NON-VIOLENT FELONY CRIMES ARE TREATED DIFFERENTLY IN THE CITY OF NEW YORK THAN ROCKLAND COUNTY

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NON-VIOLENT FELONY CRIMES ARE TREATED DIFFERENTLY IN THE CITY OF NEW YORK THAN ROCKLAND COUNTY

ABSTRACT

I had practiced law for some twenty-three years in the City of New York and inRockland County, specializing in the trial of criminal and civil matters. In 1974, I was elected for a ten-year term as a County Court Judge with jurisdiction over felony indictments and civil matters. After this varied experience, it is apparent to me that defendants charged with the non-violent felony crimes of burglary, driving while intoxicated (second offense), grand larceny, and the sale of small amounts of controlled substances,are treated differently in New York City than in Rockland County. The same Penal Law, Criminal Procedure Law, Constitution of the United States, and the State of New York, and any other laws that are applicable, are not applied equally to defendants charged with these non-violent crimes. From the initial arrest of defendants so charged, to the setting of, or refusal to set, bail, or release in one's own recognizance, then the arraignment, preliminary hearing (if permitted by the District Attorney), plea bargaining, trials, and ultimate sentencing, the same laws are applied differently.

In this thesis, I examine the defendants charged with these non-violent felony crimes, and the dramatic differences in the setting of bail, plea-bargaining, prosecutorial and judicial discretion, and the sentencing process.

The conclusions that I reach are that non-violent felony offenders in Rockland County are treated more severely than offenders who commit the same crimes in the City of New York. Only those guilty of the most violent felony crimes are sentenced to state prison in the City of New York. This is due to the large number of offenders, violent and non-violent. In Rockland County the majority of the felony crimes are non-violent. The problem comes when it is necessary for the courts to send a non-violent felony offender (raised in non-violent Rockland County) to a state reformatory or prison. My recommendation for treatment of this and other problems are explored in the final part of this paper.

INTRODUCTION

Rockland County is situated about thirty miles from mid-town Manhattan. It's a suburban community that had a population in 1955 of about 85,000, and today, the population is about 280,000. The number of burglaries reported to the police in 1976 was 2,626, and in 1977, 2,548. The total crime rate per hundred population was 3,901 in 1976, and 3,839 in 1977.[1]

The 1977 population of the City of New York was 7,567,100. The burglaries reported for 1976 were 155,243, and in 1977, 178,888. The total crime rate per thousand population was more than twice as much as Rockland County; 8,697 in 1976; 8,061 in 1977.[2]

In 1977, there were approximately 255 felony indictments, 79 of which were adjudicated youthful offender.[3] In the City of New York, a similar percentage of approximately one-third of the total number of indictments were committed by youthful-offender eligibles.

The Probation Department of the County of Rockland, in a 1977 report[4], shows that there were 182 County Court investigations for sentencing out of 226 covered by the four major areas:

1. Burglaries and related offenses -- 77
2. Sale and possession of controlled substances -- 47

3. Grand larceny and related offenses -- 42

4. Driving while intoxicated (second conviction) -- 16.

The usual sentence for first-non-violent-felony offenders charged with burglary, grand larceny and possession of controlled substance is five years probation, restitution, and if the defendant was between 16 and 19 years of age, treatment as a youthful offender. In driving while intoxicated cases, the defendant in Rockland County has a felony conviction, will be placed on probation with a condition that he attend an in-or out-patient treatment center. On sale or possession of controlled substances of small amounts of marijuana and cocaine, the usual sentence may be probation or a County Jail sentence. In some cases where there has been a prior involvement with the law of a non-violent nature, a sentence to County Jail was given. About three years ago I instituted the use of intermittent weekends for youthful-offender eligibles who were attending high schools, or non-violent felony offenders who were gainfully employed. In the City of New York burglaries were disposed of in the following manner:

> 83% were reduced to misdemeanors or violations;
>
> 15% to a lower felony, and only
>
> 2% pleaded to the original felony of burglary.[5]

recommend a sentence, or rest on the Probation Report.

The use of the Criminal Procedure Law and the Vera Institute's Recommendations on Bail, and the American Bar Association Standards For Setting Bail, are extensively used in the City of New York. In Rockland County, they are ignored by a number of the Town and Village Justices. Many people charged with non-violent crimes are committed to the County Jail for being poor, and not for being guilty.

Defendants who are charged with non-violent felony offenses in Rockland County and who plead, or are convicted of those felony charges, are sentenced more severely than defendants in the City of New York who have committed the same crime. In Rockland County, the five years probation that the defendant may receive is well supervised, and the sentencing Court is advised of violations within a short period of time.

In light of the disparity of the treatment of persons who committed the same types of non-violent felony crimes, there are recommendations that I make herein which have been adopted in other jurisdictions and successfully applied. The additional recommendations are as to the establishment of non-violent felony institutions on a regional basis.

A study by the Vera Institute of Justice involving felony burglary arrests showed that in 1971, 94% were reduced to misdemeanors or violations and were followed with a sentence of no jail time.[6] Because of the large number of more violent offenses such as robberies, assaults, rapes, etc., most of the non-violent criminal dispositions were made before the indictment and certainly before reaching any trial part. This practice of speedy dispositions by a reduction to a lesser charge of non-violent felony offenses is continued at the present time in the City of New York.

The sentences on the reduced charges in the City of New York may be: adjourned in contemplation of dismissal; a fine; probation; or some light misdemeanor time in Riker's Island. In Rockland County almost all burglary charges, driving while intoxicated (as a felony), grand larceny, and the sale and possession of controlled substances (as a felony) are processed through the grand jury system and result in indictments.

In the City of New York, plea bargaining and reduction of charges occurs in the initial arraignment stage. In the County of Rockland, plea bargaining and reduction of non-violent felonies to misdemeanors rarely occurs at any stage of the criminal justice system. The District Attorney's policy is to recommend that the defendant plead to the top felony count in the indictment, and they will either

ARRESTS AND POLICE DISCRETION

Recently in the City of New York an attempt was made to again clean up Times Square. Thirty-eight men were arrested in one hour following reports of fighting, harrassing of pedestrians, and brandishing of a knife or gun. All of those arrested had their charges reduced to disorderly conduct or harrassment. Those who did not plead immediately were given summons to appear within 30 days. The only punishment was a fine of $10 to $25.[7]

When a defendant is arrested in the City of New York, he is brought to a criminal court complaint room where there is an Assistant District Attorney to assist the arresting officer with the drawing of the charges. The Assistant District Attorney has the power to raise, reduce, or even dismiss the charge on the spot. Wherever applicable, he may have the matter transferred to the Family Court if the defendant is a juvenile and it is not one of the violent offenses for which a juvenile may be treated as an adult. If the crime is one of a family dispute, it can also be sent to the Family Court. The matter then goes to the arraignment part of the Criminal Court. There, if it is a non-violent felony offense , the defendant would be allowed to plead to a misdemeanor or a lesser offense. Some cases may be dismissed at the request of the Assistant

District Attorney or even on the Judge's own initiative. Non-violent burglary offenses are rarely sent to the grand jury. Because of the numerous violent felony offenses, the District Attorney has little time for the presentment of non-violent felony offenders.

The discretionary power of police should be considered at this point. If a New York City police officer is a member of a precinct that has a high rate of violent offenses, the majority of his police duties will be to apprehend violent offenders. In these high violent crime precincts, the standard procedure is to automatically reduce commercial burglaries to a misdemeanor when the defendant is apprehended. These are considered nuisance property crimes and non-violent. Similar reduction is made in first-offender burglary cases, especially where the defendant is a youthful-offender eligible. These actions eliminate appearances before a court of the arresting officer, District Attorney, Defense attorney, defendant, and the witnesses especially when it is apparent that probation will probably be the ultimate disposition.

The Association of the Bar of the City of New York, in a recent committee report recommended civil disposition for certain felony and misdemeanors which would automatically result in conviction without any meaingful crime sanction. The report went on to state that a

"surprisingly large number of misdemeanors and felonies are carried through to conviction and sentencing with no apparent result except a record of conviction. Suspended sentences are commonplace. Monetary fines where they are imposed are often uncollectable."[8]

The Vera Institute of Justice has established many programs in Criminal Justice reform that have saved the City of New York millions of dollars, protected the public from violent offenders, saved many defendants from long periods of incarceration for being poor and unable to make bail, and to re-establish the fact that a defendant is innocent until proven guilty beyond a reasonable doubt. One of the more dramatic programs was the Manhattan Summons Project which started in 1964.[9] It was used for simple assault and petty larceny cases initially. The volunteers checked the background of the defendant and recommended to the desk officer that a defendant with sufficient number of points on a scoring system used be released on a summons instead of being taken to an arraignment court. The defendant was advised that his failure to appear would result in a warrant for his arrest. A prompt appearance would automatically result in the defendant's release in his own recognizance pending trial. This project meant a saving of nine to ten hours in each arrest of the police officer taking the defendant to an arraignment court. During four years of

of a city-wide operation less than approximately 5% failed to appear on the return date of the summons, but 6.7 million dollars in police time was saved the City of New York. This concept has spread to California and other jurisdictions.

The American Bar Association after an extensive study of such pre-trial release procedures issued a position paper stating, "it should be the policy of every law enforcement agency to issue citations in lieu of arrest or conditional custody to the maximum extent consistent with the effective enforcement of the law."[10] On September 1, 1971, New York State's new Criminal Procedure Law officially recognized and adopted the Manhattan Summons Project state-wide. While the law applies to misdemeanors(and in New York City non-violent felonies are reduced to misdemeanors), it is important to see how similar situations are treated in Rockland County.[11]

In Rockland County when a non-violent felony offender is apprehended, he is arrested, booked, and arraigned before a local magistrate. The Assistant District Attorney who appears at the arraignment will not consent to a reduction to a misdemeanor at that time. If the defendant has his own counsel, or is represented by the Public Defender, a request for a preliminary hearing pursuant to the Criminal Procedure Law will be made.[12] This must be set down within seventy-two hours. If it is not held, then the defendant is

entitled to be released without bail. The District Attorney still has the right to submit the felony charge to a grand jury.

While the Manhattan Summons Project has worked well in the City of New York and in other areas of the country, neither the recommendations of the project, the Criminal Procedure Law, concerning appearance tickets, nor the American Bar Association Standards for bail or release on one's own recognizance by appearance tickets is followed in Rockland County.

In the twenty-three years that I have been in Rockland County, there has been little use of appearance tickets by the local police departments. This has come about because of the attitude of some of the Village and Town Justices and the District Attorney's office. I can understand that any community treats the crime it has the most of, in the most severe manner; in the City of New York violent felony offenses; in Rockland County non-violent felonies (burglaries, etc.) or misdemeanor charges (trespass and petty larceny). The criteria for police discretion in releasing defendants on appearance tickets or summons should be followed.

Any bail set in the lower courts pending an arraignment, preliminary hearing, trial, etc., is reviewable by myself and my two County Court colleagues. In the topic, "Bail", I will go into further abuses of bail and the detaining of defendants in County Jail for being poor and not for being guilty.

BAIL, PRELIMINARY HEARINGS
and DISCOVERY AND INSPECTION

"The concept of bail has a long history and deep roots in English and American law. In Middle England the custom grew out of the need to free untried prisoners from disease-ridden jails while they were waiting for the delayed trials conducted by travelling justices. Prisoners were bailed, or delivered, to reputable third parties of their own choosing who accepted responsibility for assuring their appearance at trial. If the accused did not appear, his bailor would stand trial in his place."[13] This concept is exemplified in the Knights of Pythias, a fraternal organization that was founded after the Civil War. It is based on the legend of Damon and Pythias. Damon, who had been charged unfairly by the Emperor and was sentenced to death, pleaded with the Emperor to allow him to visit his parents and family in a distant village. When the Emperor refused on the ground that he would not return, his friend Pythias offered to remain in prison as "bailor" with the understanding that he would be put to death if Damon did not return. On the day of execution as the hangman's noose was placed around Pythias' neck, a rider was sighted in the distance and Damon appeared as promised. The Emperor was so moved by the friendship of these two

men that he set aside the death sentence.

The Constitution of the United States did not grant the right of bail, but the Eighth Amendment did state "excessive bail should not be required." The only purpose of bail is to assure the appearance of the accused at trial. In recent years there has been an extensive examination of excessive bail, and recommendations and guidelines have been issued for Judges to set fair bail or to release defendants awaiting trial in their own recognizance. These are set forth in Criminal Procedure Law Section 510.30, as follows:

> To the extent that the issuance of an order of recognizance or bail and the terms thereof are matters of discretion rather than of law, an application is determined on the basis of the following factors and criteria:
>
> (a) With respect to any principal, the court must consider the kind and degree of control or restriction that is necessary to secure his court attendance when required. In determining that matter, the court must, on the basis of available information, consider and take into account:
>
> (i) The principal's character, reputation, habits and mental condition;
> (ii) His employment and financial resources; and
> (iii) His family ties and the length of his residence if any in the community; and
> (iv) His criminal record if any; and
> (v) His previous record if any in responding to court appearances when

required or with respect to flight to avoid criminal prosecution; and
(vi) If he is a defendant, the weight of the evidence against him in the pending criminal action and any other factor indicating probability or improbability of conviction; or, in the case of an application for bail or recognizance pending appeal, the merit or lack of merit of the appeal; and
(vii) If he is a defendant, the sentence which may be or has been imposed upon conviction.

Also set forth in the American Bar Association standards:

It should be presumed that the defendant is entitled to be released on order to appear or on his own recognizance.

5.3 Release on Money Bail

(a) Money Bail should be set only when it is found that no other conditions on release will reasonably assure the defendant's appearance in Court.

(b). . . money bail should not be set to punish or frighten the defendant, to placate the public or to prevent anticipated criminal conduct.

5.9 Re-Examination and Review of Release Decisions:

(a) The Release decision should be automatically re-examined by the release court within a reasonable time in the case of a defendant who has failed to secure his release.

(b) Frequent and periodic reports should be made to the court of general jurisdiction as to each defendant who has failed to secure his release within (2 weeks) of arrest.

4.4 Release of Defendants Subject to One Year Maximum Sentence.

> A defendant charged with an offense subject to no more than one years imprisonment should be released by a Judicial official on order to appear or on his own recognizance without the special inquiry proscribed hereafter (for felony cases) unless a law enforcement officer gives notice to the Judicial official that he intends to oppose such release. If such notice is given, the inquiry should be conducted.[14]

In a study in New York City and elsewhere in the 1950's, it was revealed that bail was arbitrarily set, in that one out of three detainees could have been released with the assurance that they would return the next court date. The high detention rate was very costly to the tax-paying public. Of those who were detained on high bail, only 18% were acquitted as opposed to 48% free on bail. (Philadelphia). In New York City, bailed defendants received suspended sentences four times as often as jailed defendants.[15] In Washington, D.C., a recent LEAA study indicated that defendants released on cash bond or in third-party custody were less likely to return to court than those released on their own recognizance.[16]

The Vera Institute of Justice, a non-profit organization, was

established in 1961. Its purpose was to study the criminal justice system and to develop programs to improve it. Its record of achievement to 1979 is phenomenal in the savings to the tax payer, the fair and equal treatment to defendants and the protection of the concept that all those charged with the commission of a crime are innocent until proven guilty beyond a reasonable doubt. They started an experiment in the arraignment part of the Manhattan Magistrates Felony Court. Law school students at New York University were recruited as staff interviewers. A point-scoring system was established whereby a defendant was rated as to his community ties, prior record, family background, schooling or employment, etc., as follows:

> To be recommended, defendant needs:
>
> 1. A New York area address where he can be reached and
>
> 2. A total of five points from the following categories --
>
> Prior Record
>
> | | |
> |---|---|
> | 1 | No convictions. |
> | 0 | One misdemeanor conviction |
> | -1 | Two misdemeanor or one felony conviction. |
> | -2 | Three or more misdemeanor or two or more felony convictions. |
>
> Family Ties (In New York area)
>
> | | |
> |---|---|
> | 3 | Lives in established family home AND visits other family members (immediately]sic] family only. |

2 Lives in established family home (immediate family)

1 Visits others of immediate family.

Employment or School

3 Present job one year or more, steadily.

2 Present job 4 months OR present and prior 6 months.

1 Has present job which is still available.
OR Unemployed 3 months or less and 9 months or more steady prior job.
OR Unemployment Compensation.
OR Welfare.

3 Presently in school, attending regularly.

2 Out of school less than 6 months but employed, or in training.

1 Out of school 3 months or less, unemployed and not in training.

Residence (In New York area steadily)

3 One year at present residence.

2 One year at present or last prior residence OR 6 months at present residence.

1 Six months at present and last prior residence
OR in New York City 5 years or more.

Discretion

+1 Positive, over 65, attending hospital, appeared on some previous case.

0 Negative -- intoxicated -- intention to leave jurisdiction. [17]

Following the start of this program, a National Bail Conference was held in Washington, D.C. to provide national bail reform across the United States. This was followed by the Bail Reform Act of 1966 signed into law by President Lyndon B. Johnson.

> Excerpts from Remarks of President Lyndon B. Johnson on Signing the Bail Reform Act of 1966
>
> Today, we join to recognize a major development in our system of criminal justice: the reform of the bail system.
>
> This system has endured -- archaic, unjust, and virtually unexamined -- since the Judiciary Act of 1789. . .
>
> The principal purpose of bail is to insure that an accused person will return for trial if he is released after arrest.
>
> How is that purpose met under the present system? The defendant with means can afford to pay bail. He can afford to buy his freedom. But the poorer defendant cannot pay the price. He languishes in jail weeks, months and perhaps even years before trial.
>
> He does not stay in jail because he is guilty.

> He does not stay in jail because any sentence has been passed.
>
> He does not stay in jail because he is any more likely to flee before trial.
>
> He stays in jail for one reason only -- because he is poor. . .[18]

This was the first change in Federal bail since the Judiciary Act of 1789. The Federal law stipulated that persons should be released in non-capital cases where there was reasonable assurance that they would re-appear and that the Courts make use of volunteers for release opportunities such as release in the community to a third party with a cash deposit or bail or with restricted movement. In 1964, the New York City Office of Probation took over the administration of the Vera Project. Unfortunately, only a small percentage of jail population was reached by the Vera program. Thereafter, . . a bail re-evaluation project . was undertaken. Today, the City of New York has the appearance ticket issued by the arresting officer in non-violent misdemeanors, the examination of the defendant's background charged with a burglary checked by the Bureau of Criminal Identification, together with an evaluation of the defendant's roots in the community to determine whether or not he is a good risk to be released on his own recognizance.

> Money bail should be replaced to a large extent by the practice of releasing on their own recognizance as many persons as can reasonably be expected -- in view of their roots in the community -- to appear for trial. Except in the case of a serious crime committed by an adult, a summons or citation should be used in lieu of arrest.[19]

All of the foregoing criteria for setting bail and releasing non-violent defendants in their own recognizance are readily available to Town and Village Justices in Rockland County. In 1975, the County of Rockland applied for a $50,000 grant from the Federal Government for a Release-on-Recognizance program. I opposed the use of Federal funds since the Town and Village Justices had all the criteria for bail to be used in releasing people on their own recognizance. The Chairman of the Legislative committee on criminal justice wrote to me and asked that I consent for the following reason, "Since we have no power to supplement the local judge to hold court we can only continue an educational and informational campaign with the local judges."[20] The funds were received and a director was hired. He set up a program whereby information was supplied to the Village and Town Justices when a defendant was arrested on a non-violent felony or misdemeanor charge. Two Town Justices and myself served as an advisory board to this program.

At the end of one year the director resigned because he could not get any cooperation from about three of the local town justices. Surprisingly, they were practicing attorneys and should be familiar with the bail criteria set forth herein.

> Nationwide, these judges process thousands of such cases daily. The constitutional guarantee that liberty and property shall not be taken except through due process is possibly violated more in these operations than anywhere else in the administration of justice.
>
> . . . The justice of the peace is thus the gatekeeper on the road to the county trial courts. These officials are almost always active members of local political organizations and thereby highly susceptible to political pressures in reaching their decisions. Thus they are sometimes hard put to dispense justice impartially, let alone with due regard for constitutional rights.[21]

Every Friday the Rockland County jail issues a jail list indicating those defendants awaiting justice court action and those who have been indicted and are awaiting trial in the County Court. Alongside their names is the section of the Penal Law charged, the amount of bail, and the Town or Village where the charge originated.

The Legislature of Rockland County has not completed a courtroom that I am to use. It is now the fifth year that I have held court in the Legislative Chambers. Normally, prisoners are brought

to the County Courthouse about fifty feet from the entrance to the jail. In order to bring them to my chambers, quite a few hundred feet away, they must go across a wooden bridge, a couple of roadways, and through a portion of a building where non-court employees are working. On Columbus Day, 1975, there were fifteen bail applications by the Public Defender's office. In order to bring these prisoners to my court or chambers, it would have taken about three hours. On that day, I held bail hearings in the visitor's room of the County Jail. I brought a court reporter, court clerk, deputy, the Public Defender appeared for the applicants, and an Assistant District Attorney. Of the fifteen, thirteen were for non-violent crimes and were defendants who resided and had sufficient roots in the community that warranted that they be released in their own recognizance. Every one of them showed up in court when they had to except a 69-year-old-man who had been in the County Jail for two or three weeks. He was charged with possession of a credit card which a woman had lost that same day. While in the County Jail he became ill. I released him in his own recognizance to one of the hospitals in the county so that his own medicaid coverage would cover the medical and hospital bills. If I had kept him in the jail on the bail which was set, it would have cost the county a minimum of $600 per day to keep him in a hospital with round-the-clock deputies on

double and triple over-time, plus the hospital and medical costs.

Until 1977, I have held additional bail hearings on at least three occasions in the County Jail . Then the District Attorney objected, and it has been necessary to bring two or three defendants over at a time to my chambers. The deputies then return and bring two or three others over. In the City of New York, bail hearings and even preliminary hearings have been held in the Tombs and other institutions in order to save expenses, time, and the inconvenience of transporting prisoners throughout the city.

In the last four years, I have released in their own recognizance or released on reasonable bail over three hundred people. The percentage of those who fail to return is less than one and one-third percent. The Criminal Procedure law permits the acceptance of personal surety bonds which is extensively used in the Federal Court on more serious cases than those charged in Rockland County. This is also recomended by the American Bar Association standards. In addition, the Criminal Procedure Law provides for the acceptance of a 10% cash bail with a surety.[22]

If a defendant in Rockland County does not have friends or parents who own a home or have the funds to put up the total bail, he could not be released on a 10% cash bail. After questioning the families of some of the defendants, I have found that they had worked the same job for a number of years, they may have had a car that was four to five years old, but most important, they and the defendant had roots in the community of such substance as to warrant the defendant being released in his own recognizance. Unfortunately, Judges look differently at defendants who come in to court from jail, and usually give them harsher treatment than the defendants who come into court and are on bail. Bail in Rockland County has been, and still is, being set arbitrarily, and without regard to the criteria that a few of the Village and Town Justices should follow. I must point out that these arbitrary bails are set in a minority of the justice courts in Rockland County and not in the majority. These justices must run every four years and seek voter approval in all they do.

> Many lower court judges do not understand, or choose to ignore, the beneficial aspect of these enlightened concepts of the function and use of bail, many of them finding it impossible or infeasible to <u>buck City Hall</u>

> to obtain support and approval of police and other officials. Could a uniform system of bail and use of summons be promulgated in a model code and then through the action of influential organizations be made a part of local ordinances and codes (as Congress has acted for the benefit of Federal Courts)? Furthermore, how are open-minded judges to determine what is the optimum procedure in their particular bailiwicks?[23]

If a defendant is charged with a non-violent felony (burglary) in Rockland County and there is no "rap sheet" from the Bureau of Criminal Identification, the Judge cannot set bail until he receives it. Since most of the Town and Village Judges sit once a week, the defendant could remain in the County Jail for an entire week.

In a study that I did based upon jail lists, March 1976 to November, 1977, there were 180 defendants (160 men and 20 women) who were charged with mostly non-violent felony offenses and bail of $750.00 or less was set. In examining those records, it was apparent that many defendants were charged with the commission of non-violent felonies, misdemeanors, and even violations or offenses.

The 180 defendants who were in the County Jail for bail under $750.00 or less were broken into certain categories:

Section 1192 - V & T Law (D.W.I.).	5
Violations and offenses.	10

B misdemeanors (up to 90 days County Jail) . . 15

A misdemeanors - non-violent 40

Petty Larceny. 36

A misdemeanors (weapon, assault, resisting arrest, possible violence). 23

E felonies 12

D felonies (non-violent, burglaries) 25

C felonies 3

B felonies (one of which was reduced, the defendant ROR'd, and the charges dropped) . 2

These jailed defendants were to be returned to the local justice court within one week or more on the one day that court sat. In 1977, the average cost in Rockland County for defendants in the County Jail was about $53 per day.

One of the Town Justices who objected to my releasing a defendant told me he was going to sentence the defendant to "time served" when he returned to court. I told the justice that the defendant had not pleaded guilty yet, and it was possible he could die before the return date of court, and would then have been punished for being poor, and not for being guilty. I was fortunate in being able to change this town justice's attitude towards bail. Some of the other defendants were held for extensive periods of time.

. . . A DWI was held on $500 bail for 40 days.

. . . A woman charged with petty larceny on bail of $250.00 was held for about 46 days.

. . . Another petty larceny -- bail $500.00, 8 days in jail.

. . .Burglary 3d -- $500 bail -- 38 days.

. . . Escape 3d -- "A" misdemeanor -- $200 bail -- 30 days.

. . . A youthful offender charged with an "E" felony, possession of stolen property, $1,000 bail -- 30 days.

. . . A defendant charged with trespass, an "A" misdemeanor, $350.00 bail, was held for 2 months (possibly given time served).

. . . Another woman charged with petty larceny, $100 bail, was held for 15 days.

. . . A woman charged with petty larceny, $100 bail, was held for one month.

Some of the other examples of improper and unfair bail that I found were as follows:

1. A defendant charged with harrassment was held in $100 cash bail. He had lived in the Village for over eight years, was married and had children, was steadily employed with the same firm for four years, and had $82.00 cash in his pocket. The maximum penalty for harrassment would have been 15 days in the County Jail, but usually resulted in a $10.00 to $25.00 fine.

2. Two young men from Westchester County were charged with theft of services in that they had eaten a hamburger and coke and did not have the $2.00 to pay for it. They did not attempt to escape, or threaten anyone. Police were called and they were taken before the Town Justice and held in $250.00 bail and were to be returned to court a week later. I released them on their own recognizance at a bail hearing. They did appear before the Town Justice when they were supposed to and were fined $25.00 each. They spent five days in jail because they did not have the bail.

3. A defendant charged with driving while his license was suspended was ordered to pay $50.00 fine. When the fine was not paid within fifteen days, a bench warrant was issued and he was picked up and confined to the County Jail until the next court date. I released him in his own recognizance.

4. Another defendant charged with public intoxication was given a $25.00 fine and when it was not paid within eight days, a bench warrant was issued, and he was sent to Jail until court was scheduled. I released him in his own recognizance.

5. Bail of $100 had been set for a person who lived in the County all of his life, and who had driven an automobile without insurance.

6. A forty-five-year-old man, paralyzed from the waist down and confined to a wheel chair for about fifteen years, (his right

arm in a sling from a fall out of the chair) was held overnight in the local lock-up and sent to the County Jail on a Saturday morning on $500 bail. He was charged with assault in the third degree committed on his girl friend. When the jail advised me that they could not get his wheel chair into the cell and it took two deputies to have him go to the bathroom, I released him on his own recognizance.

There were many others held in bail, who had been residents of the County all of their life, and who more than satisfied the bail criteria previously mentioned. Over 90% were not threats to the safety of the community, since the charges against them were for non-violent offenses. Only three months ago a shocking misapplication of bail criteria and court discretion involved a woman with six children. She was gainfully employed at a state hospital and had never been on public assistance. The landlord had her evicted and while her furniture was being moved, he went to the local police station, signed a complaint for felonious malicious mischief, and had the woman arrested. Since the local justice could not set bail without a rap sheet, she was held without bail over a weekend. Her six children, including a four-month old child, had to be taken in quickly by different relatives. I went to the County Jail on a Saturday at the request of the Public Defender and released her on $100 bail. She had been born and raised in the community, had been

gainfully employed for a number of years and had never been involved with any illegal activity.

Whenever I have released a defendant in his own recognizance, or reduced bail to a reasonable amount, I always advise the defendant (if charged with a felony) that if he does not appear when he is supposed to, he would be charged with bail jumping as a felony, and sent to state prison for four years. Likewise, if it is a misdemeanor charge, he would get one year in the County Jail. In over four years that I have sat, I have never had a Village or Town Justice or District Attorney request a warrant for the apprehension of any defendant I released and who never showed up, nor have I ever seen any grand jury indictment for bail jumping of those defendants I released. (Well, maybe one).

Pursuant to the Criminal Procedure Law §720, any person over 16 and under 19 charged with a felony that is not murder, or any of the Rockefeller Drug Law felonies, and who has never been previously treated as a youthful offender, is a youthful offender eligible. In Rockland County one-third of all crimes of non-violent burglaries are committed by youthful offender eligibles. One of the most dramatic misapplications of bail procedures involved two sixteen-year olds. One youth whose father was an FBI agent was released in his own recognizance. Another (originally from

New York City) and now a resident of a home for youngsters from broken families, was kept in the County Jail on $500 bail for 53 days. Both youngsters had committed the same type of burglary, of a commercial establishment, no weapon was used, nor personal violence involved. The proceeds of both crimes was less than $50. They were both sentenced to five years probation and youthful offender treatment. The youngster who spent fifty-three days in the County Jail was additionally punished for being poor and not for being guilty. The criteria that is used in the City of New York under the Manhattan Bail Project, the American Bar Association Standards and the Criminal Procedure Law would have released all of the above in their own recognizance, but this is Rockland County.

> Equal justice under the law is a myth and not a reality to the vast number of nameless, faceless indigents who pass through our criminal justice system. The public simply does not understand the frustration and hopelessness felt by the poor, the illiterate, or the minority individual accused in a community that has, for the most part, pretended he does not exist. Although a great deal has been written and publicized concerning the right to counsel, the recent media programs which continually stress police frustration with the criminal's right to counsel have had far greater impact on the vast viewing public than landmark Supreme Court decisions or scholarly articles.[24]

In New York City when a felony charge is made, the defendant will usually receive his preliminary hearing. Under the Criminal Procedure Law in all felony charges, a defendant is entitled to a preliminary hearing within 72 hours of his arrest.[25] In Rockland County the policy has been not to give the preliminary hearing, but to present the felony charge to the grand jury as soon as possible. This has occurred even in cases where a defendant has been released without bail since he must have his preliminary hearing within 72 hours, or be released without bail. If the District Attorney does not want to give the preliminary hearing to the defendant, and it is both a burglary (felony) and a petty larceny (misdemeanor) charge, he will ask the court to continue the bail on the misdemeanor and release the defendant in his own recognizance on the felony. If the defendant does not have the funds, he remains in jail. This gives the District Attorney additional time to present the case without ever giving the defendant his preliminary hearing. I have seen cases where the felony was reduced to a misdemeanor, and the matter set for trial on an adjourned date. Before that date, the matter is presented to the grand jury, and the defendant is indicted on a felony even though he was waiting for a trial on a misdemeanor. It is true that the District Attorney will give the defendant notice of his constitutional right to appear before the grand jury and testify. If no presentment is made to the grand jury within 45 days, the defendant must released without bail.

The foregoing examples indicate that in Rockland County persons charged with non-violent felony offenses could be, and are, punished for being poor and before they are found guilty of the charge against them.

In the City of New York and in Rockland County, the District Attorney's office will provide the defendant's attorney with whatever discovery material the defendant is entitled to.[26] This will include copies of confessions taken from the defendant, evidence used in the commission of the crime such as guns, knives, etc. evidence of the crime itself such as packages of drugs, forged check, etc. The discovery proceeding in Rockland County is one that I developed about three years ago. It replaced the omnibus motion that defense lawyers would make requiring the District Attorney to answer extensively, and the Court to write a long, stereotyped Decision and Order to order the District Attorney to provide defendant's attorney with what he was entitled to have. An examination of the order used in Rockland County indicates that it eliminates a lot of unecessary paper work and would give the defendant's attorney all of the discovery materials he is entitled to under the law. The only criticism I find is that where the Consent Order indicates a defendant made an oral statement or

admission, the District Attorney's office supplies the defense counsel with the oral statement "in substance" and not the actual words themselves. The practice is not to have the oral admission or statement committed to writing but to have the witness who heard it testify to it at a trial. By the time of the trial, the witness may have testified as to what the substance of the statement was at (1) a preliminary hearing; (2) the grand jury; (3) the suppression hearing, and (4) the trial. It is not surprising to find that the exact words used differ in all four cases.

It is my feeling that we should adopt the practice of the Federal Criminal Justice System and allow the defendant's counsel to examine grand jury testimony provided there is no danger to any witnesses who may have testified before the grand jury.

PLEA BARGAINING AND PROSECUTORIAL DISCRETION

It has been said, "For most offenders, justice is done by way of a deal: a guilty plea in exchange for the promise of reduced charges or a lighter sentence. Bargains are generally struck with the prosecutor; the Judge usually rubber stamps them."[27] Plea bargaining has been as widely criticized as it has been praised. In the City of New York, because of the number of cases, the prosecutor plea bargains to dispose of large numbers of cases to avoid detaining jailed defendants for unusually long periods of time, witnesses getting discouraged, and the possibility of jurors being sympathetic and letting some defendants go free. There are some defendants who claim that they are deprived of a right to a fair trial by overzealous prosecutors who overcharge and over-indict, and then agree to reduce the charge in exchange for a guilty plea. I find this exists in Rockland County.

The media and the public criticize judges who give convicted defendants sentences that they believe are lenient. The public lacks the knowledge, and the media fails in its obligation to provide that knowledge, that in 95% of the cases the District Attorney has exercised discretion in plea bargaining to reduce the charge.

> It is also clear that the prosecutor has as much and perhaps more discretion than the sentencing judge under the present system because the prosecutor has even fewer statutory restrictions placed upon the plea bargaining process. Because the actual plea entered determines the range of sentence and often the actual sentence is part of the negotiated plea, this exacerbates even further the potential for disparities under the present system realized in New York because of the need to dispose of cases in the larger urban areas where more favorable pleas are offered than in the less populated and more rural areas of the state.[28]

In 1975, the prosecutor in Alaska announced a new procedure of no plea bargaining. Interestingly, he was a former Liberal-Democrat and member of the Civil Liberties Union. A review of the program after three and one-half years indicates that the prosecutor screened out the weak cases and almost all plea negotiations disappeared. There was an increase in "charge-bargaining" and a reduction in the number of felonies that went through the Grand Jury system. The impact of this"no plea bargaining"policy had the strongest negative impact on middle-class defendants who could neither afford high-priced legal counsel nor qualify for representation by the Public Defender services. The attorneys in Alaska are not too eager to represent defendants who are charged with a felony because

they know that everything is going to go to trial unless the defendants plead to the felony. Burglaries and other property crimes resulted in more severe sentences. So-called "clean kids" received longer prison sentences than before plea bargaining in property crime convictions.

The transfer of the total responsibility for sentencing was left to the Judge. While more people are going to jail and for longer sentences in Alaska, the quality of justice in the state did not improve.[29]

> Given the central role of plea-bargaining in our criminal justice system, we strongly recommend that steps be taken to increase the public accountability of prosecutors. Each district attorneys' office should be required to publish policy statements and meaningful statistics relating to its charging and plea-bargaining practices. . . .[30]

The Institute for Law and Social Research did a study in Washington, D.C., of 5,000 cases, 32% of which were burglaries. Their conclusion was that defendants who plead guilty in a plea bargaining process received about the same sentence as similar defendants who were convicted at trial. Only those who pled guilty to violent crimes -- robbery, etc. -- received a more severe sentence after trial.

The report further stated that, "The plea bargaining process appears not only to reduce acquittals, it may also reduce crime

by reducing the number of cases dismissed." The cost saved in Washington, D.C., in taking the pleas rather than going to trial averaged about $388.00 per case.[31]

We thus see a difference in the State of Alaska as compared to Washington,D.C., on the effect of plea bargaining. The same disparity applies between Rockland County and New York City. In New York City, the District Attorney's office is involved in screening burglary arrests at the initial stages, in the complaint room of the Criminal Court. At that time, the District Attorney's office can recommend that the charge be reduced to a misdemeanor or violation. Further screenings or reductions take place: at the arraignment part; at the preliminary hearing part; before the case goes to the Grand Jury; after the defendant is indicted; and even after the case goes to the Criminal Court Trial Part for pre-trial conferences and trial.

In the latter stages, a panel of qualified assistant district attorneys screen the possibility of taking a lesser plea than the original charge. In this manner the cases ultimately tried result in a higher conviction rate.

As late as March 27, 1979, a defendant on arraignment before a Criminal Court Judge in New York City charged with possession of cocaine, a non-violent felony offense punishable by up to four years in State Prison, was allowed to plea bargain to a misdemeanor and

given nine months in the County Jail. On the same date, an eighteen-year old charged with grand larceny in the third degree, a non-violent felony offense punishable by up to four years in State Prison, was allowed to plead to disorderly conduct. These cases were before Criminal Court Judge Joan B. Carey who was appointed some nine months ago. She was quite shocked when a defendant was charged with trying to take a wallet from a man's pocket and was offered an "A" misdemeanor (punishable by one year in the County Jail) and a fifteen-day jail term, refused it. The defendant said he preferred the jail used for persons awaiting trial rather than serving time on Riker's Island. The charge was finally reduced to a "B" misdemeanor and defendant was sentenced to "time served".[32] On March 25, 1979, a defendant, an ambulance technician, charged with taking money from a man transported to Bellevue Hospital, was charged with grand larceny in May 1978, was indicted in July, 1978, and pleaded guilty to the non-violent felony offense. He was sentenced to five years probation. The Assistant District Attorney said he "did not feel that probation was entirely inappropriate, that a heavy fine should have been levied in addition."[33]

In Rockland County, defendants who were charged with less serious and less violent crimes still had to plead to the felony charge. The District Attorney refused to reduce the charge and exercise his prosecutorial discretion in the following cases:

1. A youngster, 16 years of age, was indicted and charged with burglary and petty larceny in the theft of a six-pack of beer. It took over four months for his case to go through the Justice Court, grand jury, and County Court procedure, and he pleaded to the felony charge, he was placed on probation and given youthful offender treatment.

2. Two youngsters from an institutional home who had taken a typewriter from the home, were processed through the grand jury system and indicted for burglary. They had already started making restitution to the institution for the typewriter. They were ultimately placed on probation and given youthful offender treatment after four and one-half months.

3. Another example was of a 16-year-old who had taken $12 in a burglary. Upon returning to the institutional home he immediately repented and turned this money over to one of the Sisters and told her of his crime. He was still processed through the entire system and ultimately pled to the felony and was given youthful offender, five years probation in the County Court.

In Rockland County we do not have the screening process of non-violent felony charges in the initial stages. After arraignment on a burglary charge before a Village or Town Justice, the matter may be set down for a preliminary hearing. On rare occasions a

burglary is reduced to a misdemeanor upon the recommendation of the District Attorney at the arraignment or preliminary hearing stage. Once a preliminary hearing takes place and the defendant is held for the grand jury, the charges will rarely be reduced to a misdemeanor before it goes to the grand jury. Once the grand jury hears a burglary complaint, coupled with a petty larceny charge (where the items taken are less than $250.00) a felony indictment will result. The defendant is then arraigned on the felony charge and the matter is adjourned for six weeks to enable his attorney to make motions for identification or suppression hearings, other than those consented to in the discovery and consent order provided by the District Attorney. After the initial six weeks, the case appears on the ready trial calendar. During this period of time, the defense counsel will approach the District Attorney's office and ask for a plea bargaining conference. If a plea bargain is offered by the District Attorney, the Court will usually put it on the record in the defendant's presence and he will be given a period of time to accept the offer. If he does not accept it before it appears on the ready trial calendar, he must usually plead to the entire indictment.

This has resulted in the Rockland County, District Attorney's office offering sentence bargaining in burglary cases, particularly with youthful offenders. The District Attorney will recommend that

the youthful offender plead to the top count in the indictment (burglary) and will further recommend youthful offender treatment and probation, or will rest on the Probation Report and not oppose youthful offender treatment and probation. Meanwhile, the statistics filed with the Federal and State Crime Reporting Agencies show that the District Attorney receives a conviction for a felony, even though his recommendation for youthful offender treatment wipes out the felony conviction.

Recently, two youthful-offender eligibles had been charged with the commission of a burglary and petty larceny by a grand jury indictment. At a plea bargaining conference before me, one of the defendants wanted to accept the plea offer of the District Attorney and plead to burglary, and to accept the recommendation of probation and youthful offender treatment. The other defendant wanted time to think about it. The Court accepted this plea by the first youthful offender, over the objection of the District Attorney who insisted that both defendants had to plead at the same time. Pursuant to the Criminal Procedure Law Article 720, a youthful-offender eligible is treated in private until the Court determines he should be treated as an adult and not as a youthful offender. This Court felt that to condition one youthful offender plea on the other was improper. The Appellate Division, on the application of

the District Attorney, said the Court had no authority to accept the plea on one of the defendants without the other. At another plea-bargaining conference the defendant who pleaded guilty and whose plea was set aside in the Appellate Division, had to plead to the entire indictment in order to get youthful offender treatment while the defendant who refused to plead on the first conference was allowed to plead to burglary in the third degree, but also got youthful offender treatment.

In the City of New York, these first-offender youthful offenders charged with non-violent crimes of burglary would have been screened, the charge reduced to a misdemeanor, the matter held over their heads for six months as an adjournment in contemplation of dismissal, and thereafter dismissed. If the defendants had any prior involvement, they would still have received youthful offender treatment, which is mandatory in misdemeanor cases.

In Rockland County plea bargaining is usually initiated by the defense attorney and the District Attorney when the matter appears on the trial calendar. When the media reports a sentence in Rockland County after plea bargaining, the public is never advised of the procedures that occurred before the plea was taken. In June, 1978, two New York City women in their early 20's were arrested and charged with shoplifting at a local department store.

They were charged with acting in concert and indicted by a grand jury for grand larceny in the third degree, a non-violent felony offense. In October, 1978, at a plea-bargaining conference, the District Attorney offered a plea bargain of a reduction to an "A" misdemeanor and thirty days in the County Jail. When I was advised that the District Attorney's office had no information of any prior criminal record for either woman, I indicated the sentence might be eight weekends in the County Jail or whatever was appropriate after receipt of the probation report. In a misdemeanor I am forbidden by Section 390.20 of the Criminal Procedure Law to sentence a person without a written probation report, where there will be a sentence of probation or imprisonment of more than ninety days. Because I would not violate my obligation under the law, the District Attorney withdrew his plea-bargaining offer and insisted that the case proceed to trial. I felt that this was unfair under the plea-bargaining process and I accepted the plea on both defendants. The District Attorney brought a writ of prohibition (against my sentencing them) in the Appellate Division and he was sustained by that court. I was ordered not to sentence them on the misdemeanor charges. The case then went to trial in March, 1979, some nine months later. Two days were spent selecting a jury, and for another five days the trial proceeded and the defendants were convicted of the charge. The Probation Department in Rockland County in December, 1978, had recommended probation

because this was a non-violent offense and only one of the defendants had one prior arrest for shoplifting in New Jersey. Following the conviction I sentenced one defendant to five years probation and the other defendant's sentence was adjourned because she was some six months pregnant and had not been feeling well. At the time of her sentencing the District Attorney had located three prior shoplifting charges in New Jersey all of which resulted in fines. The charge before me was the first felony conviction that this defendant had. The District Attorney requested a sentence of zero to three years in State Prison and then reduced it to One year in the County Jail because of the pregnancy of the defendant. I sentenced the defendant to thirty days in the County Jail and stayed execution so that her attorney could process an appeal to the Appellate Division on the sentencing and because of her condition.

The New York City Bar Association has recently recommended that in certain non-violent felony and misdemeanor charges, there be an administrative type of disposition at the initial level.[34] This could be by means of diversion to certain programs with the criminal charge being adjourned with the consent of the defendant, or some other initial disposition as probation, etc. They recommended that in non-violent crimes, the chance of defendants going to state

prison or County Jail is very limited. In Rockland County the same apparent conclusion is ignored. When a defendant in a non-violent burglary charge, and particularly a youthful offender, goes through the entire procedure (and it takes about five to six months) his attitude toward the criminal justice system is one of disdain. It is important to realize that most of these burglary-charged youthful offenders come from middle- and upper-middle-class families. They are kept out of jail by parents who put up their homes, or raise the whole bail. The Town or the Village Justice doesn't commit them to jail, the District Attorney doesn't commit them to jail, and the County Court Judge doesn't commit them to jail, but to a term of probation, restitution and the possibility of community service. When the Probation Officer then attempts to enforce the probation, that is where the attitude of the defendant becomes aggressive and non-cooperative. The disposition of these cases should be made as speedily and as fairly as possible so that the impact of the entire system remains with the defendant so that he will not become a repeater.

It is my opinion that if the screening process and prosecutorial discretion used in the City of New York were adopted by the District Attorney's office in Rockland County, it would save the

County of Rockland the cost of putting a case through the entire grand jury system and place a young defendant on supervised probation in a much quicker period of time, and would deter recidivism.

SENTENCING AND JUDICIAL DISCRETION

Criminologists, those involved in the criminal justice system, and the public at large, have now taken sides on the issue of determinate sentencing in place of indeterminate sentencing.

> The first goal of sentencing is to do justice to all those with a stake in the sentencing process: the offender, the victim, and the public-at-large. If our sentencing laws are to achieve this central goal, they must be fair, consistent, and uniformly applied to similar cases.
>
> . . .
>
> Uniformity mandates that similar crimes committed under similar circumstances by similar offenders should receive similar treatment.[35]

The inequities that I have pointed out in the application of the criminal justice system with regard to non-violent felony offenders is even more apparent in sentencing. Benjamin Ward, former Commissioner of New York State Department of Corrections of the State of New York, on November 12, 1977, to express his views on changing to mandatory sentencing appeared before the Executive Advisory Committee.

> Commissioner Ward stated that New York's present indeterminate sentencing structure creates too many inequities in sentencing among different individuals and too much disparity in lengths of sentences for the same crime, especially as between upstate and downstate areas. He stated that there are too many individuals serving prison terms which are too long and others which are too short.. . .[36]

The Committee has recommended that sentencing guidelines be established and mandatory maximum sentences be set for specific crimes, and Judicial discretion narrowed. The Court could still give a defendant a sentence outside the guidelines if it finds specific aggravating or mitigating circumstances which would justify the different sentence. It would have to place on the record its reasons and the facts relied upon in reaching a decision. This could further increase the disparity of treatment of non-violent felony offenses in suburban communities such as Rockland County.

> Under a mandatory sentencing system judges would lose the discretion that many of them believe to be an essential element in sentencing fairly. The discretion, however, is not really lost; it merely descends to the prosecutors who, while feeling the press of seemingly endless cases, must decide whether to reduce charges or not. Thus, the system becomes inflexible at the top and rather free at other levels. That criminal justice works better with this shift of discretion is highly debatable.[37]

Under the Governor's Committee recommendations, if a District Attorney in New York City reduced a non-violent felony offense to a misdemeanor, and the District Attorney in Rockland County refused to reduce such an offense to a misdemeanor, then the defendant charged in Rockland County would still end up with a felony conviction and a possible severe sentence. This is what is occurring at the present time. The Committee was headed by District Attorney of New York County, Robert M. Morgenthau. They likened sentencing for the same crime to a "lottery" because the punishment was different throughout the state. In examining the members of the panel, it appears that all of them are from the City of New York except for one attorney from Keene, New York, and another from Elmira, New York.' There was no representation from suburban communities such as Rockland County.

> On August 14, 1976, Governor Carey, in announcing plans for additional institutions in response to the population spiral in the State's correctional facilities stated:
>
> 'There are those who must be imprisoned, however, I want to make certain that incarceration is not used where unnecessary or for any longer period of time than is required to meet both needs of individuals and to insure the safety of the general public.'

> This proposal is designed to facilitate the increased use of Probation as a dispositional alternative for: (a) first offenders, (b) non-violent offenders, and (c) offenders for whom incarceration is not mandated by law.[38]

In Rockland County before a defendant is sentenced, a detailed probation report is received, an opportunity is given to defendant's attorney for a pre-sentence hearing, and to the District Attorney to make any further statement with regard to recommendation of sentence. After all this, and listening to the defendant if he wishes to make a statement, then the Court sentences the defendant.

In Rockland County we punish a first time non-violent felony youthful offender to five years of supervised probation, possible intermittent jail time and community services at one of the state hospitals, private hospitals or any other charitable program helping the retarded or mentally ill in Rockland County. In the City of New York, such an offender would never receive any jail time and as previously indicated, the matter would be disposed of as a misdemeanor, or less. Out of 231 pre-sentence investigations in the County Court in 1977, of the felonies, 100 received probation, 62 were sent to state prisons, 31 to the County Jail. Of the misdemeanors, 22 were put on probation, 9 went to the County Jail, 1 received a fine and 2 got a conditional discharge.[39]

In a recent editorial in the JOURNAL NEWS, a daily newspaper in Rockland County, the cost of crime was discussed. A State Senator asked for $150,000.00 bond issue to build new state prisons for 3,000 inmates. The National Council on Crime and Delinquency issued a report that it costs at least $26,000 a year to keep one prisoner in a New York Jail. It only costs $33,200 for a qualified probation officer who could supervise 80 cases. This also includes his salary, and clerical assistance, and other expenses.[40]

The New York State Division for Youth issues administrative memorandums of the costs to maintain a youth in one of its facilities. The latest that I received in October, 1978, lists daily costs of $100.12 (over $36,500 peryear) at the Highland Detention Center, and $138.18 (over $50,000) at the Bronx Long-Term Treatment Center.[41]

I have long ago proposed that a youthful-offender eligible charged with a non-violent felony charge of burglary, grand larceny and shoplifting with no prior felony involvement or extensive rap sheet, be offered the following with the aid of counsel:

1. Waive preliminary hearing and grand jury presentment.

2. Accept a prosecutor's felony information in lieu of a grand jury presentment.

3. Permit the youthful-offender eligible to plead to the felony information.

4. Submit the defendant for an examination by the probation department.

5. Sentence him as quickly and as fairly as possible.

Of course, the defendant and his attorney are already just as aware as the District Attorney and the Court should be, that the defendant is going to end up with youthful offender treatment and probation, if he has no prior involvement. We "play the game" in Rockland County to the detriment of all those involved. The upper or upper-middle-class youthful-offender eligible may spend very little time in jail if "momma and poppa" own a house and bail him out, or he is released in their custody. The Justice in the lower court was no threat to placing him in jail. Then he is offered a plea-bargain of pleading to the felony count, and a recommendation by the District Attorney for youthful offender (which wipes out the felony charge) and probation. The Probation Department, in examining the youthful-offender eligible's background, finds out that he is not a threat to society and recommends probation and youthful offender, so that they are not a threat to incarcerate him. When he appears before the County Court Judge for sentence and is placed on probation and treated as a youthful offender, another threat to incarcerate him is removed. This process can take at least five to six months from the date of arrest to the date of

sentence. It has been my experience that some youthful offenders on probation then start to give their ProbationOfficer a hard time. After all, he came through the process without getting any incarceration, so what threat is the Probation Officer? Under my plan, any youthful-offender eligible who is given quick and fair disposition of the charges against him and receives the same result as when the matter goes through all the long process, the fear of incarceration and respect for the system is much greater, and the recidivism threat reduced.

In the City of New York these defendants would never reach the felony stage through the grand jury system. The charge would have been reduced to a misdemeanor or violation or offense and they would be diverted to the youth counsel bureau or other programs, the charge held in abeyance six months to one year, and then adjourned in contemplation of dismissal.

One of the most dramatic disparities in sentencing for non-violent crimes occurred recently. In Rockland County a defendant who pleaded guilty to a charge of obtaining welfare benefits of about $1,000 received six months in the County Jail. In the City of New York, if such a defendant had a job they would either fine him or give him time to make restitution, and then adjourn it in contem-

plation of dismissal. Recently, a former New York City official, who was an attorney and stole $70,000 from his law firm, pleaded guilty and asked for mercy. He was sentenced to only four months in jail.[42]

Under the Criminal Procedure Law a defendant who has been previously convicted of a felony and then pleads, or is found guilty of a second felony, must be sentenced as a predicate felony offender.[43] This is mandatory sentencing which withholds all of the discretion from the sentencing judge. A defendant who was recently found in an intoxicated condition in possession of a credit card and driver's license that an individual had lost two weeks before, was convicted of possession of stolen property. The victim had never reported the items as stolen to the police, believing that they were lost while drinking heavily with a number of people, none of whom he identified as the defendant. Under the predicate felony section, the defendant must receive a mandatory sentence of one and one-half to three years in State Prison because of a prior felony conviction.

In another case, where a defendant had committed a second non-violent felony offense, the District Attorney in Rockland County asked that I disregard the first felony conviction and accept his recommendation to give the defendant one year in the County Jail. This would be a knowledgeable violation of the predicate felony law,

and I refused. There was a young man and woman in their 30's who had both pleaded guilty to a second non-violent felony offense, and had to be sent to State Prison. Before they left they asked if I would marry them, and I did. Then I had to send them both to different State Prisons because the sentencing was mandatory.

These cases would rarely ever be treated as second felony offenses in the City of New York as long as they were non-violent crimes. The Prosecutorial discretion in the City of New York at the arraignment stage would reduce the charge to a misdemeanor and the defendants given a County Jail sentence or probation.

Other examples where I have been frustrated because I have no discretion, involve defendants who have committed A-3 felonies under the Rockefeller Drug Law by the sale of small amounts of controlled substances. To sentence a young person raised in the non-violent community of Rockland County to a state institution for the commission of a non-violent crime is very disturbing.

It is only when the District Attorneys in Rockland County and other suburban areas of the State of New York exercise prosecutorial discretion without the sole criteria being the number of felony convictions, that there will be equal treatment for non-violent felony offenders throughout the State of New York.

RECOMMENDATIONS FOR THE TREATMENT OF NON-VIOLENT FELONY OFFENDERS IN ROCKLAND COUNTY AND SIMILAR SUBURBAN COMMUNITIES

> The criminal justice system suffers from a lack of coordination and effective management between (and often within) the four independent components which directly control the efficiency of criminal justice operations -- the city agencies, the courts, the district attorneys, and the defense bar.[44]

1. Rockland County needs a Criminal Justice Coordinator whose function would be to bring together all the parts of the criminal justice system, police officers, the District Attorney, the Public Defender, members of the criminal defense bar, county Judges and Town andVillage Justices, Probation Officers, and Parole Officers. Any volunteer organizations that are attempting to assist ex-offenders being re-established in the community after sentencing should also be included.

2. New York City, in attempting to avoid "housing" new arrested defendants for long periods of time, has established new arraignment processing procedures. They have four weekend arraignment parts so that defendants would not have to wait until Monday morning to be arraigned and bail set. This avoids congestion at that time.[45]

In Rockland County it is almost impossible for any defendant to be arraigned or brought before a Judge to have bail set or reduced on the weekend.

I recommend that all Town and Village Justices and County Court Judges should first volunteer for arraignments for defendants on weekends and holidays, and if this program does not work, then a judge should be assigned to a weekend arraignment part on a rotating basis.

3. The Rockland County District Attorney's office, together with the various police departments in the county should establish programs to identify violent repeat offenders. They should be tried and sentenced as soon as possible. In the Bronx County the Major Offense Bureau brings most of these cases to trial within ninety days. It has a very high conviction rate and the average jail sentence is seven years or more.

4. Council on diversion. There should be established a centralized council on diversion composed of representatives from the judiciary, the offices of the district attorneys, probation, legal aid, and the private criminal defense bar.[46]

The Appellate Division of the First and Second Departments issued an extensive report in December, 1974. They recommended various programs to divert first-non-violent felony offenders from

the judicial process.[47]

5. In the City of New York, a defendant-employment project under the sponsorship of the Vera Institute of Justice was established. Defendant's charged with non-violent crimes had their cases adjourned from three to five months. They were given personal counselling, job references, and vocation services. Upon successful completion of the program prepared for them, the non-violent felony charges were dismissed but only with the consent of the prosecutor and judge. In almost all of the programs set forth in that report, non-violent felony offenders would qualify. Some had to be first-offender defendants.[48] We need such a program in Rockland County.

6. In Nassau County a project known as "Operation Midway" offers counselling, vocational guidance, job placement, education and referral services to defendants between 16 and 25 years of age, arrested on any felony charge except homicide. They must also be eligible for parole. The defendant must also be a resident of Nassau County and willing to participate in an intensive probation program for up to twelve months. If the program is satisfactorily completed, the charges may be dismissed or reduced upon the recommendation of the probation department and the discretion of the court.[49]

In Rockland County an intensive probation project has just started a couple of months ago. This program should be expanded along with other diversion programs.

7. Rockland County needs a work and/or school release program for non-violent offenders who may be sentenced to the County Jail. In 1977, I requested such a program for a defendant that I wanted to send to the County Jail for one year. I asked that he be permitted to go to work every day, as he had a good job, and was a first-non-violent-felony-offender, and return to the County Jail at night, and spend weekends there. He would be charged a reasonable sum of money for his room and board. The balance of his pay check would be used for the support of his family. The recommendation received no enthusiasm from the Sheriff, who still believes that things should be done the way they were thirty-five years ago. His response was not based upon any valid reasons for rejecting the work-release program, but only on the fact that I should sentence the person to weekends "unless he wishes to go boating or take a weekend vacation."

I should point out that in Charles E. Silberman's well-received book on criminology "Criminal Violence, Criminal Justice" he tells of the success of a new institution in Vienna, Illinois, housing five hundred "residents".[50] The local citizens first opposed the construction of this new penal institution and more so when no

fences were going to be / were built. The "residents" have a key to their own rooms and the security personnel are called "correction officers". The "residents" came from maximum security prisons where they had to earn the right to spend the last two or three years at the Vienna Institution. When the local residents had difficulty in conducting a volunteer ambulance corps the director (warden) secured federal funding for the/ambulance and provides reliable "residents" for the volunteer ambulance corps. This has worked very satisfactorily since 1975. When education programs, high school and/or college, were established at the institution, local residents and their children were invited to become students along with the "residents". The communication thus established between the residents, the correctional officers, and the local citizens, is something that should be sought in Rockland County and many other counties where the criminal justice system has the time and resources to operate such a program.

8. New York City has many half-way houses for ex-offenders that provide an opportunity for decent housing, a base from which to secure decent employment, and an opportunity to re-establish themselves as a useful member of society. In Rockland County I have attended meetings of the Jail Services Committee and we have been advised that ex-offenders that have applied for social services have had to wait long periods of time and have unfortunately returned to crime in

attempting to try and "make it" on the outside. Only recently, a small group is trying to start "Winirock House", a half-way house for ex-offenders in Rockland County.

> 9. Under British law, a community service order may be entered for an offender convicted of an offense punishable by imprisonment, provided he or she is at least 17 years of age and has consented. The number of hours worked (not less than 40 nor more than 240) are specified in the court's order, and normally must be completed within one year. Community service orders are arranged in the offender's local area and an attempt is made to structure them around employment, family, and religious commitments.[51]

In 1975 I had instituted community service in sentencing certain youthful offenders convicted of non-violent felony offenses. It helps establish a foundation for the probation department to determine whether or not a defendant on probation is sincere about staying out of trouble. Some of those who have been sentenced to community service have remained past the mandatory period and have become involved in the particular field where they provided the community service. In 1978, Governor Carey and the Legislature finally recognized that community service should be part of the criminal justice system as "punishment". It has been used extensively throughout the country. In sentencing non-violent offenders, the Criminal Procedure Law now provides for community service punishment in lieu of County Jail time but only for misdemeanors, and the defendants must consent.[52] In my sentencing of community services,

the defendant can refuse and accept County Jail time, intermittent or straight time. Rockland County should expand the use of community services in lieu of County Jail for non-violent offenders of misdemeanors and felonies.

10. Because the City of New York and other heavily populated communities have such an abundance of violent crime, persons from Rockland County who commit non-violent felony offenses should not be sentenced to the same institutions. Under the violent-felony offender law, there are mandatory state prison sentences for certain specified violent crimes.[53] In Rockland County in 1977, the number of violent crimes amounted to about fourteen out of about two hundred fifty indictments.

11. The non-violent felony offenders who are to be sentenced to state prisons should be confined to smaller, regional or even county facilities. In Rockland County we have numerous vacant buildings at Rockland State Hospital and Letchworth Village which could be used to house them. In the City of New York, the State is purchasing Rikers Island to house non-violent felony offenders.[54] They will be close to their families and their community. This may deter these non-violent felony offenders from becoming recidivists after they are released. In Rockland County these non-violent

offenders, if they are housed as I have indicated, could attend training programs with job opportunities, get counselling, attend high school and college, and also participate in work and/or school release programs and community service projects. Governor Carey and his administration have sought since 1975 to open smaller facilities for the purpose of housing only non-violent felony offenders. However, because of the dramatic growth in the prison population and the lack of space, these plans had to be deferred.[55]

12. Monroe County has started a program based upon the concept of restitution. It is a private project aided by the Public Defender and volunteers in partnership with a CETA grant.

> Restitution is an age old concept in criminal justice. Provisions for restitution can be found in the code of Hammurabi, Mosaic Law, and the Roman Law. Sir Thomas Moore, composing a Utopian society, assigned restitution a prominent role in the promotion of social control.[56]

The Monroe program replaces incarceration for non-violent felonies. Only earlier offenders convicted either of a misdemeanor or non-violent felony are acceptable.

> An even more striking statistic is the fact that many of these offenders against property are first time offenders.

> A recent statistic (August 1976) obtained from the NYS Corrections Department indicates that of a total population of 17,451, 1,459 are first time property offenders. This would signify that 8.3% of our prison populace are serving time, who have no previous convictions and some no previous arrests for non-violent crimes. This group would represent the best risk group for a restitution program.[57]

13. Rockland County, in conjunction with community service projects, and probation, should establish a restitution program that would provide for job training and restitution to the victim, as an alternative to incarceration.

14. Because judges like myself in a suburban community have the resources of an experienced and interested Probation Department, time to consider alternatives to incarceration in non-violent crimes, and the time to follow up these non-violent felony offenders who are on probation, the independent calendar system used in the Federal Court should be adopted in Rockland County, and other suburban communities. The indictment would be assigned by lot to each judge, he would handle it from the arraignment all the way through the motions, examinations of grand jury minutes, plea bargaining, sentencing, and following up those defendants who are put on probation, or in alternative programs.[58] This type of interest and concern, by a Judge,

and the entire criminal justice system,could be a serious deterrent to recidivism and would aid young first offenders in re-establishing their moral priorities.

In 1975 I returned as an undergraduate student at the local community college. In May, 1978, I graduated with a degree in Social Science from St. Thomas Aquinas College. I have already completed thirty credits at C.W.Post College and this thesis, if accepted, will grant me a Masters in Criminal Justice in May, 1979. In addition, I have spoken at numerous public schools, high schools, and college classes, community organizations, and have conducted seminars in "Fair Trial/Free Press", "Is the Criminal Justice System Working" and other such topics.

The most stimulating experience has come from my contact with police and probation officers in the criminal justice classes. Many of them have never had an opportunity to ask a judge "Why?" something happens. They have made recommendations and constructive criticisms which I have listened to and accepted. I have offered my suggestions and criticisms,and they have been accepted on the same equal basis. Even members of the criminal justice system have questions that are unanswered and there is no opportunity for communication which would encourage them to ask the question and get the answer.

> "We have focused long enough on the offender and his weaknesses. It is time we look to ourselves -- to this chaotic decaying, degrading system and indict it for its failures.' By calling for us to demystify the police department, district attorney's office, courts, probation, parole, and prison and make them accountable to various publics, he presents a potential powder keg to the student of crime. Such emphasis is necessary inorder to revolutionize the criminal justice system.[59]

In April 1975 when I was on the bench for a little over three months, I had an informal meeting with the Probation Department. At that time I recommended intermittent or weekend sentences, restitution, a possible work and/or school release programs and volunteers to assist with an ex-offender in securing counselling, housing, and job opportunities. I also instituted a community service project for non-violent (felony) youthful offenders at local state hospitals, nursing homes, religious organizations, etc. I advocated the use of a prosecutor's information in place of a felony indictment so that a first-offender for a non-violent crime would be treated quickly and placed on probation as soon as possible.

The Probation Officers were advised that I would be available to meet any probationer who they felt needed some judicial direction.

> The committee wishes to emphasize that, in addition to probation, many other alternatives to incarceration should be retained and, if possible, enlarged. These alternatives, in accordance with modern penal theory, include halfway houses, community treatment centers, reduced security facilities, restitution, and the like. Intermittent imprisonment should also be continued as well as "shock probation". The use of all such alternatives should be better developed, as they can often serve both the offender and the community.[60]

Judges have the same obligation as other members of the criminal justice system and must not become complacent.

> If the judge is a man of integrity and courage, he will not shirk this responsibility. He will shed his image of isolation, will come out in the open as an advocate of judicial improvement and will adopt as his own the activist role. . .[61]

FOOTNOTES

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