conviction or convictions for one or more of the serious crimes listed above, then the court is requested to impose a mandatory minimum term of imprisonment without possibility of parole as follows: one prior conviction, 3 years; two prior convictions, 5 years. It is within the court's discretion to impose the sentences to run consecutively to any other sentence imposed or to impose a lower mandatory minimum sentence without possibility of parole if the court finds that "strong mitigating circumstances warrant such action."[43]

d. Terms of imprisonment. When multiple sentences of imprisonment are imposed on a convicted defendant at the same time, or when the person is already imprisoned and is subject to an additional term, the sentences are to run concurrently.[44] However, an exception exists for prison inmates who are convicted of a crime committed while imprisoned or during an escape from imprisonment. The maximum term of imprisonment for the crime may be added to the unserved portion of the term being served at the time of the

[43]Haw. Rev. Stat. §706-606.5(3) (1980 Supplement), as amended by Act 69, 1981 Haw. Sess. Laws.

[44]Haw. Rev. Stat. §706-668 (1976).

commission of the crime.[45]

5. Deferred acceptance of guilty plea.

According to the findings and purpose section of Act 154 which established a procedure for deferring acceptance of guilty pleas (hereinafter DAGP):[46]

> The legislature finds and declares that in certain criminal cases, particularly those involving first time, accidental, or situational offenders, it is in the best interest of the State and the defendant that the defendant be given the opportunity to keep his record free of a criminal conviction, if he can comply with certain terms and conditions during a period designated by court order. Especially where youth is involved, a record free of a felony conviction, which would foreclose certain educational, professional, and job opportunities may, in a proper case, be more conducive to offender rehabilitation and crime prevention than the deterrent effects of a conviction and sentence.
>
> The purpose of this Act is to establish a means whereby a court in its discretion may defer acceptance of a guilty plea for a certain period on certain conditions with respect to certain defendants. The completion of such period in compliance with such conditions may then result in the discharge of the defendant and expungement of the matter from his record.

The DAGP is a procedure generally used for first time offenders who are not expected to violate the law again. In order to qualify for a DAGP, the defendant must show:

1) that he has no prior felony convictions as an adult in this state or other jurisdictions or has not been ajudicated for conduct considered a felony as a juvenile;

[45]Id.

[46]Act 154, 1976 Haw. Sess. Laws.

2) the offense charged is not a class A felony, or is not a nonprobationable offense;
3) the offense charged is not a serious violent crime or involves offenses relating to public order;
4) that a firearm was not used in the commission of the offense;
5) that he is not charged with the distribution of a dangerous, harmful, or detrimental drug to a minor;
6) if he is charged with a felony that he has not been previously granted a DAGP;
7) if the offense charged is a misdemeanor, the defendant has not been previously granted a DAGP status for which the period of deferral has not yet expired.[47]

The procedure for a DAGP begins with the defense attorney making a motion (a request) for the court for a DAGP and the defendant pleading guilty to the charged offense.[48] Such a plea must be made prior to the commencement of a trial. In this case, the court does not accept the guilty plea or enter a judgment of guilt but instead, may defer further proceedings on the case. In deciding whether or not to grant a motion for DAGP, the court may use a presentence investigation report. If the court grants a DAGP motion, the accused person's guilty plea is deferred and the person is put on a quasi-probationary status to fulfill certain conditions. The guilty plea is deferred for a specified length of time. The effect of

[47]Haw. Rev. Stat. §853-4 (1980 Supplement).

[48]Haw. Rev. Stat. §853-1 (1980 Supplement).

deferring the guilty plea is that if the person satisfies the conditions imposed by the judge and is not charged with the commission of crimes during that time peiod, the charges against the defendant are dismissed and the defendant is discharged.[49] If the person violates the conditions or commits another crime, the court may then accept the guilty plea, enter an adjudication of guilt, and proceed with the sentencing.

The kinds of conditions that can be imposed upon the defendant are the same as those imposed on a sentence of probation or suspension of sentence. Likewise, if the period of the DAGP is to be suspended, then the defendant is supervised by the Adult Probation Division.

6. Young adult defendants.

Those defendants who, at the time of sentencing, are 16 years of age but less than 22 years of age, and who have not been previously convicted of a felony as an adult or adjudicated as a juvenile for a crime committed at age 16 or older and considered a felony are eligible for specialized correctional treatment and special terms.[50]

With regard to specialized treatment, a young adult defendant who is sentenced to a term of imprisonment exceeding 30 days may receive correctional and rehabilitative treatment as appropriate for his needs.

[49]When the defendant is discharged, under the terms of the statute, it is not considered an adjudication of guilt nor a conviction. After a period of a year following the discharge of the defendant and the dismissal of the charge, the defendant may apply for expungement of his records. Upon issuance of the expungement order, the person is treated as if he had not been arrested. See Haw. Rev. Stat. §831-3.2(b) (1976).

[50]Haw. Rev. Stat. §706-667 (1976 and 1980 Supplement).

The special terms of imprisonment for young adult defendants convicted of a felony are as follows:

Class A	8 years
Class B	5 years
Class C	4 years.

The court may sentence the defendant to the special term if it is of the opinion that the term is adequate for the correction and rehabilitation of the defendant and will not jeopardize the protection of the public.[51] If the court decides on imposing the special term of imprisonment, it is also required to impose the maximum length. During the term of incarceration, the young adult defendant is supposed to be imprisoned apart from career criminals. The minimum length of imprisonment is set by the Hawaii Paroling Authority.

The intent behind these provisions is to provide "specialized treatment for young persons over whom family court jurisdiction has been waived and for those persons under the age of 22 who are not subject to the jurisdiction of that court."[52] This intent is based on the belief that the age span encompassed in the statute is a "period of formative years and notwithstanding the fact that the defendants are not subject to the jurisdiction of the family court, prudence and humanity . . . argue for a specialized and concentrated effort in this area."[53]

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[51]The court has the discretion to choose between the special terms and the ordinary and extended terms of sentencing authorized by other sections of the penal code.

[52]Commentary on §706-667 (1976).

[53]Id.

7. Minimum terms of imprisonment--parole.

After the court has imposed the maximum term of imprisonment, the Hawaii Paroling Authority sets the minimum term. The minimum term is the length of time a prisoner must serve before becoming eligible to be considered for parole.

The procedure for setting the minimum is established by law.[54] Within six months of incarceration for an indeterminate or extended term, the paroling authority is required to hold a hearing to set the minimum. The prisoner is to be given reasonable notice of the hearing and has the right to appear at the hearing, be permitted to consult with any person (within reason) in preparing for the hearing, be represented and assisted by counsel, and be informed of his rights for the hearing.[55] The paroling authority is to obtain before the hearing "a complete report regarding the prisoner's life before entering the institution and a full report of his progress in the institution."[56] The purpose of the report is to evaluate the complete personality of the person to determine his "degree of propensity toward criminal activity."[57] The paroling authority may also impose a special condition that the prisoner will not be considered for parole unless the prisoner has shown a record of "continuous exemplary behavior."[58] The statute also allows the paroling authority, in its discretion, to reduce

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[54]Haw. Rev. Stat. §706-669 (1976).

[55]Id. at subsection (3).

[56]Id. at subsection (2).

[57]Id.

[58]Id. at subsection (4).

the minimum term previously fixed by order. The paroling authority is thus enjoined to consider public safety, gauged through the prisoner's rehabilitation, when determining the length of minimum sentenced to be served.

This system of setting a minimum term of incarceration is designed to alleviate somehwat judicial disparity in sentencing.[59] The statute requires the paroling authority to hold a hearing within six months. The intent behind this requirement is so that "grossly inappropriate denials of probation can in most instances be cured fairly promptly through parole, if the circumstances favoring release are evident."[60]

One month prior to the expiration of a prisoner's minimum term of imprisonment, an initial hearing is to be held to consider whether or not the prisoner is eligible for parole. If parole is not granted at this time, additional hearings are to be held at twelve month intervals or less until parole is granted or the maximum prison term expires.[61]

The prisoner is to receive reasonable notice of such a hearing and is required to prepare a parole plan in which he states the manner of life he intends to lead when on parole, including such specific information as his living arrangements and employment plans. For this hearing, the prisoner is also entitled to assistance of counsel and can have counsel appointed if unable to afford one.

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[59]"[S]ome judges will be more strongly inclined toward granting probation" than imposing a sentence of imprisonment. See, Commentary on §706-660 (1976).

[60]Commentary on §706-660 (1976).

[61]Haw. Rev. Stat. §706-670 (1976).

If the paroling authority denies parole after the hearing, it is required to state its reasons in writing. The paroling authority may also, in its discretion, order a reconsideration or rehearing of the case at any time.

If the paroling authority grants parole, the maximum term it can set is ten years. The minimum length of the term of parole is to be determined by the authority.

Because by statute a sentence to an indeterminate term of imprisonment "includes as a separate portion of the sentence a term of parole,"[62] any sentence to prison means both prison and parole and it is the paroling authority's job to determine what mixture is appropriate for each prisoner. The rules and regulations of the paroling authority define the minimum term as: "The minimum term is the means by which public safety is maintained through incarceration and the period during which the prisoner should prepare himself for parole . . . ."

The law does not set standards for the setting of minimum terms but the paroling authority, in its rules and regulations, has established a set of guidelines. The rules and regulations set out what material, information, and factors are to be considered in the decision making. The factors to be taken into consideration are divided into mitigating and aggravating factors and involve the circumstances surrounding the crime, the nature and severity of the crime, the prisoner's criminal background, and the prisoner's behavior while confined. Along with these considerations,

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[62]Haw. Rev. Stat. §706-670(5) (1976).

the parole board has established an informal sentencing grid to be used for setting the minimum. This is an attempt to regularize sentencing and remove any undue disparity.

B. Data Analysis.

This section contains specific information about sentencing practices in Hawaii's circuit courts. While this data does not provide answers to all questions concerning sentencing, it does offer a valuable look at current practices.

To determine the state of sentencing practices in any jurisdiction, two sets of data are necessary. These are the sentencing data from the courts and the releasing data from the paroling authority. The court makes the dispositional choice, as to whether the offender must be incarcerated or be put on probation. The paroling authority makes the durational choice, how long a period the offender who has been incarcerated must serve.

The first part of this chapter is based on data collected on adult felons sentenced in the state of Hawaii for the calendar year 1980. The variables included in this offender-based system file are: arrest offense, conviction offense, and sentence imposed.

The second part of the data provides a more in-depth look at sentencing practices of criminal judges in Honolulu. The staff of the Crime Commission was able to obtain data on sentencing with the first circuit court for all adult felons sentenced in 1978. While a more recent year of data would be desirable for the purpose of analysis, such a broad

data base concerning these practices is not available. State agency data is not always conducive to descriptive analysis due to the nature of agency concerns. The purpose of these agencies is more for monitoring the management and administration of criminal justice and broad statistical analysis than for in-depth research. Therefore, to give the reader the best possible overview of sentencing practices in Hawaii, the most complete data set available was used.[63]

The final part concerns paroling practices over the past five years, examining minimum sentences set for felons sentenced to imprisonment and release information.

1. 1980 felony sentencing.

For the calendar year 1980, Hawaii Criminal Justice Information Data Center has on record 475 individuals convicted of a total of 851 felony crimes.[64] For this review, the unit of analysis is the offender regardless of the number of crimes each individual was convicted of. These offenders are categorized by most serious offense of conviction and

[63] In the three legislative sessions since 1978, when these adult felons were sentenced, there have been substantive amendments to Hawaii's sentencing code (Chapter 706, Haw. Rev. Stat.). These, as described in the previous chapter, have most certainly affected sentencing practices by limiting judicial discretion (i.e., mandating imprisonment for class A felonies), but not enough to render 1978 data invalid. Most of the practices then current are continued today.

[64] Due to a time lag between the final disposition of a case and data entry, Hawaii Criminal Justice Information Data Center does not assert that the data set is complete and representative of all felony convictions for 1980.

most severe sentence received. For example, an offender who was convicted of burglarizing (class B) a home and raping (class A) an occupant of that home will be classified as a violent offender on the basis of the rape conviction. If he received a prison term for the rape charge and probation for the burglary, he will be classified as having received a prison sentence.

In 1980, half of the state felony convictions were for property crimes, one-fourth for violent crimes, and one-tenth for drug offenses. (Table 1 provides a summary.)

TABLE 1

FREQUENCIES OF MOST SERIOUS CRIME TYPE CONVICTED FOR BROKEN DOWN BY STATE AND COUNTY

	State	Honolulu	Kauai	Maui	Hawaii
Property	49.1% (233)	52.0% (195)	45.5% (10)	30.3% (10)	40.0% (18)
Violent	26.5% (126)	24.8% (93)	36.4% (8)	30.3% (10)	33.3% (15)
Drugs	9.1% (43)	7.2% (27)	4.5% (1)	27.3% (9)	13.3% (6)
Other*	15.3% (73)	16.0% (60)	13.6% (3)	12.1% (4)	13.3% (6)
	475	375	22	33	45

*"Other" category includes firearm charges, perjury, escape, etc. Also included are 11 probation revocations for which original charge convicted on could not be determined.

The sentencing of these offenders indicates that violent crimes result in prison terms far more often than property and drug crimes. (See tables 2 - 6.)

TABLE 2

1980 SENTENCING PRACTICE - STATE

	Prison	Probation and jail	Probation	SS, PAGP, DANC	Total
Property	18.4% (43)	41.6% (97)	39.0% (91)	0.9% (2)	233
Violent	42.1% (53)	40.5% (51)	16.6% (21)	0.8% (1)	126
Drugs	4.6% (2)	41.9% (18)	48.8% (21)	4.6% (2)	43
Others	41.1% (30)	30.1% (22)	24.7% (18)	4.1% (3)	73
					475

TABLE 3

1980 SENTENCING PRACTICE - HONOLULU

	Prison	Probation and jail	Probation	SS, DAGP, DANC	Total
Property	17.4% (34)	41.0% (80)	41.0% (80)	0.5% (1)	195
Violent	39.8% (37)	40.9% (38)	19.3% (18)		93
Drugs	3.7% (1)	33.3% (9)	59.3% (16)	3.7% (1)	27
Others	50.0% (30)	23.3% (14)	21.7% (13)	5.0% (3)	60
					375

TABLE 4

1980 SENTENCING PRACTICE - KAUAI

	Prison	Probation and jail	Probation	SS, DAGP, DANC	Total
Property		40.0% (4)	60.0% (6)		10
Violent	37.5% (3)	62.5% (5)			8
Drugs		100.0% (1)			1
Others		66.7% (2)	33.3% (1)		3
					22

TABLE 5

1980 SENTENCING PRACTICE - MAUI

	Prison	Probation and jail	Probation	SS, DAGP, DANC	Total
Property		70.0% (7)	20.0% (2)	10.0% (1)	10
Violent	40.0% (4)	30.0% (3)	20.0% (2)	10.0% (1)	10
Drugs		55.6% (5)	44.4% (4)		9
Others		75.0% (3)	25.0% (1)		4
					33

TABLE 6

1980 SENTENCING PRACTICE - HAWAII

	Prison	Probation and jail	Probation	SS, DAGP, DANC	Total
Property	50.0% (9)	33.3% (6)	16.7% (3)		18
Violent	60.0% (9)	33.3% (5)	6.7% (1)		15
Drugs	16.7% (1)	50.0% (3)	16.7% (1)	16.7% (1)	6
Others		50.0% (3)	50.0% (3)		6
					45

Overall, 66.5 percent of all offenders are sentenced to some time behind bars (either prison or jail) statewide. This trend is generally maintained across county lines with Hawaii County being a notable exception. Eighty percent of Big Island offenders received a sentence that included incarceration time. (See table 7.)

TABLE 7

FREQUENCY OF OFFENDER BEING INCARCERATED

	Time	No time	
State	66.5% (316)	33.5% (159)	475
Honolulu	64.8% (243)	35.2% (132)	375
Kauai	68.2% (15)	31.8% (7)	22
Maui	66.7% (22)	33.3% (11)	33
Hawaii	80.0% (36)	20.0% (9)	45

Separate tables are provided for burglary, robbery, and drug offenses so that the differences in sentencing for these offenses can be seen. Burglary is a property crime, robbery a violent crime, and drug offenses are considered victimless. Tables 9 and 10 show that class A robbers will most often go to prison, while class A drug offenders usually got probation with no jail time.[65] This table reflects judicial and social attitudes toward violent and victimless crimes. Violent crime is seen as far more harmful to society as a whole than victimless crimes. Therefore, the need to protect society from violent offenders is paramount and Hawaii's judges respond to this need by separating them from the community.

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[65]These crimes were committed prior to the mandatory incarceration statutes.

TABLE 8

SENTENCES RECEIVED FOR BURGLARY, 1980

	State			Honolulu			Kauai			Maui			Hawaii		
	A	B	C	A	B	C	A	B	C	A	B	C	A	B	C
Prison		28.9% (11)	34.0% (17)		27.3% (9)	29.4% (10)								50.0% (2)	53.8% (7)
Probation and jail		47.4% (18)	28.0% (14)		45.5% (15)	29.4% (10)		100% (1)				100% (1)		50.0% (2)	23.1% (3)
Probation		21.1% (8)	38.0% (19)		24.2% (8)	41.2% (14)			100% (2)						23.1% (3)
SS, DAGP, DANC		2.6% (1)			3.0% (1)										
		38	50		33	34		1	2			1		4	13

TABLE 9

SENTENCES RECEIVED FOR ROBBERY, 1980

	State			Honolulu			Kauai			Maui			Hawaii		
	A	B	C	A	B	C	A	B	C	A	B	C	A	B	C
Prison	76.2% (16)	12.1% (4)		77.8% (14)	16.1% (5)		100% (1)								
Probation and jail	14.3% (3)	48.5% (16)		11.1% (2)	45.2% (14)			100% (1)		50.0% (1)				100% (1)	
Probation	9.5% (2)	33.3% (11)		11.1% (2)	35.5% (11)										
SS, DAGP, DANC		6.1% (2)			3.2% (1)					50.0% (1)					
	21	33		18	31		1	1		2			1		

TABLE 10

SENTENCES RECEIVED FOR DRUGS, 1980

	State			Honolulu			Kauai			Maui			Hawaii		
	A	B	C	A	B	C	A	B	C	A	B	C	A	B	C
Prison		10.0% (2)			9.1% (1)									33.3% (1)	
Probation and jail	20.0% (1)	45.0% (9)	27.8% (5)	20.0% (1)	36.4% (4)	27.3% (3)		100% (1)			40.0% (2)	25.0% (1)		66.7% (2)	33.3% (1)
Probation	80.0% (4)	45.0% (9)	61.1% (11)	80.0% (4)	54.5% (6)	63.6% (7)					60.0% (3)	75.0% (3)			33.3% (1)
SS, DAGP, DANC			11.1% (2)			9.1% (1)									33.3% (1)
	5	20	18	5	11	11		1			5	4		3	3

This data set from Hawaii Criminal Justice Information Data Center will indicate when sentence was received for each felony conviction listed, but it does not lend itself to explain why those sentences were chosen. To exemplify the need for additional information, the varying sentences of three offenders convicted of robbery in the first degree were looked at. In the county of Maui, one defendant with one count of robbery was given a ten-year prison term but the mittimus was stayed and the sentence suspended. On Oahu, a defendant with eight convictions, including two first degree robbery and two second degree robbery counts, was sentenced to five years probation on all counts joined with restitution on two of them. Also on Oahu, a third robber was convicted on five counts including two first degree robbery charges and given a life imprisonment sentence. Obviously, mitigating and aggravating circumstances will affect sentencing and the need to examine this is apparent.

2. 1978 felony sentencing.

This sentencing data includes all of those who were sentenced in the first circuit court as adult felony offenders in 1978. During the calendar year of 1978, 593 adults were convicted of felonies in the first circuit court. The Crime Commission staff's analysis was based upon several components. These included the crime of conviction, the offender's criminal history, and the judge who imposed the sentence. For the purpose of clarity in our analysis, we will first discuss sentencing patterns in general and then look at the same variables as they apply to three specific offenses; robbery, burglary, and drug offenses.

The type of crime for which the offender was convicted is the variable which has the greatest impact on what sentence will be imposed. It is apparent that the more violent the crime, the greater the chance the offender will be sentenced to incarceration. All those convicted of murder were given prison sentences as mandated by Haw. Rev. Stat. §706-606, while 83.3 percent of sex offenders and two-thirds of the assaulters and robbers got "time." Victimless crimes (drugs, gambling, promoting prostitution, etc.) resulted in one out of five convicted offenders being incarcerated. More tolerant judicial attitudes toward victimless crimes is reflected in the fact that one-third of those offenders got either suspended sentences or a deferred acceptance of a guilty plea. (See table 11.) The prior criminal history of the offender plays a substantial role in whether he will serve time or not. Tables 12 - 15 indicate the impact of prior adult felony convictions on sentencing decisions. This relationship between adult convictions and sentence is maintained across crime type lines. Robbers with priors got time 32 percent more often than those without, while burglars and drug offenders had a 43 percent greater chance of going to prison or jail if they had a prior record; generally prior felony convictions are predictive of sentence to confinement.

TABLE 11

SENTENCE IMPOSED ON CONVICTED FELONS BY OFFENSE

	Murder	Sexual Assault	Assault	Robbery	Burglary	Theft Forgery Auto	Drug	Other	Row Total
Prison	15 100.0%	18 75.0%	3 21.4%	21 36.2%	32 23.5%	16 10.5%	4 3.1%	8 12.7%	117 19.9%
Probation and jail	0 0.0%	2 8.3%	4 28.6%	17 29.3%	22 16.2%	32 21.1%	24 18.9%	6 9.6%	107 18.2%
Probation	0 0.0%	3 12.5%	5 35.7%	16 27.6%	60 44.1%	73 48.0%	56 44.1%	29 46.0%	242 41.1%
Suspended sentence or DAGP	0 0.0%	1 4.2%	2 14.3%	4 6.9%	22 16.2%	31 20.4%	43 33.9%	20 31.7%	123 20.9%
Column total	15 2.5%	24 4.1%	14 2.4%	58 9.8%	136 23.1%	152 25.8%	127 21.6%	63 10.7%	589 100.0%

TABLE 12

SENTENCE IMPOSED AND PREVIOUS

ADULT FELONY CONVICTIONS

	No record	Record
Prison	40 9.6%	77 44.3%
Probation and jail	72 17.3%	35 20.1%
Probation	182 43.9%	60 34.5%
Suspended sentence or DAGP	121 29.2%	2 1.1%
	415 70.5%	174 29.5%

Those who had prior adult felony convictions ended up with prison or jail sentences 37 percent more often than first-time offenders.

TABLE 13

SENTENCE IMPOSED FOR ROBBERY AND PREVIOUS

ADULT FELONY CONVICTIONS

	No record	Record
Prison	10 24.4%	11 64.7%
Probation and jail	13 31.7%	4 23.5%
Probation	14 34.1%	2 11.8%
Suspended sentence or DAGP	4 9.8%	0 0.0%
	41 70.7%	17 29.3%

Eighty-nine percent of the convicted robbers who had prior records were sentenced to serve some time. Sixty-five percent went to prison while 24 percent received probation and jail.

TABLE 14

SENTENCE IMPOSED FOR BURGLARY AND PREVIOUS

ADULT FELONY CONVICTIONS

	No record	Record
Prison	5 6.2%	27 49.1%
Probation and jail	13 16.0%	9 16.4%
Probation	41 50.6%	19 34.5%
Suspended sentence or DAGP	22 27.2%	0 0.0%
	81 59.6%	55 40.4%

Approximately two-thirds of the convicted burglars with records were incarcerated.

TABLE 15

SENTENCE IMPOSED FOR DRUG OFFENSES AND PREVIOUS ADULT FELONY CONVICTIONS

	No record	Record
Prison	0 0.0%	4 26.7%
Probation and jail	19 17.0%	5 33.3%
Probation	50 44.6%	6 40.0%
Suspended sentence or DAGP	43 38.4%	0 0.0%
	112 88.2%	15 17.8%

Most drug offenders had no previous record. Of those who had prior records, 60 percent received some time for this conviction.

The juvenile history of the offender also has impact on the in/out decision made by the judge: those who were incarcerated as juveniles regardless of length of term, were 30 percent more likely to serve time than offenders with no juvenile record, and 17 percent more likely to serve time than those who had had contact with the police or family courts, but never had been incarcerated. (See table 16.)

TABLE 16

JUVENILE RECORD AND SENTENCE RECEIVED

	None	Contact with police	Incarcerated
Prison	41 12.7%	35 20.1%	36 46.7%
Probation and jail	58 18.0%	39 22.4%	10 13.0%
Probation	124 38.5%	82 47.1%	29 37.7%
Suspended sentence or DAGP	99 30.8%	18 10.4%	2 2.6%
	322 (56.2%)	174 (30.4%)	77 (13.4%)

The combined juvenile and adult arrest record also indicates that chronicity is more characteristic of sentences to confinement--those with ten or more arrests went to prison or jail 40 percent more often than those with three or less arrests. (See table 17.)

TABLE 17

ARREST RECORD--SENTENCE RECEIVED

	Light	Repeat	Chronic
Time	39 18.3%	62 36.9%	123 59.1%
No time	174 81.7%	106 63.1%	85 40.9%
	213 (36.2%)	168 (28.5%)	208 (35.3%)

Light = 3 or less adult and juvenile arrests, no prior convictions.

Repeat = 4 - 9 adult and juvenile arrests (regardless of number of resultant convictions).

Chronic = 10 or more adult and juveniles arrests (regardless of number of resultant convictions).

Table 18 depicts the sentencing pattern of five circuit court judges. Disparity, offenders with similar backgrounds found guilty of the same crime receiving widely varying sentences, is a primary sentencing issue. Many observers believe that such disparity merely reflects individual judges acting on each case as conscience directs. Others perceive this disparity as an element which seriously reduces the amount of justice in our system.

Since there is a random method of assigning cases (according to calendar availability) it is safe to assume that each judge heard a standard mixture of cases. The table does reveal a measure of disparity. Judge A sent 25 percent of the offenders to prison, while Judge D sent a low of 16.6 percent. The others range in between. Judge A also sentenced the most offenders to a combined probation and jail sentence (24.4 percent) while Judge D sentenced 11 percent to that particular sentence. Sentences to probation show the greatest disparity. Judge D sentenced 50.3 percent of his cases to probation. Judge E sentenced about half that many (26.3 percent) to the same type of sentence. Suspended sentences and DAGPs show a variation from a low of Judge A of 14.8 percent to Judge E's high of 36.8 percent. Tables 18 - 21 indicate that this disparity increases when looking at sentences for specific crimes (robbery, burglary, and drugs).

TABLE 18

ALL OFFENSES
(by sentence imposed by judge)

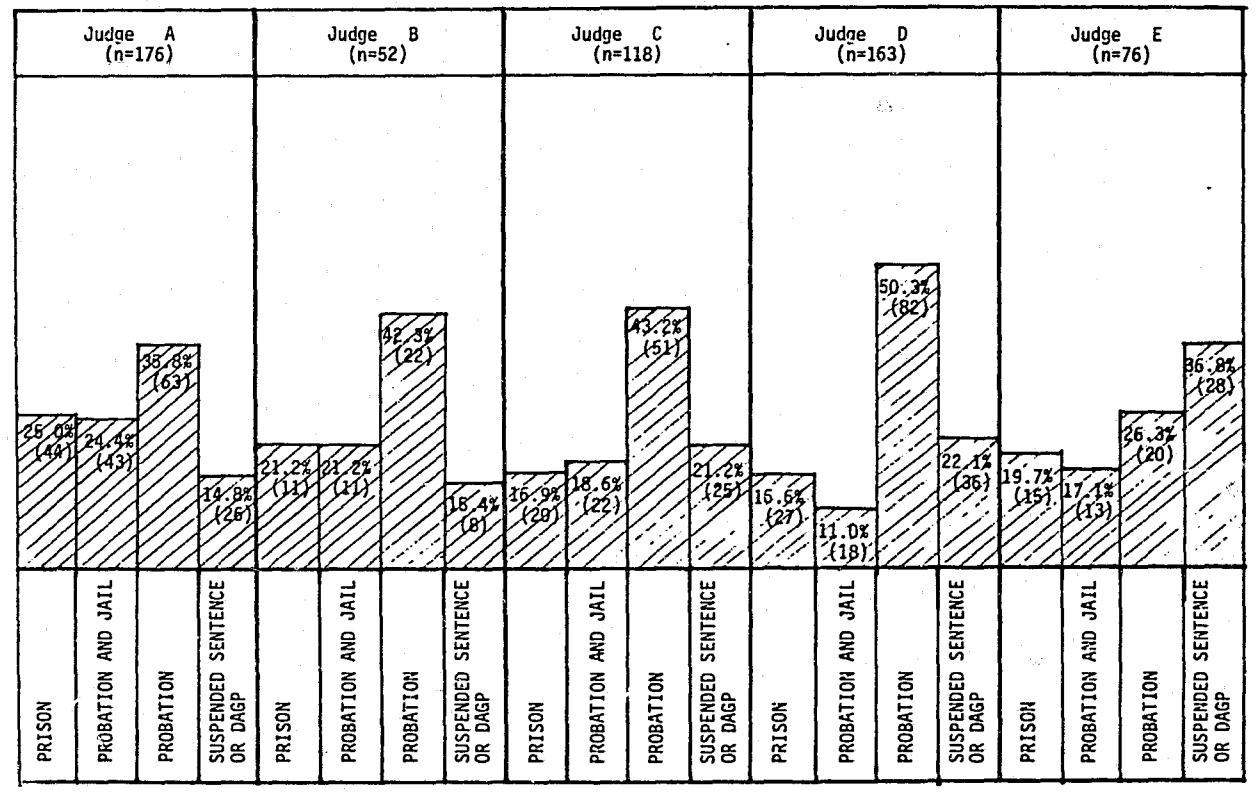
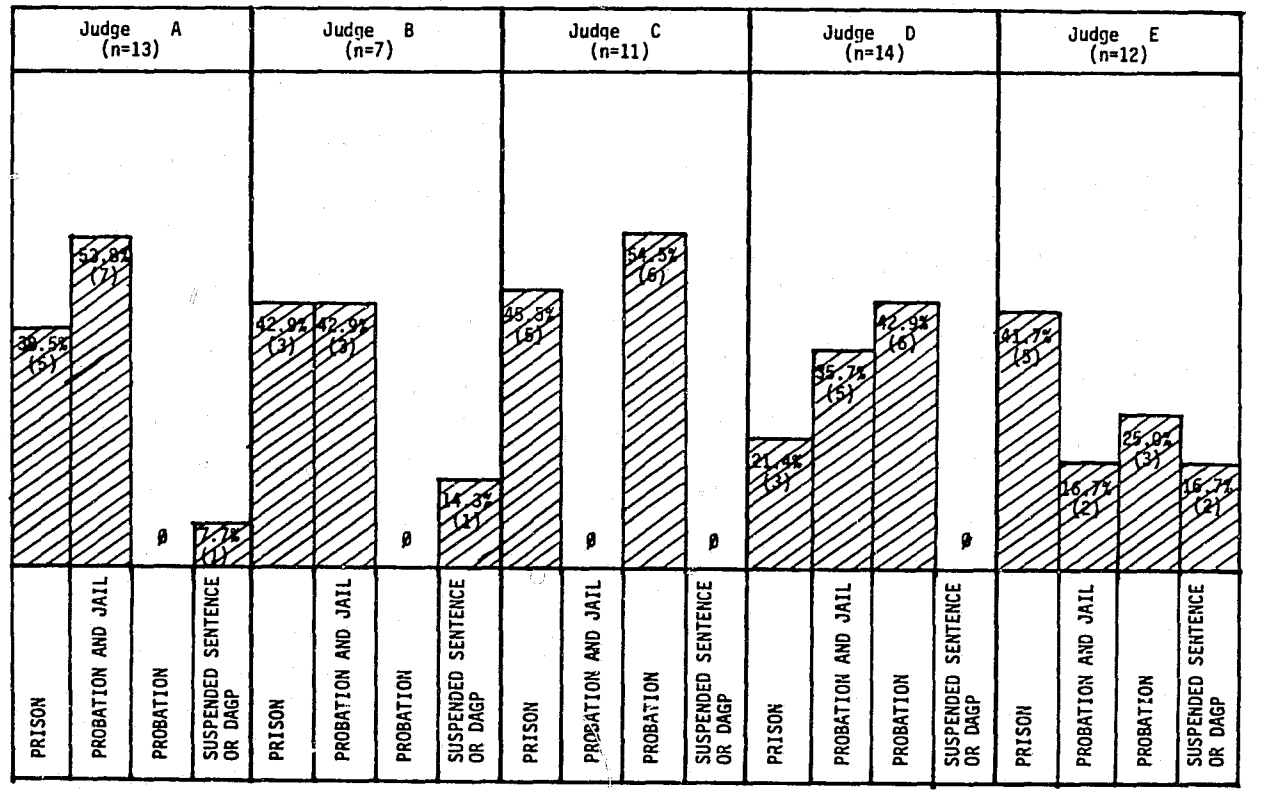


TABLE 19

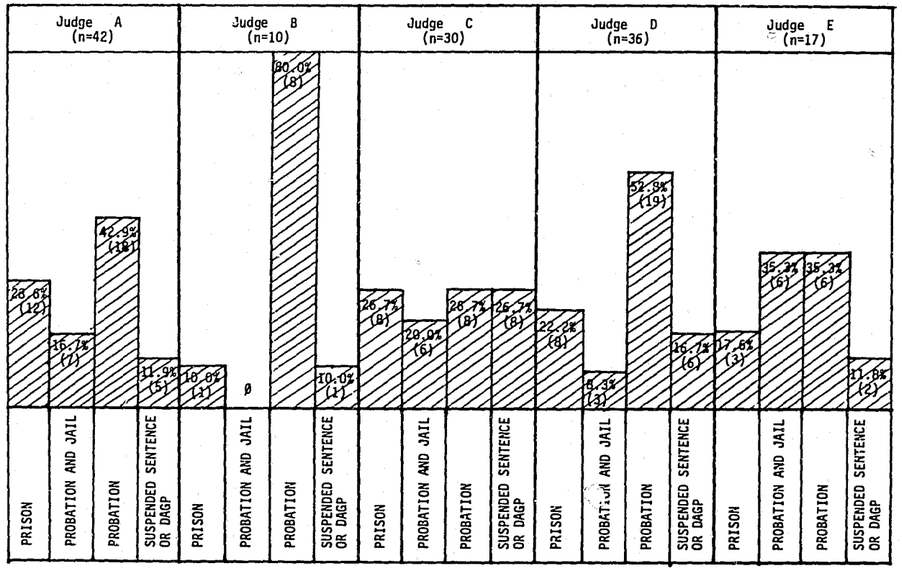
ROBBERY
(most serious offense convicted of was robbery 1° or robbery 2°)



Judges A and B prefer either prison or probation with jail. Judge C sentenced offenders to either prison or probation. Judges D and E tended to use more sentencing possibilities, but in different patterns.

TABLE 20

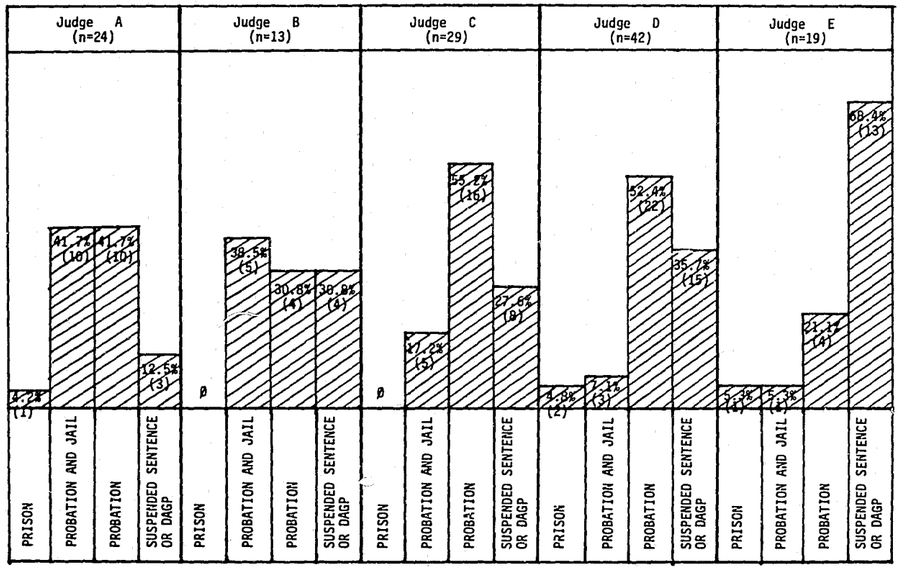
BURGLARY
(most serious offense convicted of was burglary 1° or burglary 2°)



Judge B stands alone in his use of probation for burglars. Judge C utilized all available sentences in an almost equal manner.

TABLE 21

DRUG OFFENSES
(most serious offense convicted of was §712-1241 through §712-1249)



This disparity between judges in sentencing practices continues with the disposition of drug offenders, the particular offense where the suspended sentence and DAG pleas are used most often (this because drug offenders are commonly your one time offenders). Judge E granted such sentences to two-thirds of his offenders, with Judge A and B still going heavy on the jail/probationary sentences (41.7% and 38.5% respectively).

As we review the current sentencing practices within Hawaii's first circuit court, we must also pay attention to another criminal justice agency that plays a major role in that capacity--the Adult Probation Department. For each convicted felon, a presentence diagnosis and report shall be ordered (in accordance with Haw. Rev. Stat. §706-601) and the sentencing judge shall "accord due consideration to a written report of the diagnosis before suspending or imposing sentence . . ." This pre-sentencing investigation (PSI) is conducted by Adult Probation Department and makes a recommendation to the judge as to what sentence that department feels is appropriate based on "relevant information, such as the adult's history of delinquency or criminality, his physical and mental condition, his family situation and background, his economic status, education, occupation, and personal habits."

By comparing sentences recommended by Adult Probation with the sentence imposed by the bench, 73.5 percent of the time the recommendation was followed, 3.7 percent of the defendants received more severe sentences than recommended and nearly one out of four offenders (23.3 percent) got more lenient sentences. (See tables 22 and 23.)

TABLE 22

FREQUENCIES OF SENTENCES RECOMMENDED

AND SENTENCES IMPOSED

	Recommended		Imposed	
Prison	154	(26.1%)	117	(19.9%)
Probation and jail	139	(23.5%)	107	(18.2%)
Probation	221	(37.4%)	242	(41.1%)
Suspended sentence or DAGP	77	(13.0%)	123	(20.9%)
Total	591	(100.0%)	589	(100.0%)

TABLE 23

FREQUENCY THAT JUDGES ABIDED BY

ADULT PROBATION DIVISION RECOMMENDATION

Same	432	(73.5%)
More severe	19	(3.2%)
Less severe	137	(23.3%)
Total	588	(100.0%)

(Discrepancy in total numbers due to missing information on one or more sentencing variables.)

The type of sentences that shows most consensus between Adult Probation Department and the bench are suspended sentences or deferred acceptance of guilty pleas (DAGP)--this occurred in 93.5 percent of the cases. The greatest variance was found in the jail/probation combination, the recommendation being followed only 60 percent of the time. (See table 24.)

TABLE 24

SENTENCE RECOMMENDED

(BY ADULT PROBATION DIVISION) BY SENTENCE IMPOSED

Sentence recommended	Sentence imposed: Prison	Probation and jail	Probation	Suspended sentence or DAGP	Total
Prison	113 74.8%	13 8.6%	23 15.2%	2 1.3%	151 25.7%
Probation and jail	3 2.2%	83 59.7%	50 35.9%	3 2.2%	139 23.5%
Probation	1 0.5%	10 4.5%	164 74.2%	46 20.8%	221
Suspended sentence or DAGP	0 0.0%	1 1.3%	4 5.2%	72 93.5%	77
					588

Further analysis on individual judges indicates that Judge B is most likely to go with Adult Probation Department's recommendation (82.6 percent). Judge A, who has been identified so far as leaning heavily towards incarceration, was not as harsh in sentencing to prison as Adult Probation Department would have liked--he gave 20 percent recommended for prison lighter sentences. But he did send three adults (5.6 percent) who were recommended for the jail/probation combination to prison instead, being the only judge to do so. Judge C was the least likely to incarcerate based on recommendation to do so and never invoked a harsher sentence than recommended. Judge E also never invoked a harsher sentence than Adult Probation Department felt was warranted. (See tables 25 - 29.)

TABLE 25

SENTENCE RECOMMENDED BY SENTENCE IMPOSED

CONTROLLING FOR SENTENCING JUDGE A

Sentence recommended	Sentence imposed: Prison	Probation and jail	Probation	Suspended sentence or DAGP	Total
Prison	40 80.0%	4 8.0%	6 12.0%	0 0.0%	50 28.4%
Probation and jail	3 5.6%	33 61.1%	17 31.5%	1 1.9%	54 30.7%
Probation	1 1.9%	6 11.3%	37 69.8%	9 17.0%	53 30.1%
Suspended sentence or DAGP	0 0.0%	0 0.0%	3 15.8%	16 84.2%	19 10.8%
					176

TABLE 26

SENTENCE RECOMMENDED BY SENTENCE IMPOSED

CONTROLLING FOR SENTENCING JUDGE B

Sentence recommended	Sentence imposed: Prison	Probation and jail	Probation	Suspended sentence or DAGP	Total
Prison	11 73.3%	1 6.7%	2 13.3%	1 6.7%	15 28.8%
Probation and jail	0 0.0%	9 75.0%	3 25.0%	0 0.0%	12 23.1%
Probation	0 0.0%	1 5.9%	16 94.1%	0 0.0%	17 32.7%
Suspended sentence or DAGP	0 0.0%	0 0.0%	1 12.5%	7 87.5%	8 15.4%
					52 100.0%

TABLE 27

SENTENCE RECOMMENDED BY SENTENCE IMPOSED

CONTROLLING FOR SENTENCING JUDGE D

Sentence recommended	Sentence imposed: Prison	Probation and jail	Probation	Suspended sentence or DAGP	Total
Prison	27 75.0%	1 2.8%	7 19.4%	1 2.8%	36 22.1%
Probation and jail	0 0.0%	13 43.3%	16 53.3%	1 3.3%	30 18.4%
Probation	0 0.0%	3 3.6%	59 70.2%	22 26.2%	84 51.5%
Suspended sentence or DAGP	0 0.0%	1 7.7%	0 0.0%	12 92.3%	13 7.9%
					163 100.0%

TABLE 28

SENTENCE RECOMMENDED BY SENTENCE IMPOSED

CONTROLLING FOR SENTENCING JUDGE C

Sentence recommended	Sentence imposed: Prison	Probation and jail	Probation	Suspended sentence or DAGP	Total
Prison	20 64.5%	4 12.9%	7 22.6%	0 0.0%	31 26.3%
Probation and jail	0 0.0%	18 75.0%	6 25.0%	0 0.0%	24 20.3%
Probation	0 0.0%	0 0.0%	38 80.9%	9 19.1%	47 39.8%
Suspended sentence or DAGP	0 0.0%	0 0.0%	0 0.0%	16 100.0%	16 13.6%
					118 100.0%

TABLE 29

SENTENCE RECOMMENDED BY SENTENCE IMPOSED

CONTROLLING FOR SENTENCING JUDGE E

Sentence recommended	Sentence imposed: Prison	Probation and jail	Probation	Suspended sentence or DAGP	Total
Prison	15 83.3%	3 16.7%	0 0.0%	0 0.0%	18 23.7%
Probation and jail	0 0.0%	10 55.6%	7 38.9%	1 5.6%	18 23.7%
Probation	0 0.0%	0 0.0%	13 68.4%	6 31.6%	19 25.0%
Suspended sentence or DAGP	0 0.0%	0 0.0%	0 0.0%	21 100.0%	21 27.6%
					76 100.0%

CONTINUED

1 OF 2

3. Parole.

The judges make the in/out prison decision in sentencing, but it is the Hawaii Paroling Authority who determines the actual length of time an offender will be incarcerated. (Jail terms are fixed with no minimum set. The time imposed is also the actual time served.) For the first three months of the inmate's sentence, he is housed at the diagnostic center of the Community Correctional Center. During that time, the diagnostic team evaluates the inmates adjustment to institutional life. A report of his progress plus the presentencing investigation are forwarded to the parole board who, within the first six months, sets the minimum sentence (in accordance with Haw. Rev. Stat. §706-669) based on these reports and personal interviews with the inmate. Once a minimum is set:

> A person sentenced to an indeterminate term of imprisonment shall receive an initial parole hearing at least one month before the expiration of the minimum term of imprisonment determined by the Hawaii paroling authority pursuant to section 706-669. If parole is not granted at that time, additional hearings shall be held at twelve-month intervals or less until parole is granted or the maximum period of imprisonment expires.

Haw. Rev. Stat. §706-670(1).

Therefore, minimum sentences do not guarantee that the inmate will be released at that time. Release is based on institutional adjustment and behavior, and the inmate's predicted ability to survive without recidivating when returned to the community.

Information on minimum sentences was gathered from the FOCUS tapes at the Intake Service Center. The data covers a five-year period from

1975 through 1979 and is separated by offense. It indicates that minimums have been steadily rising during that period for virtually all types of crimes.

Table 30 presents minimum sentences, in years, by offense. For burglary, the average minimum required before the offender could be considered for parole rose from 3.3 years to 3.9, 4.1, 4.5, and then 5.2 years. The minimum for most other offenses also rose but not as smoothly. There was significant fluctuation from year to year. The overall trend, however, was upward.

TABLE 30

MINIMUM SENTENCES, BY OFFENSE, BY YEAR

Minimum Sentence in Years

Offense	1975	1976	1977	1978	1979	Change (In Years)
Assaultive	7.6	9.2	10.7	6.3	8.7	+ 1.1
Homicide	8.6	5.0	8.4	5.6	9.8	+ 1.2
Robbery	6.4	12.2	6.2	5.2	9.1	+ 2.7
Burglary	3.3	3.9	4.1	4.5	5.2	+ 1.9
Forcible Sex	8.2	7.8	10.8	12.1	8.0	- 0.2
Drugs	4.1	5.5	4.5	5.2	4.5	+ 0.3
Weapons/Escape	2.3	3.5	3.9	4.2	4.7	+ 2.4
Theft/Fraud	3.1	2.3	3.1	3.6	3.8	+ 0.7
Other	2.5	3.1	2.2	2.5	3.5	+ 1.1

SOURCE: FOCUS tape.

Table 31 shows a ratio of the minimum to the maximum sentences for the same offense categories and the same time period. This set of data should give a better picture of actual sentencing than the single length of terms. The parole board sets minimums on the basis of percentage of maximums and any change in the percentages should reflect truer sentencing decisions.

Every category showed a rise in the percentage of maximum to be served. Most rose over 10 percent from 1975 to 1979. Burglary, again, rose from 51 percent in 1975 to 59 percent, 66 percent, and then 72 percent in 1979 for a net rise of 21 percent. Most offense categories did not change that regularly and some showed fluctuation but the percentage of maximums to be served rose for all crimes and significantly for most. The average minimum sentence ordered in 1979 was around 75 percent of the maximum.

TABLE 31

RATIO OF MINIMUM TO MAXIMUM

SENTENCES, BY OFFENSE, BY YEAR

(In Percent of Maximum)

Offense	1975	1976	1977	1978	1979	Change (In Percent)
Assaultive	70	79	92	79	82	+ 12
Homicide	56	55	67	67	78	+ 22
Robbery	62	81	72	83	67	+ 5
Burglary	51	59	66	69	72	+ 21
Forcible Sex	79	88	93	72	80	+ 1
Drugs	47	70	42	56	62	+ 15
Weapon/Escape	50	74	76	85	88	+ 38
Theft/Fraud	52	50	63	70	77	+ 25
Other	63	NA	NA	93	100	+ 37

SOURCE: FOCUS tape.

Table 32 puts these minimums in the perspective of the larger sentencing picture for each crime. It shows what percentage of those convicted went to prison, what the actual number was, what average percentage of maximum term was set as the minimum, and what the average minimum was in years, all for 1978. It must be remembered that many factors go into sentencing and these figures only show a rough picture of the pattern.

Personal crimes have the greatest percentage of defendants sentenced to incarceration and they serve the longest minimums. Property crime offenders get sent to prison less often and serve shorter minimums, even though the percentage of maximum is still high. People convicted of victimless crimes, here represented by drug offenses are very seldom sentenced to prison (only 3 percent, four people for the entire year), but those so sentenced serve long minimums--an average of 5.2 years, which equals burglary. Drug offenses had both the smallest percentage of convicted offenders sentenced to incarceration and the smallest percentage of maximum sentences as minimums.

TABLE 32

PRISON SENTENCES IN 1978 BY OFFENSE

Offense	Percent of those convicted sent to prison	Number of persons sentenced to prison	Ratio of minimum to maximum	Minimum Sentence (In Years)
Forcible Sex	75.0%	18	72%	12.1
Assaultive	36.2%	3	79%	6.3
Robbery	36.2%	21	83%	5.2
Burglary	23.5%	32	69%	4.5
Theft/Fraud	10.5%	16	70%	3.6
Drugs	3.1%	4	56%	5.2

Besides the increase in minimums set by the parole board, there has also been another trend occurring relating to the actual release of the inmate. The number of paroles considered compared to the number of paroles granted shows that the inmate is less likely to be released after a parole hearing in 1980 than in 1975. For fiscal year 1975-76, four out of five parole hearings resulted in release; by fiscal year 1979-80, only one out of three were granted. Therefore, as minimums are going up, so is the actual time served. (See table 33.)

TABLE 33

PAROLES CONSIDERED

	FY 75/76	FY 76/77	FY 77/78	FY 78/79	FY 79/80
Number of persons considered for parole	120	131	149	149	139
Number of paroles granted	94 78.3%	91 69.5%	72 48.3%	66 44.3%	50 36.0%
Number of paroles denied	26 21.7%	40 30.5%	77 51.7%	80 53.7%	89 64.0%
Number of paroles pending				3 2.0%	

This is the result of a conscious effort on the part of the parole board. Hawaii Paroling Authority is responsible for monitoring the subsequent behavior of the parolee in the community and is very concerned with community safety. Therefore, they will parole an inmate only when attending circumstances of that release are conducive to community safety. The fruits of this trend are borne out in decreases in the percentage of

parole revocations relative to the base parole population, with 7.5 percent revoked in 1976-77 reduced to 4 percent revoked in 1980. (See tables 34 and 35.)

TABLE 34

PAROLE REVOCATION

	FY 76/77	FY 77/78	FY 78/79	FY 79/80
Base population at year end	492	494	470	437
Parole violation hearings	44 8.9%	47 9.5%	45 9.6%	24 5.5%
Paroles revoked	37 7.5%	29 5.9%	23 4.9%	17 3.9%

TABLE 35

PAROLE REVOCATION

	FY 75/76	FY 76/77	FY 77/78	FY 78/79	FY 79/80
Parole violations hearings	82	44	47	45	24
Parole revocations	37 45.1%	30 68.2%	29 61.7%	23 51.1%	17 70.8%
Continued on parole	5 6.1%	3 6.8%	9 19.2%	4 8.9%	3 12.5%
Decision deferred	40 48.8%	11 25.0%	9 19.2%	18 40.0%	4 16.7%

C. Alternatives to Incarceration.

Sentencing an offender to prison is the most severe form of punishment available to the state at the present time. In prison, an offender is separated from society and is unable to commit further crimes against society as a whole. This separation and restraint is achieved at great cost to both the offender and to society.

Most offenders are not sentenced to prison by the courts. (See table 11, page 56.) Usually, this form of punishment is reserved for repeat offenders and those found guilty of the most serious and/or violent felonies. Others are normally placed on probation.[66] Under a sentence of probation, the offender may remain free but must submit to certain limitations on his freedom. There is an array of specific conditions of probation which an offender may be required to meet, as determined by the court.[67]

This section will focus upon two specific alternative sentencing possibilities--restitution[68] and community service.[69] Restitution is specifically mentioned in the conditions of probation and community service is included as one of the other conditions. Both are methods by which a convicted offender can make positive, tangible recompense to the victim and to society. These two forms of probationary sentencing are now in use in

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[66]Haw. Rev. Stat. §§706-720, 706-721. See page 26 of this report.

[67]Haw. Rev. Stat. §706-624.

[68]Restitution--monetary payment for losses incurred as the result of a crime.

[69]Community service--performance of volunteer work as payment for criminal activities. See Haw. Rev. Stat. §706-605.

Hawaii's courts. Issues considered in this report include:

* offenses for which these sentences are given;
* types of offenders involved;
* strengths and weaknesses of the programs;
* steps necessary to improve the applications of these sentencing alternatives; and
* completion rates.

To make the study of sentencing alternatives manageable, Commission staff restricted the data analysis to one court (first circuit) and one year (1979). Since the first circuit court handles only adult felony cases, the number of cases is not excessively large. Through the courtesy and cooperation of the Adult Probation Department of the first circuit court, Crime Commission staff were able to review 255 case files. These were the files of adult felony offenders sentenced to restitution as a condition of their probation during 1979. With the assistance and cooperation of the Volunteers in Public Service to the Courts, Commission staff also gained access to data on adult felony offenders who had been sentenced to community service by the first circuit court during 1979. Data was gathered on 36 such cases.

1. Restitution.

The data on restitution was tabulated by computer. Twenty-seven variables were taken into consideration for each of the 255 cases. In addition to demographic data on the offenders, information was collected on the nature of the original charge, the final charge, the means by which the case was disposed, the judge involved, both the juvenile and adult criminal records of the offender, other conditions of probation and the final status of the case.

Most of the offenders ordered to make restitution were single

males between the ages of 19 and 30, who had not completed high school. The majority of the offenders had committed non-violent crimes and had submitted a plea of guilty. Also, most offenders had no juvenile or adult record. With few exceptions, offenders were sentenced to probation for five years. Slightly less than half of the offenders were given no other conditions of probation, while one-quarter were given either jail or full-time substance abuse programs (Habilitat, Salvation Army). These characteristics are typical of the general probation population. In two-thirds of the cases the amount of restitution which was ordered was $500.00 or less.

Slightly less than half of the offenders (46 percent) had either paid the restitution in full, or were making regular payments. Offenders sentenced to DAG and DANC[70] pleas tended to pay promptly. One-third of the offenders had made no payment at all. In many of these cases, several months had passed without payment being made. Most of those who were not making their payments had been sentenced to spend time in either jail or a full-time substance abuse program.[71]

2. Community service.

During the 1979 calendar year, only 40 offenders were ordered to perform community service by the first circuit court. This is in sharp contrast to the 289 who were ordered to make restitution. This also

[70]Deferred Acceptance of Guilty Plea, Deferred Acceptance of Nolo Contendere Plea. See page 37 of this report for a full explanation.

[71]The data presented above represents an overview of those cases in which restitution was ordered as a part of probation.

contrasts with 1978, when there were no offenders sentenced to community service from first circuit court.

Crime Commission staff were able to review the records of 36 of these community service cases. With only a few exceptions, there were offenders who had no previous criminal record. The typical defendant sentenced to community service was a young, first-time offender who plead guilty and was sentenced to community service and restitution as part of five years probation. Two-thirds of the offenders were males age 30 or younger. Most offenders had plead guilty to the charges against them. Also, these offenders were nearly evenly divided between married and single. More than half of the offenders received five years probation. Most received neither fines nor jail sentences as conditions of their probation, but half of the 36 cases reviewed were ordered to make restitution in addition to performing community service. Half of the offenders were ordered to perform 100 hours of community service. The remainder were given community service varying from 30 to 50 hours.

Of the 36 cases reviewed by the Crime Commission staff, 31 (86 percent) completed their community service. Three offenders did not report for their work assignments, one had a medical disability waiver and one was not placed in a job. The most recent report from Volunteers in Public Service to the Courts (6/1/79--5/31/80) states that the program had 1,286 offenders sentenced to community service from all first circuit courts (including district courts) during the period. These offenders performed a total of 40,635 hours of service. The success rate of the program was 90 percent. A wider range of offenders was sentenced to community service for generally

stiffer sentences. The Hawaii Crime Commission strongly supports this type of sentence.

3. District court.

The focus of this study was first circuit court, but since the district court has ordered a much greater volume of both restitution and community service, Crime Commission staff conducted interviews with the staff of the District Court Counseling Service. The District Court Counseling Service handles an average of 100 cases of community service each month. These are misdemeanants who serve short terms. The average amount of community service ordered in district court is 20 hours. Most offenders (80 percent) are sent to the Parks and Recreation Department to pick up litter. The remainder of the offenders are sent to various volunteer agencies for their work assignments. The completion rate for this work, as reported for 1979-80, is 90 percent.

Staff members of the District Court Counseling Service indicated that community service was a positive and useful sentencing practice and expressed strong positive feelings about its continued use. The Counseling Service also reported that they do not handle restitution for district court, which is administered by the various courts.

4. Conclusions.

The measure of success for both restitution and community service employed in this study is completion. In some of the restitution cases success was also measured by regular and continued payment, indicative of completion in the near future. The overall rate of success for restitution cases is 46 percent, and for community service, 86 percent.

To some extent, this discrepancy can be explained by the higher degree of selectivity applied to the community service offenders. Adult Probation personnel explained that many probation officers did not press the offenders for restitution payments if the offender was facing numerous other serious problems, as most of them were. If nearly half of those ordered to restitution do pay under a system of minimal supervision and pressure, then it is reasonable to assume that a larger percentage would pay if the control system were better organized. As the system operates currently, overseeing the collection of restitution payments is an ancillary duty of the probation officers.

One means of improving this situation would be to employ personnel whose designated task is to oversee this collection. This could be done within the Adult Probation Office by arranging one or two probation officers to this task. Another means to accomplish this end would be to put the collection of restitution in the hands of the Volunteers in Public Service to the Courts. In either case, additional staff would be required to handle these duties. Further, since our analysis revealed that offenders who were sentenced to either jail or in-house substance abuse programs tended to default on restitution payments, some adjustment in sentencing should be made in these cases. The offenders who paid their restitution the most frequently were those who had been ordered to make restitution as part of a DAG plea or a DANC plea.

The success of these constructive programs is encouraging. They are by no means panaceas, but their expanded use is strongly indicated.

D. Interviews.

Persons from segments of the criminal justice system concerned with sentencing were interviewed by Crime Commission staff in order to get comments from those within the system about how sentencing is currently functioning in Hawaii. Commission staff interviewed representatives from the Honolulu Prosecutor's Office, Public Defender's Office, Adult Probation, Judiciary (first circuit court judges), Parole Board, Corrections, and Intake Service Center. Taken together, the comments are quite revealing about sentencing practices in Hawaii today. Opinions were expressed about how the system is designed, how well it is functioning, and what improvements should be made. These interviews are summarized in this section. The opinions expressed in this section are those of the various professionals interviewed by Crime Commission staff to provide a more complete picture of present practice, and do not necessarily represent the views of the Crime Commission.

The information is organized topically for easy analysis and application to other sections of this report. It is presented in the following categories: 1. Purpose of sentencing; 2. Sentencing code; 3. The in/out decision; 4. Probation (including alternative sentencing); 5. Prison (including parole); and 6. Alternative sentencing schemes.

1. Purpose of sentencing.

Strong opinions were expressed about the purpose of sentencing--what it is and what it should be. Most people decried the lack of a unifying philosophy and its effect on the system. There was disagreement, however, on what exactly should be the unifying philosophy. Opinions were

divided on the issues of rehabilitation, deterrence, and punishment. (See pages 10-17 for a discussion on the purposes of sentencing.)

a. Unifying philosophy. People from all segments of the system have felt the need for a common sentencing philosophy and have faced problems with consistency and coordination because of this lack. Corrections Division called this lack of a unifying philosophy a major problem with sentencing. Specifically pointed out were the problems caused by conflicting philosphies of Corrections and the Parole Board. In the system as a whole, what is lacking is a consensus among the criminal justice agencies and a sense of common purpose.

Those interviewed pointed out that while in theory there is an overriding philosophy stated in the penal code and correctional master plan, that functionally there is none. These people contend that: 1) although it may have been the intent of the code to have an overall sentencing philosophy, that has never been carried out; 2) the changes toward mandatory sentencing have further eroded the stated philosophy; 3) the resources of the community have never been integrated into sentencing; 4) there is a lack of harmony between the four circuits; and 5) there is a lack of harmony between the juvenile and adult systems.

These failings have contributed to the self-defeating tendency of the criminal justice system to function not as a system at all, but rather as a group of nearly autonomous agencies, related only out of necessity by statute and clientele. This lack of common philosophy has even divided individuals within agencies and is an important factor in judicial disparity.

b. Rehabilitation. There is a fundamental agreement between those interviewed that the concept of rehabilitation has a place in the sentencing system. It should not necessarily be the overriding, or even primary, goal of sentencing, yet "straightening out" offenders should receive attention and always remain a hope. What should be avoided is overemphasis on rehabilitation to the exclusion of all other sentencing goals.

Most of those interviewed also agreed that rehabilitation generally has not succeeded in prison. Probation is a more appropriate setting for rehabilitation. Some people, it is admitted, cannot be rehabilitated; but of those who can, probation offers the best chance.

Corrections Division is especially concerned about rehabilitation as the goal of prison sentences. It sees the prison's job as first, motivating the inmate to want to change; and second, providing him or her with the skills necessary for that change. It is a difficult job, given the setting and resources available. Yet, Corrections Division is tied into this structure by a now nearly defunct correctional master plan. It is not only caught in this delimma of being asked to do a nearly impossible job (being given the clients for whom rehabilitation has failed during probation) but is not supported in the instances when it does show some results. Corrections Division feels that prison officials work to prepare inmates for their return to society, while the paroling authority tends to deny parole to these individuals.

c. Punishment. Those interviewed agreed that punishment should be one element in sentencing, but disagreed as to what constitutes punishment in the system. They spelled out the reasons why punishment is important, both for the community and the defendant. The community at large may feel

that justice is not done if the offenders are not punished. The defendants also expect punishment. Insufficient punishment promotes lack of respect for law and justice.

Almost everyone would admit that going to prison is punishment. The disagreement centered around probation. Judiciary personnel believe that probation is punishment while prosecutors felt that it is not. Both judges and Adult Probation personnel believe that a sentence of probation can be punishment if it is a restriction on freedom. So many people, they complain, do not understand this and feel that being on probation is not bad. The Prosecutor's Office agrees that probation can and should have a punishment element but stated that right now it does not, due to a lack of supervision. One prosecutor said that currently, "probation is at best a minor inconvenience." Just as prison should be rehabilitative as well as punitive, probation can and should constitute punishment as well as rehabilitation.

d. Deterrence. There was a division of opinion about the function of deterrence. Adult Probation reasoned that there is little deterrence value in sentencing because the defendants are 1) impulsive, 2) abusing some substance, 3) depressed, and 4) think nothing good will ever happen to them anyway. Prosecutors, on the other hand, believe in the deterrence value of stiff sentences.

2. Sentencing statutes.

Those who were interviewed expressed criticisms of existing sentencing statutes. The amount of judicial discretion currently allowed and the mandatory sentencing provisions drew particularly harsh comments. Also criticized as being too open for abuse were the statutory provisions

for motions for reconsideration of sentence, statutory sentencing guidelines, maximum sentences, and sentences of jail plus fines and restitution.

a. Judicial discretion. There is agreement that the penal code has narrowed judicial discretion in sentencing and general dissatisfaction with this trend. Some want more discretion returned and some want more taken away. Judges generally feel that they are responsible, that they have heard the case and thus are well acquainted with the facts, and they are trained professionals. Therefore, they should have ample discretion in sentencing. If the judge is not to be trusted with the sentencing decisions, they say, then all you need is a machine. Others were concerned that the legislature does not trust judges with any discretion but gives it to the Parole Board and to Corrections instead.

The other school of thought holds that narrowing judicial discretion has removed disparity and that if that discretion were again increased then disparity would likewise increase. Prosecutors in particular feel strongly that the less judicial discretion there is, the better. They contend that since there is no vehicle for removing judges who are basically inexperienced in trial practice and are appointed for political reasons, the only alternative for achieving fairness in sentencing is to remove judicial discretion. Because we cannot change the judges, then we must take discretion away from them.

b. Motions for reconsideration. Another aspect of judicial discretion, beyond the original in/out decision, is the motion for reconsideration. Some of those interviewed expressed the opinion that it is sometimes misused by judges as a way to get around the sentencing code. Some judges sentence the defendant to prison, for the maximum, and then

after the initial diagnositic phase of confinement change the sentence to probation by granting a motion for reconsideration. This pattern is intended to shock the defendant into going straight while on probation.

Intake Service Center personnel indicated that such a sentencing pattern, involving motions for reconsideration, was used for 35 to 40 first-time felons in one year. They complained that the use of this avenue misled others in the system (Adult Probation) and led to a lack of coordination. The Prosecutor's Office was also concerned with the use of such motions.

c. Current sentencing guidelines. Judicial discretion is currently somewhat structured by statute, which sets out a series of considerations to use when making the in/out decision. Several interviewees commented on these sentencing guidelines. Corrections Division indicated that judges generally do follow the guidelines, but that it depends on the individual judge. A judge criticized these guidelines saying that the statutes which instruct judges to consider probation first need to be reordered. If they were followed, he said, then nobody would be sent to prison.

d. Statutory maximums. One person criticized the penal code's provision of maximum sentences. A staff member from Corrections stated that in an indeterminate system, the maximum is meaningless. The actual time served has little to do with the maximum sentence.

e. Mandatory sentences. Almost everyone had some comment about the mandatory sentences now on the books. The prosecutors like them and advocate going further, to a determinate sentencing scheme. Others in the system are generally opposed to mandatory sentencing. The prosecutors are appreciative of the current mandatory sentencing provisions because the judge

is removed from the decision. They see Hawaii's judges as erratic, prejudiced to the defense (certain ones) and "bleeding hearts." The only criticism they have of the current mandatory provisions is that the process for applying the extended term and gun offense sections is far too long and involved. Would not it be simpler, they argue, to have a determinate scheme?

Just as the Prosecutor's Office likes the mandatory provisions because they curtail judicial discretion, so do others dislike them for the same reason. Judges feel that because they are responsible, the mandatory sentencing provisions are not needed. Some believe that mandatory imprisonment for class A felons should only apply to violent offenses. Others add that most offenders to which these provisions apply are career criminals and three time losers and that they would go to prison anyway. However, in enacting the mandatory sentencing statutes, the legislature has eroded the philosophy of indeterminate sentencing.

f. Incarceration and fines and/or restitution. Adult Probation is strongly in favor of sentencing those who go to prison to pay restitution. It holds that offenders should be made to repay the victims. Corrections however, is strongly opposed to this practice. One staff member stated that such a sentence can never work because the inmates have virtually no income.

3. The in/out decision.

The original sentencing decision of whether to send the offender to prison or place him on probation is made by the judge on the basis of the information presented in the case and the presentence investigation report. Criticism of this decision is therefore focused at both the presentencing

investigation report and at the judge. Judicial disparity is most often the focus of criticism. It is a divisive issue for the sentencing system.

a. Presentence investigation report. All those interviewed agreed that the presentence investigation report, furnished by Adult Probation, on Oahu, is important, should be retained, and should be made as good as possible. A supervisor in Adult Probation in Honolulu stated that right now there are no guidelines in use other than the statutes but that the division is working on a handbook to serve as guidelines. The supervisors review all presentence investigation reports to seek consistency. If no agreement can be reached with the worker, separate recommendations are made to the judge. The report is prepared carefully, seriously, and responsibly. It is treated as if it were the actual sentence. As some judges indicated, they usually follow the recommendation of the presentence investigation report.

Most agree that the evaluation is good, but would like to see also included: 1) an evaluation of the defendant by a state drug center, as so many abuse drugs; 2) the police department's recommendations, because often the police officer has insight into the individuals involved; and 3) extra information in the case of guilty pleas, because the report is all the judge has to go on.

Several people had suggestions for improving the presentence investigation report. The public defender felt very strongly that the adult felony sentencing judges do not have all the information they need. Judges do not regularly get 1) psychological tests (which should be done regularly by a psychologist assigned to the courts); 2) school tests and

other data; or 3) the drug history or specific information about drug use relative to the crime. All of these would help the judge view the defendant as a person, not just as a murderer or burglar. School data and tests are particularly important and Adult Probation does not include that information, even in the 25 percent of the time when the defendant has a juvenile record and that information is already available. If the judge does not ask for much then he or she will not get much. The judge should have more information from the victim and more information from the defendant. The public defender feels that if the presentencing investigation report was improved in these ways, then sentencing would be better and more consistent. The mandatory provisions in the law would then not be necessary.

Corrections Division complained that it does not receive the presentence investigation reports on sentences of less than one year in jail. It would like Adult Probation to share those reports in these instances.

Furthermore, each circuit handles its reports differently. In the third circuit, on Maui, the final recommendation becomes part of the court record whereas in the first circuit it is a confidential letter seen only by the judge.

The future of Intake Service Center's involvement in presentence investigation is unsettled. Although mandated by law, Intake Service Center has not yet taken over that function from Adult Probation.

b. Judicial disparity. A volatile issue in sentencing is judicial disparity. Everyone interviewed had a strong opinion on this issue. Judges generally defended disparity as inherent in the system. One judge called disparity the human element, based on differing philosophies. He said it was all part of the judicial system and that one could not compare

sentences because each defendant is different so each sentence is different. Another commented that one of the purposes of creating indeterminate sentencing, with the Parole Board setting the minimums, was to eliminate discrepancy.

The prosecutors disagree with these descriptions. They believe that too many judges are overly swayed by the defense side and give probation too often. The prosecutor keeps a file of "judicial atrocities," such as the person convicted of 56 felonies and one misdemeanor who was granted probation. According to the prosecutor, one judge never gives prison unless required to by statute. He also commented that it is established policy that conditions at Oahu Prison should never be a consideration in sentencing, yet one judge has admitted that he takes those conditions into account. The vast disparity among the judges and the lack of recourse are the prosecutors' main complaints. They feel that the worst cases of abuse of judicial discretion are with class C felonies, property crimes. Overall, they believe that the judges have been too lenient.

Adult Probation, which is part of the Judiciary, also stated that the variation and inconsistencies in sentences is a problem. The Intake Service Center agreed that our judges are very individualistic. On the other hand, Corrections argued that a lot of careful screening goes on by the courts before a person is sent to prison.

4. Probation.

Probation is by far the most common sentence in Hawaii. Within the criminal justice system, there is strong disagreement over its effectiveness. However, two special conditions which may be attached to a sentence of probation--community service and restitution--are consistently viewed more

positively. Another positive step, some argue, would be to provide treatment at a state-run drug treatment facility.

a. Probation. There are decided differences of opinions in the criminal justice system about the purpose and use of probation and probation's effectiveness. Adult Probation claims its system of supervision is effective and, because many offenders do not repeat, successful. Others claim it is not punishment, that probations are unsupervised, and that generally an offender is "getting off free" when sentenced to probation.

A staff member from Adult Probation defends the use of probation. She says that probation works well for those young adults who need supervision, are lonely, or need limits. It does a good job of "correcting people," for those who are able to be rehabilitated. Probation can be punishment when it is a restriction on freedom; but, she says, so many people do not view it that way. She also said that the CETA job training and job placement program was positive and more of that is needed. The bottom line, she said, is that maybe half of those assigned to Adult Probation do not repeat, so probation does work for them.

Judges, who give the sentences, are divided as to what probation is. One judge said that probation definitely is punishment, just as Habilitat is. Another believes it is both punishment and rehabilitation. A third countered that it is not punishment at all, just a second chance for the offender.

Prosecutors view probation as a kind of "non-sentence," almost equivalent to an acquittal. One stated that "probation is at best a minor inconvenience." The prosecutor commented that it is not punishment at all, but that it could be if the office had enough probation officers to

ride herd on the offenders. Then it could accomplish a lot. He said that with the number of people currently on probation (over 4,000) it is impossible to supervise them adequately. What he recommended instead of probation is short jail sentences for first offenders to jolt them. He also would like to see special conditions put on probationers, which is seldom done, like making certain high-crime areas out of bounds.

Corrections disagrees. It would like to see fewer sentences of jail plus probation, because they are purely punishment. With jail sentences as long as one year, the sentence loses it shock value.

The public defender expressed strong feelings about probation as it is currently run in Hawaii. He says that it is wrong that the felony courts' involvement with a defendant ends with sending him or her off to probation. The conditions imposed by the court are often unrealistic (such as "the defendant must remain employed" yet he or she is unemployable) yet the court takes no notice and washes its hands of the matter. With unrealistic conditions, the defendant's processed for failure right at the outset. Furthermore, he says, there is no meaningful probation as such at the current time. If the court is serious about the conditions imposed, he holds, then it should see to it that those conditions are enforced. For instance, if a felon on probation is convicted of a misdemeanor, Adult Probation will not do anything, even when they learn that the person has been convicted. A good percentage of the probationers believe nothing will happen to them if they violate the conditions. It is also not meaningful because, often, either a) the probationer never sees his or her probation officer; or b) he or she has to take time off from work and come in for no good reason (being asked "how are you doing?").

The public defender has also offered suggestions for improving probation. He emphasizes that probation should be individualized. The officer should know what resources are available and tailor the program to the individual, such as provide vocational rehabilitation if the person can be certified so eligible. Rather than follow this process, currently probation officers adopt the attitude that if the person is not going through a crisis then everything is all right. What is needed is better behavioral modification techniques.

He also suggests creating levels of probation. This would give the probation office some power to enforce its conditions. If the person violates probation, then something should happen to him or her--a weekend in jail, then 30 days in jail, and up to some time in prison at some point. One level should be face to-face meetings required everyday for two weeks.

b. Community service. Most people interviewed support community service sentences in theory. Perhaps because of television, crime and criminal acts have become so impersonal that people have become immune to the effects. Community service sentences, if used correctly, can help make the consequences of crime more real to offenders. It is a good teaching tool which could be used more for adult felons and all offenders. When sent to work at Waimano Home, young people realize how lucky they are and how much they have. However, most agree that to be meaningful, the service ordered should bear a relationship to the crime committed. For instance, if a person steals a car, he or she should be ordered to wash and wax that car five times for the victim. In general, the community service sentence can be a meaningful, inexpensive alternative which can benefit the victim, the offender, and society as a whole.

Resistance comes when the service ordered is not meaningful and when the work is not adequately supervised. Then it merely serves to give the offender a disdain for the law. Some feel that this is the state of community service at the moment. Some judges are reluctant to use this alternative. They do not know what agencies and facilities are available or how well the defendant will be monitored to see if the sentence is carried out. They need more clarification about this relatively new type of sentence.

c. Restitution. People in the system also agree about the benefits and appropriateness of restitution in theory. However, they do not agree about the practicality of sentencing every defendant, when appropriate, to pay restitution. Adult Probation and the Prosecutor's Office agree that every defendant should be made to pay restitution, even if sentenced to prison. Judges and Corrections do not believe it is possible to force prisoners to pay. Most defendants are indigent and the Supreme Court has ruled that the state cannot touch money earned in prison. It is questionable, they argue, that any person sent to prison would ever pay. The sentence then becomes meaningless and detracts from respect for the law. For someone on probation, the law says that he or she must pay only if they have the ability to pay. Thus, many of the sentences for those on probation also go unserved. Any restitution sentence must be considered carefully so that it is realistic. For those who cannot pay, perhaps community service is more appropriate.

One judge also disagreed with restitution on principle. He said that if the defendant has any money then the victim can sue in civil court. For the criminal judge to determine the amount of restitution, he would be

prejudging the amount of damages.

d. Drug treatment facility. There was some sentiment expressed that the state has need for a drug treatment facility. A judge was concerned that from 75 percent to 90 percent of property crimes are commited by drug abusers and are in reality drug-related offenses, yet there is no state facility for drug treatment. The judge must sentence the offender to jail, which is an inadequate solution for the person's problems. This is especially true of first-time offenders. Habilitat is a program appropriate only for some, not for most, drug abusers.

5. Prison.

There is a consensus that prison is necessary for some but there is a general dissatisfaction at its cost per inmate and the programs made available. Most people would like to see honor camps, prison farms, and prison work programs, with the inmates themselves defraying part of the cost of their upkeep. Most people also have some complaint about the length of sentences served and about prison furloughs. These issues concern Corrections Division, the Parole Board, and Intake Service Center.

a. Parole Board: minimums. The Parole Board believes it is doing a good job in setting minimums. Prosecutors and judges generally agree but would like input into the decisions. Others believe the minimums being given are inappropriate.

The paroling authority stated that in the Rules and Regulations of the Parole Board, guidelines have been established. These define and structure the elements to be considered and serve to remove discretion as much as possible, thereby removing disparity. The formula used is: first time to prison, the minimum is one-third the maximum; second time, one-half

the maximum; third time and after, three-fourths the maximum. Each of these can be adjusted: reduced up to three years for mitigating circumstances and increased up to five years for aggravating circumstances. They believe that this system works well to accomplish both the rehabilitation of the inmate and protection of the community as spelled out in the law.

Judges would like to have input to and feedback from the Parole Board. Judges generally want to have some say in the minimum because they feel they can make a significant contribution. They have heard the case in court and felt the impact of the testimony. They would also like to have the authority to review the decision. Judges acknowledge that they are not trained in the philosophy of sentencing--protection of the public versus punishment, etc.--and that the Parole Board has more information available than they have and so are willing to leave the setting of minimums to the Parole Board. However, they would like some direct involvement.

The prosecutors think the Parole Board is doing a good job setting minimums. They would also like to be involved in the decision, however.

The Intake Service Center commented that the Parole Board has established good guidelines for setting minimums. Corrections disagreed, however. A Corrections Division staff member believes that the philosophy of punishment inherent in the parole guidelines has created almost a determinate scheme, eroding the stated philosophy of rehabilitation. He added that the Parole Board is ignoring the person's readiness to return to the community--the rehabilitation aspect--in favor of punishment. Another Corrections administrator said that she does not argue the concept of punishment in sentencing but says that the system should be consistent.

For her, parole is also punishment but the Parole Board refuses to view it as such, considering only prison to be punishment. She is concerned that the minimums now being given are very long and it is very hard to get them reduced. This erodes her ability to give inmates incentives to make progress.

b. Intake Service Center. The Intake Service Center is very important in the criminal justice system because it does pretrial processing, presentence work (or will do, statewide), and the 90-day diagnostic evaluation prior to setting the minimums.

c. Cost of prison. Most criticisms of prison per se center on the cost of maintaining inmates. A Corrections official explained that prison population is increasing while the money alloted Corrections is decreasing. The debt ceiling is preventing increases, yet no account is taken of the increase in prisoners. He argued that in considering sentencing practices, one must take the cost factor of prisons into account. The biggest cost is personnel and the prison is understaffed now. Even so, the cost of maintaining one prisoner is approximately $20,000 per year.

Some recommendations for dealing with this problem were offered. These included: 1) the Michigan system of one-in/one-out--for every admission someone must be paroled; 2) implementing the Scadanavian system of day prisons. Prisoners report everyday but go home at night; 3) instituting a direct incarceration tax, singled out from other taxes like property tax is. This way every taxpayer would be aware of the cost of prisons and public support would be generated for reducing this public burden; 4) using the Washington, D.C. system of misdemeanor citations. Every misdemeanant would be issued a citation, similar to a traffic ticket,

which would drastically reduce the cost of pretrial incarceration because there would be no misdemeanor arrests.

d. Prison work. Almost everyone agreed that the prison should have work programs as it did in the past. They believe prisoners should be made to earn their keep by doing work such as building solar units or doing road work. Others argue that prison should simply be the holding facility for inmates to do hard labor. Work programs are far too few (school, welding, automotive repair) and many more are needed. In the past there were such work programs--bookbinding, furniture refinishing, etc.--but they were phased out when the inmate population was low (around 1974). Now, there is no money or space to reinstitute these programs.

e. Honor camps and prison farms. There is agreement that work farms would be a good, cost effective, and productive alternative to the current prison system. Some inmates would profit by the experience and the goods produced could help pay for the cost of the prison system as a whole. Olinda Camp used to supply all the meat and vegetables needed for all state facilities. However, it was closed and no longer allowed to do so. Most of those interviewed agreed that prison has little value for rehabilitation and that it would be better to make maximum use of honor camps and work farms instead. Perhaps Halawa land could be used for prison farms.

f. Prison furloughs. Concern was expressed over prison furloughs. People in the system argued that giving Corrections the discretion to grant furloughs undermines the rest of the sentencing structure. The paroling authority complained that there are no statutes governing furloughs and their relationship to minimums, only internal rules which can be followed

or not at will. They would like to see everyone who is to be paroled be on furlough first. Corrections contended that in a few instances Corrections followed the Parole Board's wishes to grant furloughs first and the persons were denied parole anyway.

Some who were interviewed believe that furloughs subvert the whole system. They may be granted against the wishes of the judges and the Parole Board and may be granted without regard to the minimum or even mandatory minimum sentences given by the court. There is no outside review in the case of prison furloughs. Corrections is thus granted wide discretion in this important matter.

g. Paroling authority: parole. The Parole Board believes it is doing a good job in paroling prisoners, as witnessed by the low recidivism rate, but Corrections feels that too few inmates are being released, which has caused crowding at the prison. The paroling authority claims to be doing a good job because the recidivism rate of 8 percent is the lowest in the country. Of those 30 who had parole revoked, only 7 were for additional crimes (and not all felonies) while 23 were for technical violations of parole. One hundred and six out of 275 are steadily employed and less than 10 percent are on welfare. They admit that the rate is low because parole criteria are high and rigid so that the chances of success are good. They strongly believe that public safety should not be sacrificed to relieve prison crowding.

Corrections does not agree with this because they must deal with the effects of strict parole standards. They do not like the standard imposed by the paroling authority of accepting people for parole only if they have successfully completed a work furlough program at the prison. They believe

parole is refused too frequently, eroding their ability to give incentives for inmate progression. Prisoners who do what is expected of them by Corrections may still be denied parole.

6. Alternatives.

Some people expressed interest in alternative sentencing structures as a solution to the problems with Hawaii's system. Some would like to see a sentencing commission to standardize and rationalize practices statewide. Others favored judicial guidelines, whether in connection with a statewide sentencing commission or not.

a. Sentencing commission. Some of those interviewed would like to see a statewide sentencing commission created in Hawaii. It could be similar to Minnesota's, serving to give direction, maintain coordination, and review practices on an ongoing basis. Corrections Division holds that such a commission would be a great help in planning. One person suggested the commission be multi-disciplinary, including someone from mental health and someone from the behavioral sciences, as well as people trained in law.

The public defender would like to have something similar to a sentencing commission, but less actively involved in policy. He believes that having a council to observe practices and report would help restructure sentencing practices so as to make them into a system. He would take everything that is not judicial in the system, put it under the Department of Social Services and Housing (DSSH), and make the director of DSSH accountable. The council would observe sentencing practices and evaluate them, in writing, giving the Governor and the Chief Justice 30 days to correct the inadequacies or the council would make those inadequacies public.

b. Guidelines. Judicial guidelines, whether mandatory or informal, were favored by some. Some of those interviewed would like to see a system of guidelines incorporated in the sentencing commission scheme, as Minnesota has. Others favor some kind of optional judicial guidelines which could help make sentencing more uniform, while maintaining the system as it is currently constituted.

E. Summary.

The Hawaii Revised Statutes provide for a system of indeterminate sentencing with offender rehabilitation as a primary purpose. Recent legislation has revised this somewhat by providing for mandatory sentences in certain specific instances. As a consequence of these revisions, Hawaii now operates with a hybrid sentencing system, mostly indeterminate, but partly determinate. These changes represent a piecemeal approach to our sentencing problems. A systemwide look at problems would seem to be a more coherent and productive method to apply to these concerns.

The data section shows that most convicted felons are sentenced to probation or the combination of probation and jail. Those who are convicted of the more serious or violent crimes get sent to prison. Judicial disparity is evident in this data. The minimum sentences have increased in the past few years, and this may well account for the increase in prison population.

Our data on restitution and community service show that these forms of alternative sentencing are successfully operating here in Hawaii, but are not used widely in felony sentencing.

Interviews with professionals in the criminal justice system indicate

that the system functions in spite of a lack of good inter-agency communications and a clear unifying sentencing philosophy. Many of those interviewed said that they would welcome some changes which might help to overcome these problems.

V. NATIONAL TRENDS IN SENTENCING

V. NATIONAL TRENDS IN SENTENCING

A. General.

On the national level, there is much interest in sentencing. Procedures are in the state of change in many states. Such large scale dissatisfaction indicates that there are serious problems inherent in the present systems. The trend is toward determinate sentences, mandatory sentences for specific offenses, and a general limitation of judicial discretion. Among the means employed to limit or structure judicial discretion are: legislative sentencing, sentencing guidelines, and parole guidelines.

Sentencing guidelines have been developed in several states. These guidelines usually concentrate on the following sentencing concerns: mandatory sentences; circumstances surrounding a particular offense, whether mitigating or aggravating; multiple crimes; appeals of sentences; parole; good time; and retroactivity of new sentencing legislation. By definition, guidelines are an indication or outline of policy or conduct. In sentencing, guidelines serve as a tool to assist in decision making. They can serve to structure decision making, and should not be employed in a rigid manner. Most cases will fall within the guidelines, and judicial departures will be necessary in the others. The United States Parole Commission reports that between 80 to 85 percent of its cases are accounted for by guidelines.[72]

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[72]Leslie T. Wilkins, et al., Sentencing Guidelines: Structuring Judicial Discretion, National Institute of Law Enforcement and Criminal Justice, 1978, p. 5.

Guidelines are not mechanical. Mandatory sentences are much more mechanical. Under the guidelines structure, individual cases are judged within the overall policy constraints. Judges can use guidelines as an empirical yardstick against which to measure the sentence he or she tentatively plans to impose.

Minnesota enacted sentence guidelines legislation in 1978. This particular system employs a sentencing guidelines grid which takes into account both offense and offender characteristics. Under this system, judicial discretion is essentially limited to the in/out decision. Any wide variance with the sentences provided by the grid must be explained in writing. The same Minnesota legislature also established a sentencing commission with the following mandated tasks:

* develop and implement sentencing guidelines;
* collect, analyze, and disseminate data on state and local sentencing;
* conduct research on sentencing guidelines, the use of imprisonment and alternatives to prison, and plea bargaining practices;
* study the impact of the above and recommend changes to the legislature.

The stated purpose of the Minnesota procedures is to provide uniformity, equity, and certainty of sentencing by establishing rational and consistent sentencing guidelines which reduce sentence disparity and ensure that sanctions following conviction of a felony are proportional to the severity of the offense of conviction and the extent of the offender's criminal history.

Pennsylvania has enacted legislation to provide for the development of sentencing guidelines aimed at protection of the public, retribution, and

rehabilitation. These guidelines will include specific sentence ranges, increased severity for felons previously convicted of an offense with a deadly weapon, provide for variation from the range for aggravating or mitigating circumstances. This legislation provides for public hearings prior to their implementation. Courts will be required to use these guidelines and provide a written justification for variation from them.

New Jersey has established a criminal disposition committee designed to review all aspects of the criminal justice system. This committee will develop sentencing guidelines which will focus on the criminal history of the offender, his or her amenibility to non-custodial supervision, exacerbating factors, the offender's community background, and his or her actions since arrest. These guidelines employ a complex scoring system, and are to be employed by the courts on a voluntary basis.

In Massachusetts, the idea of sentencing guidelines is being considered by the Superior Court and separately by the legislature. These guidelines are concerned more with parole than with actual sentencing.

Numerous other states are in the process of developing programs of varying degrees of similarity. Among them are Alaska, Florida, Illinois, Maryland, Michigan, Utah, and Washington.

B. California.

The California state legislature passed a determinate sentencing law in 1977. After several years as a leader in the express use of indeterminate sentencing as a rehabilitative tool, this represented an extreme change in policy and an emphatic vote of no confidence in the process of rehabilitation. The purpose of the determinate sentencing law is stated in the California

Penal Code (Sec. 1170) as follows:

> The Legislature finds and declares that the purpose of imprisonment for crime is punishment. This purpose is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentence of offenders committing the same offense under similar circumstances. The Legislature further finds and declares that the elimination of disparity and the provision of uniformity of sentences can best be achieved by determinate sentences fixed by statute in proportion to the seriousness of the offense as determined by the Legislature, to be imposed by the trial court with specified discretion.

Specific terms were established by the legislature for specific crimes. Sentence length was also set by the legislature. A sentencing judge could select one of three sentence lengths. The offender was expected to serve the entire sentence with the exception of one-third good time.

Parole was retained under this system, but the maximum time a person was to spend on parole was established at one year. The maximum for parole revocation was set at six months.

A study comparing the indeterminate and determinate sentencing laws in California produced the following conclusions about determinate sentencing:

* Determinate Sentencing Law provides more adequate punishment than Indeterminate Sentencing Law.
* Under the DSL there is more certainty about the amount of time to be served.
* DSL increased certainty of imprisonment upon conviction.

* DSL provides more sentence equity.
* DSL produced less incapacitation due to shorter sentences.[73]

Since 1977, the prison facilities of California have become overcrowded. Several new bills have been passed in the legislature which have tended to be in response to particular criminal activities. This added legislation has increased sentence length overall.

The Arthur Little study cited above recommended that California establish a sentencing commission, and pointed out the following strengths of such a body:

a) The complexity of the criminal justice system can be considered.
b) A systematic approach to the criminal justice system and its many components can be utilized.
c) Such a commission is less vulnerable to direct political pressure.
d) The commission will have the time, the expertise, and the manpower to develop sentencing reform.
e) The commission will be able to monitor and develop a feedback process that can be utilized to change sentencing practices without the necessity of continual legislative action.[74]

These are compelling arguments to consider the development of a sentencing commission. It is useful to make a distinction between a sentencing commission and sentencing guidelines. A commission is a body whose function may be the development of guidelines, or it may be a body

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[73]Arthur Little Inc., Determinate and Indeterminate Sentence Law Comparison Feasibility of Adapting Law to a Sentencing Commission (Guideline Approach), Arthur Little Inc., San Francisco, May 1980.

[74]Ibid., p. V-1.

charged to investigate any possible sentencing reform. Guidelines are one vehicle to accomplish sentencing reform.

C. Minnesota.

Dissatisfaction with indeterminate sentencing practices has led several states to begin exploring methods of determinate sentencing. A major problem involved in determinate sentencing is prison overcrowding. California experienced this as a result of their 1977 determinate sentencing scheme. Minnesota has developed a determinate sentencing scheme which can be adjusted to control prison population growth. In March 1978 the Minnesota State Legislature created the Minnesota Sentencing Guidelines Commission. This commission has two clear mandates; 1) to reduce disparity in the sentencing of adult felons, and 2) to control prison population growth by monitoring and adjusting sentencing practices. The Minnesota Sentencing Guidelines Commission is composed of nine members who are appointed for a term of four years. The membership includes:

The Chief Justice of the Supreme Court or his designee;

Two District Court judges appointed by the Chief Justice of the Supreme Court;

One public defender appointed by the Governor upon recommendation of the State Public Defender;

One county attorney appointed by the Governor upon recommendation of the Board of Governors of the County Attorneys' Council;

The Commission of Corrections or his designee;

The Chairman of the Minnesota Corrections Board or his designee; and

Two public members appointed by the Governor.

Supporting the commission is a staff of six who have been instrumental in developing the sentencing guidelines and who presently monitor sentencing practices in the state.

To accomplish the tasks outlined by their legislative mandate, the commission staff studied sentencing and releasing practices currently in use in the state of Minnesota. These studies indicated that disparity did exist. Since there are several philosophical bases for sentencing, the commission staff had to determine which to apply to their sentencing guidelines. Since the indeterminate sentencing scheme was based on a minimially effective rehabilitation rationale, the staff chose to base their sentencing guidelines on a just desserts or punishment model which does not preclude rehabilitative programs.

The Minnesota Sentencing Guidelines Commission developed guidelines which will recommend a fixed presumptive sentence to be served less earned good time. Maximum good time in Minnesota is one-third of the sentence. Sentences are based on two factors, 1) the severity of the offense of conviction[75] and 2) the criminal history of the defendant. Since there are two variables to be considered, a grid can be used.[76] The vertical axis of the grid contains the severity of the offense divided into ten levels. The commission and staff worked to rank offenses according to levels of severity, and there are still adjustments being made. The horizontal axis

[75]See pages 124-127 for offense severity reference table.

[76]See page 128 for sample grid.

of the grid contains the criminal history of the offender ranked from 0 to 6. Each square of the grid contains the presumptive sentence for the offense in question adjusted according to the criminal history of the offender. A horizontal line through the grid constitutes the dispositional line. Offenders whose offense and criminal history place them above the line receive probation, below the line receive incarceration. Below the line the duration of the sentence is given in months. Three figures are given; the middle figure is the presumptive sentence, the higher and lower figures represent sentences for aggravating and mitigating circumstances. A judge may depart from any of these sentences and give a higher or lower sentence, but he or she must give a written explanation of the reasons for such a departure. A point system is employed to calculate the criminal history status of an offender. This system considers all of the following:

1) prior felony convictions,
2) custody status at time of arrest,
3) prior misdemeanor convictions,
4) prior juvenile record for young adult felons.

A sentencing worksheet (see pages 129-130) is provided to the probation officer who completes the presentence investigation report. The worksheet, when properly filled out, provides the judge with the presumptive sentence in any particular case. Copies of the worksheet go to the sentencing commission, the judge, the prosecutor, the defender, and the department of corrections. The sentencing commission uses their worksheets to keep an accurate and current record of sentencing practices. If prison population begins to grow beyond an acceptable limit, (set at 5 percent less than institutional capacity) then the sentencing commission can adjust

sentencing practices to keep the population within the determined limits.

Maximum sentences remain on the books, and may be employed if a judge sees fit. A written explanation would be necessary.

Both parties have the right to appeal a sentence.

Passed into law in 1978, the guidelines were implemented as of May 1, 1980. Prior to implementation, the commission and staff held public hearings around the state to receive the reactions and suggestions of the various members of both the criminal justice system and the public. Such points as the level of severity of various offenses and the means used to calculate the offenders criminal history were discussed. These points remain subject to discussion and part of the work of both commission and staff is to reevaluate sentencing criteria.

Some of the unique characteristics of the Minnesota Sentencing Guidelines Commission are these:

1) they operate with a legisaltive mandate;
2) they are statewide and represent both the criminal justice professionals and the public;
3) sentences represent "real time" to be served;
4) they are required to consider the impact of sentencing on the correctional capacity of the state; and
5) sentences are not to be based on social factors such as age, sex, race, marital or employment status of the offender.

The guidelines have been in operation in Minnesota since May 1, 1980. Overall, criminal justice personnel are satisfied with the system. A critical factor was the judicial departure rate. It was estimated that this system could only work to reduce disparity if the departure rate was 10 percent or less. During the first year, the departure rate was 6.5 percent.

Judges in Minnesota are able to operate well within the limits of the guidelines. Problems of adjustment have been frequent, but it is estimated that this is an inevitable consequence of a major change in the system. The appeals have also been minimal, only 12 in 2,400 cases the first year.

Commentary

A Hawaii Crime Commission staff researcher interviewed some members of the Minnesota Sentencing Guidelines Commission and some members of the commission staff. Their comments are included below.

Minnesota Sentencing Guidelines Commission Staff Director

The purpose of the guidelines is to reduce sentencing disparity by providing judges with clear and concise guidelines based on offense and criminal history, to limit the incarcerated population by putting the least violent offenders on probation, and to provide "truth in sentencing," i.e., the offender actually serves the sentence he is given by the judge, less earned good time.

A major strength of the guidelines is that it puts the violent offenders in prison. With construction costs rising, and inmate maintenance costs doing the same, controlling prison population is a necessary economy measure.

Minnesota Sentencing Guidelines Commission Chairman

The overall reception of the guidelines has been positive in the first year, however, some of our judges have expressed resistance to the monitoring process. This monitoring provides a set of very high quality data. By constant monitoring and changing when necessary, we intend to keep the guidelines flexible and responsive to the needs of the criminal justice system and society.

Staff Research Director

The most common policy response to the increase in prison populations and the accompanying decline in the quality of living conditions in prison has been to build more prisons. Costs for such construction now range up to $80,000 per cell. Prison population projects are usually used to determine the number of cells that will be needed. The assumptions built into most population projects are that current sentencing practices will remain unchanged during the projected time, and that a major element causing variation in prison population is demographic changes in the general population.

This is not the only way to view the situation. Sentencing policies can be established which will effect a more rational use of the existing capacity. Prison capactiy and prison population levels can be recognized as policy choices to be made by criminal justice system decision makers. Consequently, policy can be developed which will determine the most appropriate use of existing space.

State Supreme Court Justice

Racial disparity in sentencing did exist before the guidelines were implemented. Most trial judges like this new system; it gives them more discretionwhile clarifying the whole sentencing process. Although many have said that the sentencing grid is too lenient on offenders, most departures from the presumptive sentences have given lighter sentences than the one found on the grid. Open public hearings helped to inform those concerned about the intent and the workings of the guidelines system. The guidelines are a reasonable compromise between the indeterminate and the determinate systems. The justice expressed the feeling that the first year was good.

Criminal Court Judge--St. Paul

The guidelines are a very satisfactory system. Although some of his colleagues have complained about the monitoring procedures, he believes that judicial discretion has been increased under the guidelines (i.e., the judge now sets the sentence and the duration). He said that serious dissatisfaction with the working of the parole system led to the development of the guidelines.

One shortcoming of the guidelines system that the judge pointed out was that some first offenders might receive a more severe sentence than under the indeterminate system.

Chairman, Parole Board

The Chairman of the Parole Board was the most severe critic of the sentencing guidelines. He may be seen as the individual with the strongest cause for bias since his position will eventually be terminated under the new system (funding for the Parole Board terminates on January 1, 1982). His premise is that the sentencing guidelines, being imposed on the courts, will generate resistance from the judges who must abide by them. Further, since several criminal justice agencies are involved in sentencing, guidelines ought to be provided for them as well. His suggestion was that the legislature require all agencies involved in the sentencing process to develop their own sentencing guidelines within a specified period of time. Given this raw material, a body appointed by the legislature could then develop guidelines which would be closely related to operational realities.

The elimination of parole is a serious mistake in the Chairman's view.

Although reaction to the guidelines system is mixed, the comments are largely favorable.

OFFENSE SEVERITY REFERENCE TABLE

First degree murder is excluded from the guidelines by law, and continues to have a mandatory life sentence.

X	Murder 2-609.19
IX	Murder 3-609.195
VIII	Assault 1-609.221 Attempted Murder 1-609.185 with 609.17 or 609.175 cited Criminal Sexual Conduct 1-609.342 Kidnapping (w/great bodily harm)--609.25, subd. 2(2) Manslaughter 1-609.20 (1) & (2)
VII	Aggravated Robbery--609.245 Arson 2-609.561 Criminal Sexual Conduct 2-609.343(c), (d), (e), & (f) Criminal Sexual Conduct 3-609.344(c) & (d) Kidnapping (not in safe place)--609.25, subd. 2(2) Manslaughter 1-609.20(3) Manslaughter 2-609.205(1)
VI	Arson 2-609.562 Assault 2-609.222 Burglary--609.58, subd. 2(1)(b) & (2) Criminal Sexual Conduct 2-609.343(a) & (b) Criminal Sexual Conduct 4-609.345(c) & (d) Escape from Custody--609.485 subd. 4(4) Kidnapping--609.25 subd. 2(1)

Offense Severity Reference Table (continued)

Receiving Stolen Goods (over $2,500)--609.525; 609.53
Sale of Hallucinogens or PCP--152.15, subd. 1(2)
Sale of Heroin--152.15, subd. 1(1)
Sale of Remaining Schedule I & II Narcotics--152.15 subd. 1(1)

Criminal Negligence Resulting in Death--609.21
Criminal Sexual Conduct 3-609.344(b)
Manslaughter 2-609.205(2), (3), & (4)
Perjury--609.48, subd. 4(1)
V Possession of Incendiary Device--299F.80; 299F.815; 299F.811
Simple Robbery--609.24
Solicitation of Prostitution--609.322, subd. 1
Tampering w/Witness--609.498, subd. 1

Assault 3-609223
Bribery--609.42; 90.41
Bring Contraband into State Prison--243.55
Bring Dangerous Weapon into County Jail--641-165, subd. 2(b)
Burglary--609.58, subd. 2(1)(a), (c), & (d)
Criminal Sexual Conduct 4-609.345(b)
Negligent Fires--609.576(a)
IV Perjury--209.53, subd. 4; 300.61; & 609.48, subd. 1
Receiving Profit Derived from Prostitution--609.323, subd. 1
Receiving Stolen Goods (4150-$2500)--609.525; 609.53
Security Violations (over $2500)--80A.22, subd. 1; 80B.10, subd. 1; 80C.16, subd. 3(a) & (b)
Terroristic Threats--609.713, subd. 1
Theft Crimes--over $2500 (See Theft Offense List)*
Theft from Person--609.52
Use of Drugs to Injure or Facilitate Crime--609.235

Offense Severity Reference Table (continued)

Aggravated Forgery (over $2500)--609.625
Arson 3-609.563
Coercion--609.27, subd. 1(1)
Coercion (over $2500)--609.27, subd. 1(2), (3), (4), & (5)
Damage to Property--609.595, subd. 1(1)
Dangerous Weapons--609.67; subd. 2; 624.713, subd. 1(b)
Escape from Custody--609.485, subd. 4(1)
False Imprisonment--609.255
Negligent Discharge of Explosive--299F.83
Possession of Burglary Tools--609.59
Possession of Hallucinogens or PCP--152.15, subd. 2(2)
III Possession of Heroin--152.15, subd. 2(1)
Possession of Remaining Schedule I & II Narcotics--152.15, subd. 2(1)
Prostitution (Patron)--609.324, subd. 1
Receiving Profit Derived from Prostitution--609.323, subd. 2
Sale of Cocaine--152.15, subd. 1(2)
Sale of Remaining Schedule I, II, & III Non-narcotics--152.15, subd. 1(2)
Security Violations (under $2500--80A.22, subd. 1; 80B.10, subd. 1; 80C.16, subd 3(a) & (b))
Solicitation of Prostitution--609.322, subd. 2
Theft Crimes--$150-$2500 (See Theft Offense List)*
Theft of Public Records--609.52
Theft Related Crimes--Over $2500 (See Theft Related Offense List)*

Aggravated Forgers ($150-$2500)--609.625
Aggravated Forgery (misc.) (non-check)--609.625; 609.635; 609.64
Coercion ($300-$2500)--609.27, subd. 1(2), (3), (4), & (5)
II Damage to Property--609.595, subd. 1(2) & (3)
Negligent Fires (damage greater than $10,000)--609.576(b)(4)
Riot--609.71
Sale of Marijuana/Hashish/Tetrahydrocannabinols--152.15, subd. 1(2)
Sale of a Schedule IV Substance--152.15, subd. 1(3)

Offense Severity Reference Table (continued)

Terroristic Threats--609.713, subd. 2

Theft-Looting--609.52

Theft Related Crimes--$150-$2500 (See Theft Related Offense List)*

Aggravated Forgery (less than $150)--609.625

Aiding Offender to Avoid Arrest--609.495

Forgery--609.63; and Forgery Related Crimes (See Forgery Related Offense List)*

Fraudulent Procurement of a Controlled Substance--152.15, subd. 3

Leaving State to Evade Establishment of Paternity--609.31

Nonsupport of Wife or Child--609.375, subds. 2, 3, & 4

I Possession of Cocaine--152.15, subd. 2(2)

Possession of Marijuana/Hashish/Tetrahydrocannabinols--152.15, subd. 2(2)

Possession of Remaining Schedule I, II & III Non-narcotics--152.15, subd. 2(2)

Possession of a Schedule IV Substance--152.15, subd. 2(3)

Selling Liquor that Causes Injury--340.70

Solicitation of Prostitution--609.322, subd. 3

Unauthorized Use of Motor Vehicle--609.55

IV. SENTENCING GUIDELINES GRID

Presumptive Sentence Lengths in Months

Italicized numbers within the grid denote the range within which a judge may sentence without the sentence being deemed a departure.

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

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

*one year and one day

SENTENCING WORKSHEET

MSGC

SJIS COMPLAINT # (1-11)

District Court Case # (14-23)

(24) 1 ☐ Modified Worksheet

(12-13) 01

Offender Name (Last, First, Middle) (25-49) | Date of Birth (50-55) / / | Sex (56) 1 ☐ Male 2 ☐ Female | PSI Investigator (Last, First, Middle) (57-76)

Race/Ethnicity (77): 1 ☐ White 2 ☐ Black 3 ☐ Am. Indian 4 ☐ Hispanic 5 ☐ Asian 6 ☐ Other

Date of Worksheet (78-83) / / | Date of Offense (84-89) / /

SEVERITY

1 ☐ Supplement attached to report additional current convictions (90)

Title most severe offense (12-51)	Minnesota Statute (52-60)	Date of Conv/Plea (61-66)	SEVERITY LEVEL (70-71)
		/ /	

Conviction Offense Modifiers: 1 ☐ Attempt 609.17 cited (67) 1 ☐ Conspiracy 609.175 cited (68) 1 ☐ Dangerous Weapon 609.11 cited (69)

Title second most severe offense (12-51)	Minnesota Statute (52-60)	Date of Conv/Plea (61-66)	SEVERITY LEVEL (70-71)
		/ /	

Conviction Offense Modifiers: 1 ☐ Attempt 609.17 cited (67) 1 ☐ Conspiracy 609.175 cited (68) 1 ☐ Dangerous Weapon 609.11 cited (69)

CRIMINAL HISTORY

1 ☐ Supplement attached to report additional prior offenses (72)

Was offender under custody supervision at time of current offense? (73) 0 ☐ No 1 ☐ Yes

If yes, type of supervision (74): 1 ☐ Probation 2 ☐ Parole or Supervised Release 3 ☐ Confined 4 ☐ Released Pending Sentence 5 ☐ Escape 6 ☐ Other

Cust. Stat Point (75)

	(12-13)	(14-15)	OFFENSE TITLE (16-55)	Disp. Date (56-59) mo / yr	Units (60)
Juvenile Adjudications ☐ Offender 21 or older when current offense committed	02	01		/	
		02		/	
Prior Misdemeanor and Gross Misdemeanor Sentences	03	01		/	
		02		/	
		03		/	
		04		/	
Prior Felony Sentences and Stays	04	01		/	
		02		/	
		03		/	
		04		/	
		05		/	
		06		/	

Juv Point (76)

Misd./G.M. Point (77)

Felony Points (78-79)

Total Criminal History Points (80-81)

Presumptive Guideline Sentence (82): 1 ☐ Stay 2 ☐ Commit to Commissioner

Length of Presumptive Sentence (83-86) ___ Months

Minnesota Sentencing Guidelines Commission
284 Metro Square Building
7th & Robert Streets
St. Paul, Minnesota 55101
612-296-0144

SG-00001-01

SENTENCING WORKSHEET

The following are brief instructions for filling out the Sentencing Worksheet on the reverse side of this form. For more detailed and complete explanation please refer to the *"Minnesota Sentencing Guidelines and Commentary"*.

WHEN TO COMPLETE: This form should be completed following a felony conviction for offenses which occurred on or after May 1, 1980, and submitted as part of the presentence investigation report (PSI). Complete one Sentencing Worksheet form per complaint form; multiple offenses included on a single complaint should be included on one Sentencing Worksheet, and if more space is needed, use a Supplement to Sentencing Worksheet. At the time the PSI which includes the Sentencing Worksheet is submitted to the judge, distribute the remaining copies of the Worksheet to those on the distribution list. If prior to or after sentencing, information contained on the Sentencing Worksheet is modified, complete another Sentencing Worksheet, place an 'X' in the "Modified Worksheet" box, and distribute according to the distribution list.

SJIS Complaint #: The eleven digit pre-coded number on the complaint form.
District Court Case #: The number used for filing cases in district court.
Offender Name: Use the name the offender is generally known by, which will usually be the first name noted on the complaint. If a different name surface during the adjudication or investigation process that appears to more generally or accurately identify the offender, use the latter name.
Date of Birth: Month, Day, Year (e.g., 12/22/47).
Sex: Self-explanatory
PSI Investigator: The name of the probation officer or investigator who completed the form.
Race/Ethnicity: Check the box which corresponds to the predominant race/ethnicity. If predominance cannot be determined, check "Other".
Date of Worksheet: The date the PSI, including the Sentencing Worksheet, is completed (Month, Day Year -- 6/18/80). If the Sentencing Worksheet is modified after initial submission of the PSI, use the date that the Modified Worksheet is completed.
Date of Offense: The date the offense occurred (Month, Day, Year 5/15/80). In cases of multiple convictions included on a single complaint: (a) use the date of the most severe offense if the offenses occurred on different dates, or (b) if there is more than one offense in the most severe level and they occurred at different times, use the date of the earliest offense in that severity level. *The date of the offense, however, must not be prior to May 1, 1980.*

SEVERITY

There is space for two conviction offenses on the Sentencing Worksheet. If there were more than two convictions for offenses from a single complaint, report the additional conviction offenses on the Supplement to Sentencing Worksheet and check the box marked "Supplement attached to report additional current convictions".

Severity is determined by the Offense Severity Reference Table in the Minnesota Sentencing Guidelines and Commentary. The reporting order of conviction offenses when of equal severity is left to the discretion of the PSI investigator.

Title most (and second most) severe offense: The dollar value of the conviction offense should be included in the Title when the offense is Forgery, Theft, Theft Related, or Receiving Stolen Goods (e.g., Theft $150-$2500). Include common name of drug in the Title for drug offenses (e.g., Sale of Schedule I Narcotic -- Heroin).
Minnesota Statute: Cite chapter, section, subdivision, and clause of the charging statute, e.g., Theft $150-$2500 might be 609.52, subd. 2(1).
Date of Conviction/Plea: The date of the conviction (Month, Day, Year) or entry of plea preceding the order for the preparation of a presentence investigation report.
Conviction Offense Modifiers: Check "Attempt 609.17" or "Conspiracy 609.175" if the offender was found guilty of an attempt to commit the crime or conspiring with another to commit the crime. Check "Dangerous Weapon 609.11" only when 609.11 was cited on the complaint and retained through conviction or plea.
Severity Level: Use the number that corresponds with the Roman Numeral designation of severity from Offense Severity Reference Table e.g., Aggravated Robbery, Minn. Stat. 609.245, which is noted as Roman Numeral VII, should be entered into "Severity Level" as number 7.

CRIMINAL HISTORY

There are spaces on the Sentencing Worksheet for two prior juvenile adjudications, four prior misdemeanors or gross misdemeanors, and six prior felonies. Additional prior offenses in any or all of these offense types should be reported on the Supplement to Sentencing Worksheet, and the box "Supplement attached to report additional prior offenses" checked. A single Supplement form can be used for both additional current offenses and additional criminal history items.

Offense title for prior offenses should be brief and descriptive. Disposition date for priors includes only Month and Year and should serve as a guide for identifying specific priors and as a guide to check for decayed priors. *Priors that have been decayed should not be reported on the Sentencing Worksheet or Supplement.*

Custody Supervision at time of offense: The custody supervision must result from a prior felony or gross misdemeanor for a "Yes" response to this item.
Type of Supervision: Unsupervised probation should be coded as "Probation". Work release should be coded as "Confined".
Custody Status Point: If "Yes" is coded under "custody supervision at time of current offense", enter Custody Status Point of 1, if "No" is coded, enter Custody Status Point of 0.
Juvenile Adjudications: (a) If offender was 21 or older at "Date of Offense", check the box under Juvenile Adjudications and do not report information on juvenile adjudications; (b) If offender was under 21 at "Date of Offense", report juvenile adjudications for offenses which would have been a felony committed by an adult, and which were committed between the offender's 16th and 18th birthdays. If more than two juvenile adjudications, report additional adjudications on the Supplement.
Juvenile Point: (a) If you check the box marked "offender was 21 or older", enter Juvenile Point of 0; (b) If offender was under 21 at time of current offense and had fewer than two juvenile adjudications, enter Juvenile Point of 0; (c) If offender was under 21 at time of current offense and had two or more juvenile adjudications, enter Juvenile Point of 1.
Prior Misdemeanor and Gross Misdemeanor Sentences: List prior offenses which resulted in: (a) prior misdemeanor sentences, and (b) prior gross misdemeanor sentences. Do not report decayed offenses. If there are more than four non-decayed prior misdemeanor or gross misdemeanor sentences, report them on the Supplement.
Units: (a) One unit is given for each prior misdemeanor sentence; (b) two units are given for each prior gross misdemeanor sentence.
Misdemeanor/Gross Misdemeanor Point: (a) If total units are less than four, enter Misd./G.M. Point of 0; (b) If total units are four or more, enter Misd./G.M. Point of 1.
Prior Felony Sentences and Stays: List prior offenses which resulted in: (a) prior felony sentences; or (b) a stay of imposition, if less than five years has elapsed since discharge from that stay (if more than five years has elapsed since discharge from that stay, the offense should be reported as a misdemeanor unless it has decayed as a misdemeanor). Do not report decayed felony sentences. Report additional felony sentences and stays on the Supplement.
Felony Points: Felony points equal the total number of prior felony sentences and stays, including any prior felony sentences and stays reported on the Supplement.
Total Criminal History Points: The sum of Custody Status Point, Juvenile Point, Misdemeanor/Gross Misdemeanor Point, and Felony Points.

PRESUMPTIVE GUIDELINE SENTENCE

The presumptive guideline sentence is determined by locating the cell in the Sentencing Guidelines Grid intersected by the Severity Level of the current conviction offense and the Criminal History Score (0 through 6 or more).

The presumptive guideline sentence for cases which fall in cells above and to the left of the solid line is a Stay; in cells below and to the right of the solid line the presumptive guideline sentence is to commit to the Commissioner of Corrections. When a commitment sentence is mandated by law (e.g., 609.11) or presumptive guideline sentence is to commit, even if the case falls in a cell above and to the left of the line.

The length of the presumptive sentence is the single durational figure in cells above the line and the single durational figure shown above the durational range in cells below the line.

In attempts and conspiracies to commit crimes, the presumptive guideline sentence length is half that shown in the appropriate cell of the guidelines grid, thus a presumptive duration of 25 months for a completed crime would be 12.5 months for an attempt to commit that crime. The dotted extension of the box is to be used for fractions, e.g., "5" of 12.5 months; thus, the presumptive sentence would be entered as 0125.

DISTRIBUTION:
Agent
Sentencing Commission
Judge
Prosecutor
Defense
Court Services/DOC

D. Alternatives to Incarceration.

Many states are presently faced with both rising crime rates and overcrowding of penal institutions. More frequent imposition of longer sentences, aimed at controlling the increase in the crime rate has resulted in crowding of the jails and prisons. In spite of these efforts, the crime rate has continued to accelerate.

Other factors also influence the crowding of penal institutions. The elimination of good time (Michigan), mandatory sentences in certain drug cases (New York), and strict gun laws (Florida, Massachusetts), and determinate sentencing schemes (Maine) have all served to increase the populations of prisons and jails in those states.

Many of the measures mentioned above are "get tough" laws passed by state legislatures in response to the growing public con ern over the increase in crime. Crime statistics are not exact enough to provide an accurate assessment of the problem. Often, the legislative measures devised to control the problem of crime have generated new problems without accomplishing their originally stated goals.

Many jurisdictions are aware of this dilemma, and have adopted measures designed to provide the courts with an array of alternatives to prison.

Many states currently make use of restitution and community service. A variety of organizational schemes are employed to operate these programs. Included below are brief background notes on three such programs; Alameda County in California, Multnomah County in Oregon, and Winona County in Minnesota.

1. Alameda County, California--Community Services Alternatives.

The Community Service Alternatives Program has been operating in Alameda County since 1966. In February 1972, this pilot project of the Volunteer Bureau received a grant for expansion and development. The third and final year of OCJP funding ended January 31, 1975. The program is now well established, and is supported by the county of Alameda, through a contract with the probation department.

In Alameda County judges offer selected offenders the option of performing a stipulated number of hours of community service in lieu of paying a fine or serving jail time. The court notifies the Volunteer Bureau when such a referral is made. The individual is then interviewed at the bureau and placed in a non-profit or public agency. On or before the assigned completion date, project staff report to the court the outcome of the referral.

During the 1979-80 fiscal year, 3,792 offenders were placed on community service. The largest single group of these were drunk drivers (24 percent). Drug and property offenses accounted for another large segment of the offenders. The completion rate (i.e., the offender completed the number of hours within the alloted time) was 72 percent for this period. Seventeen percent failed to do any work at all.

Approximately 600 different agencies use the services of court-referred volunteers.

A. TYPE OF AGENCY (Note: many provide services which overlap the arbitrary categories below.)

HOSPITALS AND MEDICAL - convalescent hospitals, rest homes, hospitals, free clinics, public health, etc.

EDUCATION - schools, colleges, adult education, tutoring

RECREATION - youth organizations, senior citizen centers, etc.

CULTURAL - libraries, art, music, radio, TV

REHABILITATION AND COUNSELING SERVICE - (residential and day programs) emotional, physical, correctional, addictive programs

INFORMATION AND REFERRAL - consumer services, legal, housing, employment

CHILDCARE

MULTI-PURPOSE SOCIAL SERVICE AGENCIES - Red Cross, Volunteer Bureaus, settlement houses, emergency needs - food, shelter, clothing

ECOLOGY - environmental protection, animal care, recycling

HEALTH ASSOCIATIONS

MISCELLANEOUS - parks, city government, churches

B. TYPES OF WORK
Approximately 60 percent do maintenance or clerical work, much of it unskilled.

MAINTENANCE - skilled and unskilled; repairs, janitorial, household work, recycling, school watchman, animal care.

CLERICAL - skilled and unskilled; typing, filing, collating, addressing, etc.

STAFF AIDE - assisting professional staff, such as medical work, community organization, interviewing, counseling, planning, etc.

HOSPITAL AIDE AND FRIENDLY VISITOR - primarily convalescent hospitals and rest homes, and also individual shut-ins.

RECREATION AIDE

CHILD CARE, TUTOR, TEACHER AIDE

HANDICRAFTS/ARTISTIC - sewing for needy clients of local agencies, woodwork, scrapbooks, graphic work, murals, posters, etc.

AIDE TO DISABLED - direct service to retarded, blind, deaf, motor-impaired.

MISCELLANEOUS

2. Multnomah County, Oregon--Restitution (Project Repay).

Project is located in the District Attorney's office. It consists of a project coordinator/restitution investigator, an assistant investigator, and a deputy district attorney who document victim losses and recommend amount of restitution to deputy district attorney and court.

The project monitor ensures that offenders have reasonable payment schedules and meet them. This monitor has increased payments in the past year. Steps in procedure:

1. intake clerk screens cases (career, armed, violent excluded) sexual assault - another unit,
2. investigator determines amount of loss,
3. restitution amount given to prosecutor,
4. offender ability to pay assessed,
5. final amount based on loss and ability to pay.

The judge still has the option to order restitution. The circuit court accounting office collects payments.

The project monitor works with the probation department to monitor payments - offenders are subject to revocation and incarceration if they are not paying.

In cases where the offender can't pay, or where loss is covered by insurance, the offender may be given community service. Community service is handled by a special office within the adult probation office.

3. Winona County, Minnesota--Restitution Program.

This program was instituted in 1972 and is still in operation. It is limited to adult misdemeanor offenders. The stated underlying principle of this program is this:

> . . . if you have wronged someone, it is your responsibility to make it right with the person you have wronged or to the community as a whole, and at the same time do constructive things for yourself to improve your self-esteem and social position.[76]

Penalties imposed on offenders were designed to be positive. Such penalties included repaying the victim (money or services), repaying the community (charitable work), or doing constructive things for oneself (schooling or substance abuse programs).

These are the basic premises which served in the development of this program:

1. Offenders suffer from a sense of low self-esteem and feel removed from the mainstream of society. Offenders also lack the respect of others.

2. Traditional harsh and degrading sentences tend to reinforce poor self-esteem and led the offender to respond in a negative manner.

3. The more an offender becomes involved in the criminal justice system, the more difficult it becomes to free themselves from negative pressures which have caused their problems in the first place.

An interesting feature of this program is that the offender is involved in the sentencing process.

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[77]Burt Galaway and Joe Hudson, eds., Offender Restitution in Theory and Action, Lexington Books, Lexington, 1977, p. 151.

> The offender and the court service officer meet in private to discuss the program. If a victim is involved, restitution to the victim is discussed. If there is no direct victim, restitution to society in general is discussed. The court service officer then enters into the problems and goals of the offender, for example, alcohol treatment, drugs, marital problems, unemployment, and so on. The offender is given a list of possible alternatives, and the offender is given options to select from. Negative or degrading restitution is strongly discouraged. The possibility of failure to perform a sentence is discussed as well as the usual fine or jail sentence if there is failure.

Between 1973 and 1976, 815 offenders took part in the program. Of these, there were only 22 repeaters (2.7 percent). A parallel study on offenders who had been sentenced to Winona County jail showed a repeat rate of 27 percent.

Listed below are some of the alternatives available to offenders in Winona County.

These programs are working well in the three instances reported above.

Alternatives that Help Others

Work at YMCA
Work at YWCA
Work for American Red Cross
Work for Boy Scouts
Work for Girl Scouts
Work for church organizations
Help a victim of vandalism
Shovel sidewalks or do yard work for invalid persons or senior citizens
Paint and repair government buildings
Clean streets or parks
Work in high schools
Work in colleges
Work in vocational schools
Work in Winona Volunteer Services
Work in group homes
Pick up litter on highways
Clean litter from lakes and streams
Donate blood
Become a volunteer probation officer
Work for historical society
Work in day care centers
Work in Big Brother Program
Work in Menatl Health Center
Work in children's homes
Work for Minnesota Society for Crippled Children
Work for Sportsmen's Club projects for wildlife
Work in Winona County Fairgrounds
Erase "graffiti" from public buildings
Work in special projects or organizations

Work in St. Anne's Hospital
Work in Sauer Memorial Home
Work in Tri-County Poverty Program
Work for Winona Art Center
Repair vandalism done by others
Work in Watkins Memorial Home

Alternatives that Help the Offender

Personal counseling
Alcohol education Clinic
Driver's improvement clinic
Vocational education classes
High school or college
Family services
Vocational Rehabilitation Center
Medical treatment
Surrender driver's license
Sell or junk automobile
Refrain from owning an automobile for a given time
Stay away from ex-wives, ex-husbands, and/or relatives and certain individuals
Legal counseling
Alcoholics Anonymous
Alcohol and drug abuse programs
Mental health center treatment
State hospital treatment
Marriage counseling
Group counseling
Employment counseling
Stay out of a certain bar (disorderly conduct)
Stay out of a certain store (shoplifting)
Sell, surrender, or destroy weapons

VI. CONCLUSIONS

VI. CONCLUSIONS

The large amount of concern about sentencing by both the public and criminal justice system professionals indicates that there are problems in our sentencing system. The Statewide Sentencing Project[78] has questioned the basic assumptions of our sentencing practices. The complex nature of our sentencing process makes it difficult to focus on any single problem area. We have attempted in this report to look at the system as a whole. This examination of the system is intended to clear the way for carefully considered systemwide changes.

An important issue to consider is the purpose of sentencing. There are multiple purposes for imposing a criminal sentence, and none of them should be arbitrarily cast aside. A fundamental purpose is punishment. This does not mean that we should give up on rehabilitation, or despair of the possibility of deterrence or incapacitation. Rather, we should sentence with the entire spectrum of purposes in mind. We hope that all of these purposes (punishment, deterrence, incapacitation, and rehabilitation) will be accomplished, and ideally, they will be.

Our present system of sentencing felons has evolved over the past 150 years. This system is the result of numerous policy decisions made in the attempt to provide for the safety of society while at the same time dealing humanely with convicted felons. Historically, reforms have been made with great confidence in a particular set of assumptions, as in the 1830's or at the beginning of this century. Today we have no glowing new

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[78] See Appendix, page 144, for evaluation of the project.

assumptions to lead us into reform, just the knowledge that the old reforms have failed.

This sense of a need for revision or modification of the present system is evident not only in Hawaii, but throughout the nation. During the past decade significant changes have been made in several states. Some of these changes have worked well, and some have not. Hawaii has been moving in this same direction in a less concentrated fashion.

Our present system is neither chaotic nor in a state of crisis. Most parts of our system operate well, and according to design. No system is perfect. There are areas within our system in need of improvement. Making the policy decisions which will improve our system before a crisis develops seems to be the best approach.

VII. RECOMMENDATIONS

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General Statement

There is a need to continually improve the criminal justice system of the state of Hawaii. Sentencing can be disparate; corrections lacks the facilities to properly accomplish the stated purpose of sentences--rehabilitation; and our alternatives to incarceration need guidelines and augmentation.

Some of the problems in our criminal justice system have been given attention by legislative action. The Crime Commission believes that a careful and systemwide examination is necessary at this time. It is with this point of view that the following recommendations are made.

A. Sentencing and Guidelines Commission.

To address the problem of fragmentation in our criminal justice system, the Hawaii Crime Commission recommends the formation of a state sentencing and guidelines commission. It would be the task of this commission to develop guidelines for all agencies involved in the process of sentencing. These guidelines should serve to create needed improvements in our heterogeneous criminal justice system, reduce sentencing disparity, clarify sentencing criteria, and improve our rehabilitation capabilities.

Another task of this sentencing and guidelines commission would be to examine the operation of our indeterminate sentencing practices. Since change in a complex system would have wide effects, some of which cannot be foreseen, it is advisable to proceed carefully. Although there may be some reasons for adopting a determinate sentence law, proceeding slowly

will probably prove the best course of action. If it is possible to adjust our indeterminate sentence law in a manner which will bring practice more in line with stated purpose, then our system can be improved without the trauma of radical change. If the improvements prove untenable, then we can make changes in a careful manner. A sentencing and guidelines commission can also examine our sentencing practices in terms of other sentencing issues.

This sentencing and guidelines commission should be composed of members who are criminal justice system professionals. Citizen participation may also be desirable, but not essential. The emphasis is on criminal justice system professionals because it is the purpose of this commission to improve the criminal justice system by establishing guidelines for specific agencies, such as probation, judiciary, parole, and corrections.

B. Alternatives to Incarceration.

1. Probation.

Since probation is the most frequently employed alternative to incarceration for adult felons, the Hawaii Crime Commission recommends that this program be given all the support necessary to perform its task at maximum efficiency.

a. Increase number of probation officers in Adult Probation in order to reduce caseloads. The additional number of probation officers shall be justified by the judiciary.

b. Make terms of probation more realistic through specific guidelines. (If the terms of probation are impossible to meet, then the

sentence is unenforceable.)

c. Develop more formal levels of probation. Different levels of supervision intensity are used by Adult Probation in the first circuit. A more formal arrangement can provide better supervision of probationers, especially if a wider array of rewards and punishments, including intermittent jail time, is provided.

d. Develop guidelines for the presentence investigation report. Since this is one of the most critical documents in the sentencing process, its uniformity is essential to that process.

e. More flexibility in probation sentences. Currently all felons receive five years. Perhaps sentences ranging from one year to five years would be more appropriate.

2. Community service.

Used creatively, this positive alternative can be beneficial to both the offender and the community. It is now being used in a limited number of felony cases and numerous misdemeanor cases. The Crime Commission recommends the continued and expanded use of this program, under specific guidelines.

3. Restitution.

Restitution can also be a positive and constructive form of sentencing. The imposition of this sentence needs to be realistic, with consideration given to an offender's ability to pay. Offenders who cannot pay can be required to substitute community service when this is feasible. Specific guidelines would be promulgated by the commission.

C. Prison Camps.

Many professionals in our criminal justice system have lamented the closing of Olinda Camp and the limited use of Kulani Camp. The Crime Commission shares this view, and suggests that these facilities be fully utilized to reduce prison crowding. The Hawaii Crime Commission also recommends the creation of prison farms on each island, which could reduce the cost of prison operations. The construction cost would be substantially less than a secure prison facility.

The state now owns land which can be utilized; prison labor could also be employed to construct the facilities needed. Guidelines should be established for the assignment of inmates to these farms, such as non-violent, first-time offenders.

Enabling Legislation

Any enabling legislation needed to enact these recommendations will be submitted to the 1982 legislature and later added to this report as an attachment.

APPENDIX

APPENDIX

EVALUATION OF THE STATEWIDE SENTENCING PROJECT REPORT

The Hawaii Crime Commission (the Commission) has reviewed the Statewide Sentencing Project's report (the Report) entitled "Evaluation of Hawaii's Indeterminate Sentencing Law," prepared under the direction of Judge Masato Doi, and has the following observations, comments, and recommendations to make with respect to the specific statutory changes proposed in the Report and found in Appendix C thereof (pp. 185-189):

I. PURPOSE OF SENTENCING--PUNISHMENT, NOT REHABILITATION

The Commission agrees with the Report's findings that rehabilitation as the primary goal of a statutory sentencing scheme is not realistic given the great difficulty in measuring it, i.e., in determining when one has been rehabilitated, and the questionable presumption upon which it is based--that one's criminality can in fact be "cured." Accordingly, the Commission supports the Report's recommendation that punishment be emphasized over rehabilitation as the goal of sentencing.

However, with respect to the specific statutory changes the Report recommends to reflect this shift in emphasis from rehabilitation to punishment, the Commission does not feel that the amendment contained in section C, p. 186, should be effectuated. This amendment would preclude the Hawaii Paroling Authority, in its determination of the time at which parole is to be granted to an eligible individual, from considering whether or not the individual has obtained the "maximum benefits of the correctional institution." The Commission believes that the change from

rehabilitation to punishment is a change in emphasis only, and while the primary focus is to be on punishment, rehabilitation should still be pursued. Accordingly, the Commission suggests not adopting this amendment which attempts to delete all references to rehabilitation from present law.

II. PAROLE GUIDELINES

The Commission supports the concept of guidelines to govern the Hawaii Paroling Authority's determination of minimum terms of imprisonment and additional terms of imprisonment upon parole revocation. The Commission is in full agreement that such a system would reduce disparate treatment of prisoners and make the entire parole process very "visible," thereby ensuring that arbitrariness is limited and that predictability and stability are achieved.

However, the Commission does not feel that prison overcrowding is a valid consideration in making determinations of minimum terms of imprisonment and additional terms of imprisonment upon parole revocation as the Report recommends. The Commission is of the opinion that the problem of prison overcrowding is an administrative/fiscal problem and should not influence a decision to "punish" an inmate for a shorter period of time because if this logic prevailed, if the prison were not overcrowded, inmates would be "punished" by imprisonment for longer periods of time. To have one's freedom denied or granted on the availability of bedspace appears arbitrary and capricious and does not promote justice.

Accordingly, the Commission recommends that paragraph (5) of the Report's proposed addition to the Hawaii Revised Statues requiring the Hawaii Paroling Authority to promulgate written guidelines (pp. 185-186) be deleted.

In addition, it should be noted that the guideline system recommended by the Report serves only to reduce disparate treatment of prisoners. It does not reduce disparate treatment of defendants because it does not address the issue of the sentencing judge's IN/OUT decision--what factors influence or should influence his decision to send a defendant to prison (IN) or not (OUT). That is, the problem of judges under present law meting out disparate sentences is not addressed by providing guidelines for the paroling authority.

III. "GOOD TIME" CREDIT

The Commission does not feel that "good time" credit should be established statutorily as the Report recommends. While the Commission agrees that there should be some form of "good time" credit to act as an incentive for prisoners, it believes that this credit should be established by the Hawaii Paroling Authority as part of its minimum term guidelines. In this manner maximum flexibility is retained by an administrative agency (the Authority) to adjust the credit (obviating the need to seek legislative action every time it was felt that an adjustment was required) while at the same time allowing the inmate to rely on a guaranteed reduction in his term of imprisonment if he meets certain known, established conditions.

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