

# **Crime and Punishment in New York:**

*An Inquiry Into Sentencing  
And  
The Criminal Justice System*

63/84

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

**CRIME AND PUNISHMENT IN NEW YORK:**

**An Inquiry Into Sentencing And  
The Criminal Justice System**

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

**March, 1979**

**March 23, 1979**

**To the honorable HUGH L. CAREY,  
Governor of the State of New York**

**It is with great pleasure that I submit to you the final report of your  
Executive Advisory Committee on Sentencing, containing a summary  
of its activities, and its recommendations and conclusions.**

**Respectfully submitted,**

**Robert M. Morgenthau  
Chairman**

**New York State Executive Advisory**

**Committee on Sentencing**

*Members of the Committee*

**Robert M. Morgenthau, Chairman**

**Jorge L. Batista  
Peggy C. Davis  
Stanley Fink  
I. Leo Glasser  
Emanuel R. Gold  
Harry D. Goldman  
Charles J. Hynes**

**John F. Keenan  
Arthur L. Liman  
John F. O'Mara  
Robert P. Patterson, Jr.  
Barbara Swartz  
Harold R. Tyler, Jr.  
S. Burns Weston**

*Staff*

**General Counsel  
Assistant Counsel**

**Associate Counsel**

**Research Director  
Researchers  
(Part-Time)**

**Office Staff**

**Steven E. Landers  
David W. Beier  
Marsha Garrison  
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Gerri Jacobs  
Denise Mullins  
Nancy Sallows  
Eric Thompson  
John R. Zebrowski  
Mary Grady  
Valeria Hollins  
Carol Ann Petzoldt**

*Consultants*

**Louis Harris and Associates, Inc.  
Institute for Law and Social Research (INSLAW)  
Leslie T. Wilkins, Professor at the School of Criminal Justice, State  
University of New York at Albany.**

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Preface: *The Committee's Inquiry*

The New York State Executive Advisory Committee on Sentencing was established by Governor Hugh L. Carey in December, 1977. Robert M. Morgenthau, District Attorney of New York County, was appointed by the Governor to be Chairman of the Committee. The other members of the Committee were:

- Jorge L. Batista, First Assistant Attorney General of the State of New York; Regent of the State University of New York; and former President of the Puerto Rican Legal Defense Fund.
- Peggy C. Davis, Deputy Coordinator for Criminal Justice, City of New York; former Associate Professor of Law, Rutgers University, and Staff Counsel NAACP Legal Defense Fund.
- Stanley Fink, Speaker of the New York State Assembly.
- I. Leo Glasser, Dean of the Brooklyn Law School; former Judge of the Family Court of New York State.
- Emanuel R. Gold, Deputy Minority Leader of the New York State Senate.
- Judge Harry D. Goldman, member of the law firm of Goldstein, Goldman, Kessler and Underberg, in Rochester; former Presiding Justice of the Appellate Division, Fourth Judicial Department, New York State Supreme Court.
- Charles J. Hynes, Deputy Attorney General, Special Prosecutor for Nursing Homes, Health and Social Services; former First Assistant District Attorney, Kings County.
- John F. Keenan, Deputy Attorney General, Special Prosecutor for Corruption in the New York City Criminal Justice System; former Chief Assistant District Attorney, New York County.
- Arthur L. Liman, member of the law firm of Paul, Weiss, Rifkind, Wharton & Garrison; former Chief Counsel, New York State Special Commission on Attica.
- Judge John F. O'Mara, member of the law firm of Burns & O'Mara, in Elmira; former District Attorney of Chemung County and Judge of the Court of Claims of the State of New York.
- Robert P. Patterson, Jr., member of the law firm of Patterson, Belknap, Webb & Tyler, and President of the New York State Bar Association.
- Barbara Swartz, Assistant Clinical Professor, New York University Law School, and Director, Bedford Hills Women's Prison Project.

- Judge Harold R. Tyler, Jr., member of the law firm of Patterson, Belknap, Webb & Tyler; former Deputy Attorney General of the United States, and Judge of the United States District Court, Southern District of New York.
- S. Burns Weston, Attorney-at-Law, Keene, New York; former President of the Bar Association of Greater Cleveland.

### *The Committee's Mandate*

In the Executive Order creating the Committee, the Governor noted that "at the center of the controversy [over sentencing] is the question whether indeterminate sentences, such as those provided for under the New York Penal Law, are preferable to a system of definite sentencing, or whether some option between the two approaches should lie with the sentencing judge." Accordingly, the Governor directed the Committee to "evaluate the effectiveness of the existing laws relating to imprisonment, probation and parole in achieving legitimate sentencing goals," and study and evaluate alternatives for change.

By the spring of 1978, the Committee had assembled a small independent staff and commenced its investigation.

### *Defining the Scope of the Inquiry*

An immediate and difficult problem was to define the boundaries of the Committee's study. From the outset it was clear that the inquiry must of necessity encompass more than a theoretical study of New York's sentencing laws. Events which occur both before and after sentence is imposed are inextricably entwined with the sentencing process itself, and must be considered for a true picture of present sentencing practices to emerge. Thus, this study has attempted to describe and analyze presentencing stages of the criminal justice system, as well as the practical results of sentencing — what happens to those who are imprisoned, placed on probation, or subject to parole supervision.

The Committee made two other fundamental choices. It decided to concentrate its efforts on felony, rather than misdemeanor, sentencing — in part because of the dearth of data relating to the sentencing of misdemeanants in New York. The Committee also concluded that its inquiry would focus exclusively on the sentencing of adult, rather than juvenile, offenders, since the juvenile justice system was felt to present unique problems which could more properly be addressed in a separate study.

## *How the Study was Conducted*

The Committee's investigation encompassed a wide variety of activities.

### *1. Review of the literature:*

The Committee staff conducted an exhaustive review of the relevant literature relating to the history of sentencing in New York; alternative sentencing models proposed or adopted in other jurisdictions; prosecutorial discretion and plea-bargaining; sentencing disparity; parole; probation; corrections; non-incarcerative community-based sanctions; and the moral and criminological implications of alternative sentencing policies. In addition, the Committee commissioned a study by the Institute for Law and Social Research (INSLAW) relating to deterrence, incapacitation, rehabilitation, and their link to sentencing, which accompanies this report as Appendix E.

### *2. Interviews:*

The Committee and Committee staff spoke with many individuals in New York State who are both knowledgeable and experienced in matters relating to sentencing, probation, parole, and corrections. These include members of the judiciary; officials of the New York State Office of Court Administration; high-ranking officials of the State Department of Probation and the New York City Department of Probation, and probation officers employed by several local probation departments; top-level management of the Division of Parole, individual parole officers, the Chairman of the Board of Parole and several members of the Parole Board; the Commissioner of the New York State Department of Correctional Services, aides to the Commissioner, and corrections officers; members of the Commission of Correction; officials of the New York State Division of Criminal Justice Services; the Commissioner of the New York City Police Department; assistant district attorneys; defense attorneys; representatives of pretrial services agencies; inmates and representatives of inmate organizations; academicians; criminologists; legislators; and officials of various professional associations representing employees in the criminal justice system.

In addition, Louis Harris and Associates, Inc. conducted lengthy interviews, on behalf of the Committee, with fifty Supreme and County Court judges, fifty assistant district attorneys, and fifty

defense attorneys, selected by stratified random sampling and located across New York State. The results of this survey are contained in Appendix D to this report. Professor Leslie T. Wilkins, of the School of Criminal Justice, State University of New York at Albany, assisted in the development of the questionnaires used in these interviews.

### *3. Sentencing simulation study:*

In order to shed further light on the existence of sentencing disparity in New York, the Committee conducted, with the cooperation of the Office of Court Administration, a sentencing simulation study, in which forty-one Supreme and County Court judges imposed sentences in sample cases. A description of this study, and its results, are contained in Appendix C to this report.

### *4. Data analysis:*

In addition to studying publicly available data relating to sentencing in New York, the Committee staff sampled computerized data maintained by the New York State Department of Correctional Services and the Division of Parole in order to establish the average time actually served by offenders convicted of various offenses, and the range of maximum sentences imposed for various crimes.

The Committee staff also conducted a survey of all district attorneys' offices in New York State, in order to determine whether each office had formal policy guidelines with respect to plea-bargaining, and the substance of those guidelines.

### *5. Public hearings:*

The Committee held public hearings in New York City, Albany and Rochester from November 14-18, 1978. Fifty-six witnesses testified at those hearings, and an additional eleven individuals submitted written statements in lieu of oral testimony.

### *6. On-site investigations:*

Committee members and staff visited the State correctional facilities at Auburn, Bedford Hills, Green Haven and Ossining. At these prisons, interviews were held with over fifty inmates, as well as corrections officers and prison officials.

Three days of parole hearings, held at the Elmira Correctional

Facility, were also audited by Committee members and staff.

*Acknowledgments:*

Throughout its investigation, the Committee and its staff received assistance and cooperation from state and local officials at every level. A special word of appreciation is appropriate for Judah Gribetz, former Counsel to the Governor, who gave freely of his time to the Committee, never let us forget the importance of our charge, and did much to encourage the independence and vigor of the Committee's investigation. His successor, Judge Richard A. Brown, has continued in that tradition. Judge Richard J. Bartlett, who enabled the Committee to conduct its sentencing simulation study and engage members of the judiciary in a dialogue about sentencing, also has the Committee's special gratitude.

During the course of its work, the Committee also received invaluable assistance from the library staffs of Paul, Weiss, Rifkind, Wharton & Garrison, the Office of the Special Prosecutor for Corruption in the New York City Criminal Justice System, and the National Council on Crime and Delinquency, which we gratefully acknowledge. We also thank James McSparron, Counsel to the Commissioner of Correction, for his work on community corrections.

Finally, the Committee wishes to thank Governor Carey, who was determined that this study should be conducted without political constraints, and provided us with the funds and freedom to do so.

## EXECUTIVE SUMMARY

### I

#### *The Indeterminate Sentencing System In New York State*

The Committee's investigation has revealed what so many judges, lawyers, and ordinary citizens intuitively know: sentencing in New York State today is erratic and unpredictable. We conclude that New York's system of indeterminate sentencing is therefore in need of fundamental reform.

The reason is simple. Under our present sentencing laws, judges exercise vast and unchannelled discretion in imposing sentence. Armed with only a vague and conflicting set of sentencing goals, judges are left to sentence largely on the basis of their own personal predilections. Since judges differ in personality and viewpoint, so do the sentences they mete out. The result is widespread sentence disparity: similar offenders committing similar crimes often receive substantially dissimilar sentences.

The uncertainty and randomness which characterize sentencing in New York undermine the ability of our sentencing laws to do justice or to control crime. Justice demands fair and consistent sanctions — yet sentencing today is haphazard and arbitrary. Deterrence requires that potential offenders know in advance what sanctions they will receive if they are convicted of a crime — yet current sentencing practices resemble a lottery, offering the hope that, depending upon the luck of the draw, an offender may escape with little or no punishment. In short, mere chance, rather than the rule of law, often governs the way we sentence criminals today.

Our present sentencing system has another, and to our minds, equally serious failing. It places a shroud of mystery over sentencing, which confuses even those intimately involved in the criminal justice system, and breeds cynicism and bewilderment in the general public.

Under the indeterminate system, a sentence does not mean what it says. The sentencing judge only sets a broad range of time which an offender *could* serve: it is the Parole Board, an administrative agency, which determines the time that the offender actually *will* serve.

No matter how conscientious its members may be, the Parole Board's role as the judiciary's partner in sentencing has a bedeviling effect on our sentencing system.

First, it distorts the initial sentencing decision, since judges, in

determining sentence, attempt to anticipate the Parole Board's eventual release decision, but have little idea what Parole Board policies are or what that release decision is likely to be. Second, it creates the impression in the public mind that our criminal justice system is a fraud: the public can find no other explanation when it learns that individuals who receive lengthy maximum sentences are released before completion of their terms. This fragmented responsibility for sentencing, in our view, further muddles an already muddled sentencing system, and brings our criminal justice system into public disrepute.

The indeterminate system is not only inadequate in practice; it is also fundamentally flawed in theory.

Indeterminacy is based on the concept that criminal conduct is an illness which will be "cured" during the offender's period of incarceration. Since the judge cannot predict, at the time of sentencing, precisely when the "cure" will occur, he sets only the outer limits of the sentence; it is the task of the Parole Board to determine when and if an offender has been rehabilitated, and to release him at the appropriate moment.

This model has, however, one major defect: it simply doesn't correspond to reality.

Research has amply demonstrated that we do not know how to rehabilitate offenders through incarceration. Moreover, we have no way of knowing when or if an inmate has in fact been "cured" of crime. Our sentencing laws are therefore built on a pile of false assumptions, and have been designed to accomplish a task which is beyond their powers.

In summary, this is the picture to be drawn of sentencing in New York State:

Sentencing is marked by inconsistency and unjustifiable disparity. Since the penal law presents no coherent set of goals to guide the sentencing decision, judges exercise vast discretion which is nearly immune from review — and different judges exercise it differently. We find that many judges are unfamiliar with the sentencing practices of other judges and the release practices of the Parole Board, which in effect resents offenders. The indeterminate system also draws a veil of secrecy over sentencing, leaving the defendant, the victim, and the public in ignorance concerning who makes sentencing decisions, and why those decisions are made. The result, we submit, is a system which is neither just, effective, nor credible.

We conclude that New York's present indeterminate sentencing system should be replaced by an alternative mode of sentencing. At this point we must state our views more explicitly concerning the goals

which our sentencing laws should be designed to accomplish, before choosing among the alternatives for change.

## II

### *The Goals of Sentencing*

We believe that sentencing should serve two preeminent goals.

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.

- Fairness requires that the severity of criminal sanctions be directly related to the seriousness of the offense and the offender's prior criminal record. Courts should impose the least severe sanction capable of achieving legitimate sentencing goals.
- Consistency demands a graduated system of penalties proportionate to the harm caused by criminal conduct.
- Uniformity mandates that similar crimes committed under similar circumstances by similar offenders should receive similar treatment.

We strongly believe, however, that no sentencing system can be just which entirely eliminates judicial discretion and mechanically applies a set of penalties to preconceived categories of offenders and offenses. Judicial discretion must be retained to tailor penal sanctions to the unusual case and unforeseen combination of circumstances, but that discretion should be guided, structured, and subject to meaningful appellate review.

The second goal of sentencing is to protect the public, to the extent possible, by controlling crime. We must emphasize that sentencing reform, important as it is, cannot be a panacea for crime. Although public discussion of sentencing often blithely assumes that changes in our sentencing laws will "solve" the crime problem in New York, we find no evidence to support such a view. In order to restore some measure of realism to the sentencing debate, it is important to underscore why merely altering sentencing practices can have only a limited impact on the crime rate.

First, it must be understood that out of the total number of crimes committed, not all result in arrest and conviction. Since many offenders do not reach the sentencing stage, the possible effects of sentencing — in terms of either deterring criminal conduct or isolating of-

fenders from the community — are likely to be reduced.

There are other reasons to question whether sentencing reform can, by itself, have a substantial effect on crime. The ability of our sentencing laws to deter crime is weakened by the fact that at least some violent crime appears to be impulsive and irrational, and unaffected by fear of sanctions. Other offenders may be willing to risk future punishment — however severe — in return for immediate gain. Our ability to reduce crime by incapacitating offenders may be hampered by difficulties in apprehending the hardened and sophisticated criminal, and in accurately assessing which offenders will commit new crimes once they are released from custody.

A fair statement of the limits to our knowledge about deterrence, incapacitation and crime control is this: although it is clear that punishment deters some people, some of the time, from committing some crimes, it is not known whether increasing the severity of punishment will necessarily decrease crime, and if so, by how much. Similarly, although we doubtless prevent some crime by incapacitating offenders, it is difficult to measure how much crime is prevented or to determine which offenders to incapacitate — matters of essential importance, since incapacitation is too expensive a strategy, in terms of increased prison costs, to apply indiscriminately.

We can, however, draw some conclusions with relative confidence. *Certainty* of punishment is more important than *severity* of punishment in deterring crime. Thus, for our sentencing laws to have their maximum deterrent effect, they must provide for relatively fixed, consistent sanctions to be imposed on similar offenders committing similar crimes. In this way, an offender will be put on notice of the penalty he will receive if he is convicted of a crime, and the repeat offender — who at least until a certain age, is the type of offender most likely to recidivate — will receive progressively stiffer punishment, and be isolated from the community for lengthier periods of time.

The goals of sentencing which we have enunciated here cannot be accomplished within the confines of the indeterminate system. Nor can indeterminacy, which gives rise to sentencing practices widely viewed as arbitrary, inconsistent, or plain incomprehensible, promote respect for the law, which is ultimately the true means of assuring law-abiding behavior. While we recognize that perfection cannot be expected from any sentencing scheme, we believe that the indeterminate sentencing system is a failure, and should be abandoned. Thus we turn to determinate sentencing models which have been proposed or adopted in other jurisdictions as alternatives to the indeterminate system.

## III

*Alternatives to the Indeterminate System*

Determinate sentencing means different things to different people. To some, it conjures up the spectre of a mechanical, inhuman sentencing system, unable or unwilling to take into account the uniqueness of the offender or the offense. Individuals who insist that our criminal laws must do justice understandably recoil in horror from such a sentencing scheme — as do we.

We reject, for this reason, determinate sentencing schemes providing for “flat” or “presumptive” sentences, established by the legislature, which must be imposed by the sentencing judge. Where such schemes place crimes into a small number of broad categories, they indiscriminately lump together vastly different sorts of criminal conduct, and must inevitably produce unjust results. Where more narrowly drawn offense categories are used, the product is a criminal code of enormous length and complexity, replete with fine distinctions, which is still unable to anticipate all possible variations of an offense, thus forcing judges to impose similar penalties in dissimilar cases. Neither scheme, in short, is able to overcome the fatal flaw of inflexibility.

We believe that New York’s sentencing laws should avoid the evils of the present regime of unfettered judicial discretion, but not at the expense of embracing fixed, rigid, mandatory sentencing. We believe that there is, however, a middle ground between these two extremes: a system of sentencing guidelines, which attempts to channel and structure — but not abolish — judicial discretion.

Under a system of sentencing guidelines, the legislature retains its traditional role of setting maximum terms, but an independent commission is appointed to establish sentencing guidelines. The sentencing judge is free to depart from the guidelines in appropriate circumstances, but when sentencing outside the guideline range, he or she must make, on the record, findings of fact sufficient to justify the deviation from the guidelines, and the sentence is then subject to appellate review.

Sentencing guidelines are based on the severity of the crime and facts relating to the prior history of the offender. For each combination of offense and offender, the guidelines provide a narrow sentence range (which could be increased or decreased, within limits, by specified aggravating or mitigating circumstances). A judge would

impose a sentence within the guideline range, unless the unusual nature of the case required a sentence outside the guidelines — a decision which could later be modified on appeal, if the appellate court found that the specific facts relied upon by the lower court did not justify deviation from the guidelines.

A system of sentencing guidelines would thus achieve the goals of flat or presumptive sentencing — limiting sentence disparity and increasing the certainty of punishment — while avoiding the inflexibility that marks them both. Thus, the ability of a judge to take into account the unusual nature of the case is retained; at the same time, the opportunity to abuse that discretion is substantially limited. Both justice and certainty would thus be promoted by sentencing guidelines.

A guideline model has one further advantage: it utilizes an independent commission to determine the type and length of sentence appropriate for different kinds of offenses and offenders. Such a commission would have the expertise and flexibility to establish guidelines on the basis of careful consideration of existing sentencing practices, as well as scientific knowledge concerning the relationship between sentencing and crime control. It would monitor the operation of the guidelines, and alter them periodically if on-going research and experience indicate the need for change. Finally, although the rule-making of the commission would be on the record and open to public scrutiny, the commission itself would be removed from partisan politics.

#### IV

##### *A Proposed Sentencing Guidelines System for New York State*

A determinate sentencing system, utilizing sentencing guidelines, would have these central features:

##### *Who Would Formulate Sentencing Guidelines*

A New York State Sentencing Commission would promulgate guidelines to aid the sentencing court in determining the sentence to be imposed in a criminal case, including the type of sanction to be imposed (probation, fine, restitution, community service, or incarceration) and the length of time for which the sanction should be imposed (or the dollar amount if a fine or restitution is the appropriate disposition). The Commission would consist of nine members, to be

appointed by the Governor, the Legislature, and the Administrative Board of the Judicial Conference. It would be assisted by an Executive Director and staff.

### *How the Type and Length of Sentence Would be Determined*

The guideline sentence should be the least severe sanction necessary to achieve legitimate sentencing objectives. Sentences not involving confinement should be preferred, *unless*:

- a) confinement is necessary to protect society by restraining a defendant who has a history of serious criminal conduct;
- b) confinement is necessary to avoid depreciating the seriousness of the offense or justly to punish a defendant;
- c) confinement is necessary to provide an effective deterrent to others likely to commit similar offenses; or
- d) measures less restrictive than confinement have been applied frequently or recently to a defendant and have been unsuccessful

In establishing its initial sentencing guidelines, the Commission should give substantial weight to current sentencing and release practices. Under the indeterminate system, maximum sentences provided by statute bear no resemblance to the terms most inmates actually serve. Sentencing guidelines should, as a starting-point, attempt to replicate average sentences *actually served* by offenders for various crimes. The reason for this is simple: the length of sentences cannot be drastically altered, at a single stroke, without severely disrupting the criminal justice system. As sentencing guidelines develop over the years, they can be gradually redrawn and refined according to the dictates of justice and crime control, but this cannot be an overnight process. In particular, we strongly oppose the formulation of guidelines in such a manner as to increase suddenly and substantially the average sentence lengths served by inmates.

### *How Judges Would Use Sentencing Guidelines*

The judge would impose a sentence within the range prescribed by the sentencing guidelines, unless the court finds that specific aggravating or mitigating circumstances exist which are not reflected in the guidelines or which justify a different sentence. The court would be required to state on the record, at the time of sentencing, its reasons for imposing a particular sentence, and if the sentence is of a different type or duration from the guideline sentence, its specific reasons for

deviating from the guidelines, and the facts relied upon in reaching its decision.

#### *How Appellate Review Would Limit Disparity*

Both prosecutor and defendant would be entitled to appeal a sentence outside the guidelines. In addition, a sentence could be appealed by either party on the ground that the sentencing guidelines were incorrectly applied to the defendant. By motion for leave to appeal, a sentence could also be challenged on the assertion that the guidelines, as applied to the defendant, are clearly unreasonable. The various Appellate Divisions of the Supreme Court would continue to decide sentence appeals.

#### *How the Role of the Parole Board Would Be Altered*

Under a system of sentencing guidelines, defendants sentenced to a term of incarceration would actually serve that term in prison (except as it is reduced by good-time). The Parole Board would perform a discretionary release function *only* for inmates who had been sentenced under the prior indeterminate system.

Parole release would be abolished because it would serve no legitimate function under a sentencing guidelines system. The New York State Parole Board today has abandoned its traditional practice of basing its release decisions on an inmate's purported progress towards rehabilitation; it has substituted instead a set of guidelines, which essentially reflect the severity of the offense and the offender's prior criminal record. These facts are known to the sentencing judge at the time the original sentence is imposed, and would be incorporated into a system of sentencing guidelines. We see no reason for permitting the Parole Board to resentence offenders on substantially the same criteria employed by the sentencing judge. Such a procedure is not only duplicative; it also violates our belief that sentencing is a judicial function, which should be performed in a public forum — the courtroom — and open to public scrutiny. Only an appellate court, and not the Parole Board, should have the power to overrule the sentencing judge and modify his sentencing decision.

The Division of Parole would continue to play a role, however, in supervising an offender following his release from prison. Since evidence suggests that post-release supervision may lower recidivism, we recommend that upon release, offenders serving sentences of more than two years should undergo a two-year period of community

supervision (offenders serving terms of less than two years would undergo a one-year period of supervision) with the possibility of returning to prison for a period not to exceed six months for violation of substantive and meaningful conditions of supervision. Community supervision should aim to reintegrate the offender into society by providing meaningful employment and counselling services, and the Division of Parole should be given sufficient resources to provide this vital assistance to offenders.

#### *How Good-Time Could Reduce a Sentence*

In order to help maintain prison discipline, each inmate would be entitled to earn a reduction of up to 20% of his sentence as good-time for conforming his conduct to prison rules. If a serious disciplinary violation is committed, an inmate may be deprived of up to 90 days' good-time which he has earned prior to the infraction.

#### *How Rehabilitation Would be Encouraged*

Rehabilitation of an offender would no longer be justification for imposing a sentence of incarceration under a sentencing guidelines system (although for offenses which do not cause grave harm to society, rehabilitation would be a consideration in imposing a non-incarcerative, rather than an incarcerative, sentence). Nevertheless, we strongly believe that rehabilitation should be a paramount goal of the *correctional system*.

We believe that breaking the link between an inmate's purported progress towards rehabilitation and the time he must serve in prison will actually enhance, rather than reduce, the possibility of rehabilitation in our prisons. Rehabilitation simply cannot be coerced, as we have attempted to do in the past by making parole release dependent on an inmate's program participation. Efforts should center on making meaningful programs available to those inmates who truly wish to take advantage of them because they wish to change their lives, rather than merely convince the Parole Board to grant them an earlier release date.

Our report details specific recommendations for improving the rehabilitative potential of our prisons — including a reexamination of existing classification and transfer policies in the light of rehabilitative needs of inmates; expanding psychiatric and drug and alcohol-abuse services; providing greater coordination between educational, vocational, and industrial programs; and achieving phased rein-

tegration of the inmate into society by allowing the inmate to function in progressively less restrictive settings, as he demonstrates his ability to do so.

## V

### *Additional Recommendations*

As we have stressed repeatedly in this report, changes in our sentencing laws will not solve the crime problem. One major constraint is that our criminal justice system lacks the resources to deal effectively with crime. Our sentencing laws, insofar as they are able, must provide for the most rational possible use of those severely limited resources.

#### *Alternatives to Incarceration*

Imprisonment is an extraordinarily expensive strategy for crime control — according to recent estimates, the cost of incarcerating an inmate in state prison for one year is over \$15,000. Nor is it notably effective: offenders on probation are no more likely to commit new crimes than similar offenders who have been incarcerated. To the extent that imprisonment of an offender is not required to do justice or protect the public, it is vital that alternative — and less costly — dispositions be available and utilized.

Today, sentencing is basically an all-or-nothing proposition: the sole alternative to incarceration is usually probation. Given the meager quality and quantity of probation supervision, we find that probation is often a meaningless disposition — a fact which may discourage judges from imposing probation in otherwise appropriate circumstances, and which robs it of much of its rehabilitative potential. It is therefore urgent that the State Division of Probation and local Probation Departments make an immediate effort to up-grade the quality of probation supervision, and that they be given the resources necessary to accomplish the task. We further find that the sole business of the probation department should be the supervision of probationers, and that presentence investigations should be removed from the department and performed by an arm of the court.

Furthermore, we conclude that a variety of *intermediate dispositions* — including restitution, day fines, and community service orders — should be developed and incorporated into a sentencing guidelines system. A single state agency should be responsible for en-

couraging and funding local programs. We reiterate our belief that such intermediate dispositions could play a valuable role by providing for meaningful sanctions, short of incarceration, to be imposed on less serious offenders. Such sanctions would serve a two-fold purpose: they would demonstrate to the offender that violation of the laws entails a penalty, and they would satisfy the community that offenders pay, in some coin, for their crimes.

### *Plea-Bargaining*

It is a commonplace that prosecutor's offices are over-burdened, and must plea-bargain, rather than try, a substantial portion of their caseload. The prosecutor, through his plea-bargaining practices, thus has a major impact on sentencing — although our investigation has revealed that judges themselves usually play an important role in the plea-bargaining process.

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. In addition, the Sentencing Commission should explore the possibility of developing plea-bargaining guidelines in tandem with a sentencing guidelines system.

We do not believe, however, that blanket restrictions on the right of a prosecutor to plea-bargain is a promising direction to pursue. Where such restrictions have been imposed, the result has been that fewer offenders were convicted than before — albeit for longer terms — thus undermining the certainty of punishment.

Studies have found that witness and evidence related problems are a major determinant of plea-bargaining decisions. We therefore conclude that the resources of prosecutors' offices could be most effectively used — and the possibility of inappropriate plea-bargains reduced — by further strengthening early case assessment and major offense bureaus, and taking other measures to insure that indictments contain realistic charges. Improved police investigation, by providing more detailed and accurate information to prosecutors, could enable prosecutors to identify and focus their efforts on repeat offenders early in their criminal careers. Finally, we believe that mediation and arbitration programs, on an entirely voluntary basis, should be available for cases which are susceptible to a solution outside the confines of the criminal courts.

\* \* \*

For the foregoing reasons, we conclude that New York's indeterminate sentencing system is neither just, effective, nor credible. As flawed in practice as it is in theory, we recommend that the indeterminate sentence should be abandoned, and replaced by a system of sentencing guidelines.

# **INTRODUCTION**

*Introduction: The Sentencing Debate*

Crime — and what to do about it — dominates public debate and private conversation in New York State today. Frustration mounts with a criminal justice system which seems both lackadaisical and ineffective. The presumed villains are many: indifferent prosecutors, capricious or soft-hearted judges, an obscure parole board. To a sizeable number of politicians and ordinary citizens, the solution, however, is clear: to stop crime, we must change the way in which we sentence criminals.

It is in this climate of opinion that sentencing reform — the subject of this report — has become a prominent issue on the public agenda. In particular, the indeterminate sentencing system has come under increasing attack, both in New York and throughout the nation, from many quarters and for many reasons. A central focus of our inquiry is thus to examine whether the indeterminate system should be retained in New York, or replaced by some more definite sentencing scheme.

We do not view this as an abstract question. Fundamental to any answer is an analysis of how present sentencing arrangements really work, and the relationship of sentencing to other aspects of the criminal justice system. Much of this report, in addition to examining the sentencing process itself, is therefore devoted to describing what happens before and after sentence is imposed.

Moreover, we have found it essential to address basic issues lying at the heart of sentencing — issues which are often ignored in the general furor over crime. What can we realistically expect *any* sentencing system to achieve? To what degree can criminal sanctions control crime by deterring, isolating, or rehabilitating offenders? What should be the goals of sentencing? What are the alternatives for sentencing reform?

Our investigation has led to two inescapable conclusions.

First, we have found that sentencing in New York is marked by widespread disparity, inconsistency and uncertainty, which diminish its ability to do justice *or* to control crime. An equally important flaw is that our present sentencing system places a veil of secrecy over sentencing, and conceals from public view precisely who is making sentencing decisions, what those decisions are, and why they are made. The result, we submit, is a system which is neither just, effective nor credible — and one urgently in need of fundamental reform.

In the following pages, we shall set forth a proposal to replace New York's present mode of sentencing with a determinate sentencing system based upon sentencing guidelines, designed to structure — but

not eliminate — judicial discretion. We are convinced that this reform, if enacted, will dramatically enhance the justice, effectiveness, and candor of our sentencing laws.

Our second conclusion, however, is that it would be naive and plain untruthful to claim that this or any other sentencing reform, by itself, will eliminate crime as a social problem. We are concerned, in particular, to avoid the trap of boundless optimism which has snared so many other advocates of sentencing reform. Experience tells us that many of the sentencing proposals now in vogue — such as schemes designed to increase the severity of punishment, or provide for mandatory sentences — have been tried in the past, and have proven to be failures. With this in mind, it is appropriate to begin our report with a brief review of the history of sentencing in New York.

**PART I:**

**HOW THE  
SYSTEM WORKS**

*Chapter I*  
*An Historical Look at Sentencing in New York*

Over the past two hundred years, New Yorkers have embraced a variety of sentencing schemes, in the hope that each would provide the elusive answer to the problem of crime.<sup>1</sup> New York's present indeterminate sentencing system is the final product of this patchwork of failed experiments.

*Sentencing in the Colonial Era*

The criminal sanctions of colonial society bear little relationship to sentencing as we know it today.<sup>2</sup> Jails were used, not as places of imprisonment, but as places to house defendants awaiting trial. Instead of prison terms, colonial courts meted out a variety of other sanctions: fines and restitution orders, corporal punishments (such as flogging or branding), and the stocks or the pillory, which were designed to humiliate the offender in the eyes of his neighbors.<sup>3</sup> Banishment was also commonplace; in New York City, the Mayor's Court prescribed 30 to 40 lashes and an order of departure for virtually every vagrant found guilty of theft.<sup>4</sup>

In contrast to these punishments was the gallows. The death penalty was the linchpin of the penal law, and was intended to be the primary — and indiscriminate — deterrent against crime. Thus, death was the prescribed punishment for more than 200 offenses in colonial New York, and was frequently imposed on recidivists. Even for a petty offense like pick-pocketing, the law required the gallows.<sup>5</sup>

Such a system of sanctions, marked as it was by extremes of severity and leniency, with little in-between, proved to be unworkable. A variety of devices were therefore utilized to mitigate the harshness of the laws. One was "benefit of clergy," which permitted the release of a first offender convicted of some capital offenses if he could recite one verse from the Bible.<sup>6</sup> More important, however, was nullification; colonial juries apparently acquitted large numbers of defendants, or found them guilty of less serious offenses, in order to avoid being required to pronounce the death penalty.\*<sup>7</sup>

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\* Other factors also undermined the effectiveness of these draconian sentencing laws. Since colonial towns generally maintained inadequate police forces, there was little likelihood that an offender would be arrested. The itinerant criminal was also protected by the lack of communication between settlements; knowledge of his past criminal conduct, which might lead to imposition of the death penalty, seldom reached the scene of his next crime.<sup>8</sup>

In sum, colonial sentencing practices were erratic in nature, vacillating wildly between harshness and leniency. The threat of the gallows, which was intended to discourage crime, in reality had the opposite effect: by decreasing the risk that the offender would receive any punishment at all, it undermined the deterrent power of the criminal law.

*Revolutionary Reform: The Transition to Incarceration*

The failings of the colonial system were not lost upon New Yorkers in the aftermath of independence. They quickly moved to abolish the harsh statutory codes of colonial days.

The impetus for this reform was only in part humanitarian. More important, it sprang from the perception that the threat of harsh but erratic punishments was ineffective in deterring crime.\*

The most influential exponent of this view was Cesare Beccaria, an Enlightenment philosopher, who wrote:

“The certainty of punishment, even if it be moderate, will always make a stronger impression than the fear of another which is more terrible but combined with the hope of impunity.

“Do you want to prevent crimes? See to it that the laws are clear and simple and that the entire force of a nation is united in their defense.”<sup>10</sup>

The prison sentence was to be the means of delivering society from crime. Imprisonment, according to Beccaria, would provide a more effective deterrent than the gallows or brutal corporal punishments, since judges and juries would not hesitate to impose a prison term on a convicted offender. Individuals would thus be discouraged from breaking the laws — for what reasonable man would choose to be a robber, once he realized that he would invariably be punished for his crime?

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\* Popular pressure for the abolition of the death penalty in England during this period also reflected dissatisfaction with its efficacy as a crime control device. Merchants and businessmen were foremost among the reformers who put large numbers of petitions before Parliament for change in the law. One such petition, for example, was signed by 735 bankers and directors of joint stock companies; it prayed that “the House of Commons will not withhold from them that protection of their property which they would derive from a more lenient law.”

The New York legislature was convinced. In 1796, it enacted a new penal code which abolished all corporal punishments and restricted the use of capital punishment solely to cases of murder and treason. Terms of imprisonment were prescribed as the penalty for most offenses.

The statutory terms were generally very long — primarily because the historical alternative had been the gallows. Under the revised statutes of 1801, murder, rape, robbery and burglary were all punishable by life imprisonment; any other felony greater than petty larceny was punishable by a term of up to fourteen years; and petty larceny, assault, attempted murder and attempted rape were punishable by imprisonment for up to three years. Within these limits, the judge imposed a sentence designed purely to punish the offender and provide an example to others; for a crime like attempted robbery, for example, the judge, “after a consideration of all the circumstances of the case,” might sentence the offender to any prison term up to 14 years, to be served either “in solitary confinement, at hard labor, or both.”<sup>11</sup>

Along with this new mode of sentencing, the prison was born. At first, the prison was seen merely as an instrument of deterrence — a place to keep convicted offenders, as a living reminder of the fate which awaited others who were foolish enough to commit crimes. In time, however, the prison came to develop its own justifications, which would point the way for new avenues of sentencing reform.

### *The Dilemma of the Prison*

By the mid-nineteenth century — if not earlier — it was apparent that sentencing reform had not succeeded in eliminating or even controlling crime. No aspect of the new sentencing system was deemed a greater failure than the prison itself.

We have already stated that the prison was originally invented to deter crime, not to provide moral uplift. Early in its history, however, the idea gained currency that the prison could work to prevent crime in still another way: it could isolate the offender from temptation and vice, and provide an environment which would lead the offender to repent his life of crime.<sup>12</sup> Through a regimen of hard labor, strict silence and religious education, the “penitentiary” — as it was first developed by the Quakers in Philadelphia’s Walnut Street Jail in 1790, and later adapted in Auburn, New York — attempted to remold the prisoner into a law-abiding citizen.\*

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\* The history of prisons will be more fully discussed in Chapter IV of this report.

These attempts failed. Rather than reducing the propensity to crime, prisons appeared actually to *foster* it — and at enormous expense to the taxpayers, who were forced to feed, house and clothe an ever-expanding prison population.<sup>13</sup> Overcrowding was constant and necessitated periodic mass pardons in order to relieve congestion.<sup>14</sup> Moreover, since inmates found little incentive — besides physical coercion — to conform their conduct to prison rules, maintaining discipline in unruly prisons became an increasingly difficult task for prison managers.<sup>15</sup>

The answer to the dilemma of the prison, according to a study conducted by the New York Prison Association in 1868, was simple: to make prisons work, the sentencing laws must be changed.

The Association stated that “the whole question of prison sentences is in our judgment one which requires substantial revision.”<sup>16</sup> In particular, sentences of definite duration, imposed by the sentencing judge, were strongly opposed; the Association concluded that “time sentences are wrong in principle, that they should be abandoned, and that reformation sentences should be substituted in their place.”<sup>17</sup>

In essence, the Association believed that in order to provide a stronger incentive for rehabilitation, “the duration of sentences [should] be measured by labor and good conduct, with a minimum of time but no maximum.”<sup>18</sup> This idea had originally been developed by British and Irish prison administrators, who were concerned about prison discipline; the system they developed involved rewarding good behavior through conditional release — or “parole” — prior to the expiration of the term set by the judge.<sup>19</sup> It also drew support from a second source; certain European reformers, who, believing that criminality was often hereditary, saw the “indeterminate” sentence as a useful device for achieving the nearly perpetual confinement of the habitual criminal.

### *The Rise of the Indeterminate Sentence*

The notion of an indeterminate sentence quickly became the focus of sentencing reform.<sup>20</sup> In 1870, the first National Prison Congress formulated a Declaration of Principles which wholeheartedly adopted the principles of indeterminacy. “Peremptory sentences,” the Congress declared, “ought to be replaced by those of indeterminate length. Sentences limited only by reformation should be substituted for those measured by mere lapse of time.”<sup>21</sup>

New York was quick to embrace indeterminacy when it opened the Elmira Reformatory for young offenders in 1876. While inmates at

Elmira were required to be sentenced to the maximum statutory term, they could be released by the managers of the reformatory at any time *before* they had completed their full prison terms, if it was believed that they had been rehabilitated.<sup>22</sup>

By the dawn of the twentieth century, the indeterminate sentence began to play an increasingly important role in New York's sentencing laws; by 1902, imposition of an indeterminate sentence was mandated for all first felony offenders, except those convicted of murder.<sup>23</sup> Any prisoner who had served his minimum sentence was eligible for conditional release by the newly-constituted Board of Parole. By 1931, 44.3% of the state's prison population was committed under an indeterminate sentence.<sup>24</sup>

The ascendancy of the indeterminate sentence — and claims for its ability to provide the definitive solution to crime — was given nearly irresistible impetus by the rise of the new social sciences, such as psychiatry and social work. Enlightened opinion now held crime to be a disease of the moral faculty, equivalent to a form of physical or mental illness, and equally susceptible to scientific treatment. The indeterminate sentence was seen as an analogy to a hospital cure:

“[The indeterminate sentence] is exactly such a commitment as the court makes to an asylum of a man who is proved to be insane, and it is paralleled by the practice of sending a sick man to the hospital until he is cured.”<sup>25</sup>

Inspired by this outlook, advocates of indeterminacy contended that parole authorities, rather than judges, should determine the duration of an individual offender's confinement. The Wickersham Commission summed up the argument:

“Physicians, upon discovering disease, can not name the day upon which the patient will be healed. No more can judges intelligently set the date of release from prison at the time of trial. Boards of parole [on the other hand] can study the prisoner during his confinement... Within their discretion they can grant a comparatively early release to youths, to first offenders, to particularly worthy cases who give high promise of leading a new life... and keep vicious criminals in confinement as long as the law allows.”<sup>26</sup>

Thus, supporters of indeterminacy made the same promises to solve the problem of crime as had an earlier generation of sentencing reformers — but they had an additional advantage: they could claim that science was on their side. As Elmira's first superintendent, Zebulon Brockway, put it, the indeterminate sentence would effect "a change from the reign of sentiment swerved by the feelings to a passionless scientific procedure."<sup>27</sup>

### *The Baumes Laws*

In the face of an apparent crime wave in the mid-1920's, however, sentencing reform abruptly — if briefly — took a step in quite a different direction.

Responding to public fears over rising crime rates, in 1926 the Legislature appointed the Baumes Commission to study crime and sentencing in New York. In its report, the Commission broke with the prevailing school of thought, and asserted that severe mandatory penalties, not rehabilitation, was the strategy required to reduce crime:

“[I]t was apparent that all criminals are not reformable and that even among those who are, all are not equally responsive to reformative treatment... Which are, and which are not reformable is a problem which has not been and seemingly cannot be determined with scientific accuracy. Criminology, psychiatry, psychology, and sociology have not yet become exact sciences...Adoption of the theory that all criminals are sick would not remedy the [crime] situation.”<sup>28</sup>

Accordingly, the Commission drafted a series of measures aimed at deterring crime by drastically increasing the severity of punishment. Pursuant to the Commission's recommendation, the legislature imposed a mandatory minimum term of fifteen years for Robbery 1<sup>o</sup> and Burglary 1<sup>o</sup>, and prescribed an additional sentence of at least five years for use of a deadly weapon during commission of a felony.<sup>29</sup> New habitual offender statutes, requiring lengthy mandatory minimum terms, and life imprisonment for fourth offenders, were also passed into law.<sup>30</sup> In essence, the Baumes Laws marked an unwitting return to the harsh, inflexible sanctions which had characterized

sentencing in colonial America.

Proponents of the Baumes Laws confidently predicted that these draconian measures would result in a drastic decrease in crime. As one group of supporters rhapsodized:

“The burglary insurance companies representing many millions of capital are heartily in favor of the new laws and very earnestly urge that they be kept strong and stern. The criminals will be driven out of our community and the jurisdiction to which they flee will likewise enact similar measures of punishment and the result will inevitably be a general reduction of crime and losses throughout the whole country.”<sup>31</sup>

The Baumes Commission was quick to proclaim the success of its sentencing reform. The evidence they cited was a decrease in reported crime — and particularly a decrease in the number of prison commitments. For example, the Commission proudly pointed to the fact that the number of fourth offenders committed to Sing Sing had decreased by 46% in the first five months of the Baumes Laws.<sup>32</sup>

By 1932, however, a new state crime commission — the Lewisohn Commission — shed a different light on these statistics, and termed the Baumes Laws a dreadful failure. The result of the harsh penalties provided by the Baumes Laws, as the Lewisohn Commission found, was *not* to deter crime, but to drastically decrease the certainty of punishment: fewer offenders were being convicted, thus undermining the deterrent threat of criminal sanctions. As the Commission wrote:

“It is as if the courts themselves, realizing almost instinctively the essential injustice inherent in these mandatory sentences turned with relief to any methods, however clumsy, to avoid imposing such long inflexible terms of punishment. In doing so they unconsciously often rendered the whole system of prison sentences absurd and gave the prisoners and their families a sense of being able to frustrate or evade any of the laws of punishment and correction.”<sup>33</sup>

The Commission also found that the habitual offender provisions of the law had not resulted in the incapacitation of the most serious offenders, but simply in the same kind of hit-and-miss severity that had plagued the earlier colonial system. The harshness of these provisions had made many judges and juries eager to evade them,<sup>34</sup> and the few defendants who *were* convicted as habitual offenders had records that were often less serious and less lengthy than criminals who, through various stratagems, had been sentenced as first offenders.<sup>35</sup>

Having rejected the mandatory sentences embodied in the Baumes Laws as a hinderance to crime control, the Commission argued for a renewed commitment to the indeterminate sentence. It recommended that:

“[T]he distinction between the indeterminate and fixed or definite sentence should be abolished and all convicted felons with the exception of those sentenced for murder, first or second degrees, should receive indeterminate sentences.”<sup>36</sup>

The triumph of the indeterminate sentence in New York was virtually complete.

### *The Attack on the Indeterminate System*

From the time of the Lewisohn Commission to the late 1960's, the indeterminate sentence evoked little controversy. Much as the precise mix of Bible reading and hard labor necessary to achieve reformation had occupied the attention of reformers a century earlier, correctional personnel now debated the problems of diagnosis and formulation of treatment plans. Criticism of the correctional and sentencing system did not question the assumptions of indeterminacy, but focused exclusively upon the need for more resources and better therapeutic techniques. With better vocational and educational programs, more counseling or psychotherapy, few doubted that the indeterminate sentencing system would work.

Today, that concensus has all but disappeared.

Dissatisfaction with the indeterminate system stems, in part, from public preoccupation with crime — and from the realization that indeterminacy has not fulfilled its promise to solve the crime problem. This sentiment has resulted in legislative whittling-away of the in-

determinate sentence, including the 1973 revision of New York's drug laws and the Violent Felony Offender provisions of 1978, which have reintroduced mandatory minimum sentences for many crimes. Other proposals would go still farther, and entirely discard indeterminacy in favor of a variety of determinate sentencing schemes — some of which are virtual carbon copies of earlier failed experiments, such as the ill-fated Baumes Laws.

More instructive, however, are criticisms of the basic rationale of the indeterminate sentence which have been voiced by groups as diverse as prisoners, civil libertarians, and law enforcement officials.<sup>37</sup> At the core of their case against indeterminacy is the argument that the length of an offender's prison term should not be affected by his purported progress towards rehabilitation. Equally important is the contention that under our present system, judges exercise vast and unstructured discretion in imposing sentence — with the inevitable result that similar offenders committing similar crimes often receive widely dissimilar sentences, depending upon the personal predilections of the sentencing judge. In addition to being a source of inequity, such disparities are also seen to undermine the deterrent effect of criminal sanctions. Thus, critics argue that our present system is both unjust and ineffective.<sup>38</sup>

We will discuss these and other criticisms of our present indeterminate system later in this report. First, an examination of the criminal justice process — from the time that a crime is committed through the imposition of a punishment — is necessary before the need for or likely impact of any scheme for sentencing reform can properly be assessed. We thus begin our inquiry at the beginning — with what happens *before* sentencing.

*Chapter II*  
*What Happens Before Sentencing and Why*

Public discussion of sentencing often overlooks one basic fact: sentence cannot be imposed unless an offender is first arrested, indicted, and convicted. With each step in the presentencing process, his chances of reaching the sentencing stage are substantially diminished — in 1977, for example, New Yorkers reported 1,083,483 major offenses to the police, but fewer than 150,000 of these complaints (about 16.5%) resulted in an arrest, and only 20,197 arrests led to a felony conviction.<sup>1</sup> What happens before sentencing thus sets limits on what any system of sanctions can possibly achieve.

The statistical profile which accompanies this report portrays, in some detail, the filtration process which results in such a large number of reported crimes leading to so relatively few convictions.\* We will not repeat that discussion here; our purpose instead is to go behind the numbers and examine the constraints which influence the conduct of police and prosecutors, and make this attrition in felony cases almost inevitable.

1. *The Role of the Police*

“Catching criminals” is often seen as the exclusive province of the police. In fact, nothing could be further from the truth. For without the substantial help of the public — help which is often, for one reason or another, not forthcoming — the police are virtually powerless to solve crimes or apprehend offenders.

A. *Reporting the crime*

In the vast majority of cases, the police will not even know that a crime has been committed — much less arrest a suspect — unless the crime has been reported to them by a member of the public, usually the victim. Thus, the victim himself acts “as the gatekeeper of the criminal justice system.”<sup>2</sup>

Surveys reveal that victims fail to report about half of all crimes.<sup>3</sup> For example, it is estimated that more than 146,800 actual robberies were committed in New York City in 1974, but only 77,940 official complaints were made.<sup>4</sup> There are several reasons why a victim may choose to report a crime, or to keep his misfortune to himself.

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\* The statistical profile is annexed to this report as Appendix A. Contemporary crime statistics cited in this section of the report are drawn from the statistical profile.

\*\* This means that official crime statistics drastically understate the actual crime rate.

First, the seriousness of the crime appears to influence his decision. As victimization surveys indicate, more serious offenses are generally more likely to be reported to the police than less serious ones. Thus, violent crime — which constitutes only about 20% of actual crime in New York — is generally reported far more frequently than property offenses, though the latter actually occur far more often.\* Robbery with serious injury is more frequently reported than robbery with minor injury; larceny of more than \$50 is reported four times as often as larceny of less than \$50.\*\*

Another important factor is the relationship between the victim and offender. More than half of the non-reporting assault victims, for example, indicated as the reason for their decision that they “did not want to harm the offender, regarded the matter as a private matter, or were afraid of reprisal.”

Reporting also varies depending on the victim’s perception of the response his or her complaint will receive from the police. “Nothing could be done” was the reply most frequently made by non-reporting victims of property crimes when asked why they did not contact the police.<sup>10</sup> Their perception is not inaccurate: police clearance rates for property crimes *are* extremely low,<sup>11</sup> for reasons which we shall discuss later in this chapter.

Other victims may not report because they believe that their complaint will not be treated with sensitivity or will be taken lightly.<sup>12</sup> Rape victims sometimes fall into this group, as do disgruntled individuals who have experienced insensitive treatment or no results following earlier incidents, and those who themselves have criminal records.<sup>13</sup> It is logical to conclude that public cynicism about current sentencing practices may also discourage reporting of crime.<sup>14</sup>

In sum, about half of all crimes which occur will never result in arrest simply because the public, for whatever reason, chooses not to report them. As we shall now see, even for those crimes which *are* reported, the public continues to play a crucial — indeed, a decisive — role in determining whether the police will succeed in making an arrest.

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\* The exceptions to this rule are motor vehicle theft and commercial offenses where reporting the crime to the police may be a prerequisite for obtaining reimbursement from insurance. *Why* more serious crimes are most often reported is open to conjecture; the explanation may simply be the victim’s feeling that something should be done about so grave an offense.<sup>6</sup>

\*\* No one group of victims can be singled out as the source of non-reporting. Although victims come from all segments of society, the decision to report is largely unrelated to race, sex or economic status; it does bear some relationship to age, however, since younger victims report crimes less frequently than older ones.<sup>8</sup>

### B. *Apprehending the suspect*

The police are not, individually or collectively, a modern-day equivalent of Sherlock Holmes, creating clues out of thin air by sheer powers of deduction. In order to solve a crime, the police must either be on the scene when it occurs, or must be supplied with evidence leading to a particular suspect.

In fact, it is a rather rare event for a policeman to come across a crime in progress. The 1967 Crime Commission's Science and Technology Task Force estimated that a Los Angeles patrolman could expect to come upon a burglary once every three months and a robbery once every 14 years.<sup>15</sup> In another survey, only 3% of criminal incidents known to the police came to their attention as the result of an officer being "on the scene."<sup>16</sup> As a result, the police are largely dependent upon the public for clues which will lead to an arrest. As Charles Silberman recently wrote:

"More than anything else, what determines whether or not the police will catch the person responsible for any given crime is whether the victim, a witness, or some other informant can provide the information needed to identify and catch the offender."<sup>17</sup>

Consider the following statistics. As we earlier stated, in 1977 New York police departments received 1,083,483 complaints relating to major offenses, but "cleared" only 16.5% of those crimes through an arrest:<sup>18</sup>

	<u>Number of Crimes</u>	<u>Clearance Rate</u>
Total	1,083,483	16.5%
Murder	1,913	63.0%
Rape	5,260	41.9%
Robbery	83,772	17.5%
Aggravated Assault	57,030	53.6%
Burglary	308,941	13.9%
Larceny/Theft	493,237	15.5%
Motor Vehicle Theft	133,159	8.0%*

\* Some caveats about these statistics are in order. As we have seen, they understate the total number of crimes which actually occurred, since many crimes go unreported; at the same time, the percentage of violent crimes appears to be higher than it actually is because violent crimes are, in general, more frequently reported than crimes against property.

The police are most successful in solving serious violent offenses; with the exception of robbery, violent crimes are cleared about three times as frequently as property offenses. One reason is that victims of violent crimes often *see* their assailants, and can supply the police with information about the offender. Often, in fact, the victim and the assailant may know each other: two out of three homicides are committed by murderers who know their victims<sup>19</sup> (thus enabling the victim's friends and relatives to supply information leading to an arrest), and assaults are not uncommonly committed by prior acquaintances.<sup>20</sup> Victims of property crimes, however, often have no contact with the offender and thus cannot assist the police — nor are there ordinarily witnesses to such crimes, which are usually committed by stealth and out of public view.<sup>21</sup>

The important role played by the victim in apprehending a suspect is demonstrated in a Rand Corporation study of robbery arrests in New York City.<sup>22</sup> An arrest was made near the scene of the crime in only one case out of ten. Of the remainder, the police made arrests in 46% of the cases in which the victim could *name* the suspect, but in only 2% where the victim could only *describe* the offender.\*

Many times, however, victims have just a fleeting impression, if any, of the offender; others may fail to report the crime promptly, leaving a cold trail when the police arrive.<sup>24</sup> The result — especially in large urban areas — is that the police often have little to aid them in attempting to solve most crimes.

It must also be understood that criminal investigation is by no means the only — or even the most pressing — demand on a policeman's time. Maintaining public order — not detective work — is the focus of most police efforts. The typical patrol officer spends the better part of his day responding to an infinite variety of emergencies.<sup>25</sup> Citizens call the police whenever the incident involves "something that ought not to be happening now and about which somebody had better *do* something now."<sup>26</sup> Policemen get cats out of trees, intervene in family quarrels, direct traffic, talk potential suicides out of jumping, control crowds, and intervene in a wide range of situations which threaten public order.

In responding to such emergencies, the policeman exercises vast discretion in determining whether or not to invoke the criminal

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\* Victims can help in still another way. As a study of robbery arrests in Oakland reveals, victims often pursue and capture the offender, or lead the police to him; they may also supply the police with crucial identifying information, such as the license number of a getaway car.<sup>23</sup>

process by making an arrest. In the words of the National Advisory Commission on Criminal Justice Standards and Goals, the patrol officer performs "a quasi-judicial function" as "the first interpreter of the [criminal] law":

"He makes the first attempt to match the reality of human conflict with the law; he determines whether to take no action, to advise, to warn, or to arrest; he determines whether he must apply physical force, perhaps sufficient to cause death. It is he who must discern the fine distinction between a civil and a criminal conflict, between merely unorthodox behavior and a crime, between legitimate dissent and disturbance of the peace, between the truth and a lie."<sup>27</sup>

This initial decision must often be made quickly and without much guidance; with the benefit of hindsight, the decision to arrest (or to arrest this particular suspect) may later turn out to be wrong. Other arrests are made not to solve crimes at all, but merely to separate the combatants in the course of breaking up a barroom brawl or a heated family quarrel. How this discretion is exercised by the police officer, however, will determine which cases — and which *types* of cases — will reach the hands of the prosecutor.

## 2. *The Role of the Prosecutor*

The prosecutor, like the policeman, is often constrained in the performance of his duties by circumstances largely beyond his control. The full measure of the constraint is this: in 1977, 139,625 felony arrests led to only 31,360 indictments, resulting in just 20,197 felony convictions.\*<sup>28</sup> What accounts for so few indictments and convictions, compared with such a large number of arrests?

The answer, we believe, is that the nature of the cases *themselves* generally lead to this result. Just as the police are able to solve only a relatively small percentage of crimes because of evidence and witness-related problems, prosecutors obtain convictions for only a fraction of arrests — for precisely the same reasons.

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\* These statistics should be read in light of the cautions we express in Appendix A.

### A. *Plea-bargaining: then and now*

We know that such an explanation contradicts several popular *canards* — particularly that felony offenders often go unpunished because prosecutors are “giving away the courthouse” through permissive plea-bargaining practices. Such mythology simply flies in the face of fact.

First, it is just not true that plea-bargaining is a phenomenon of contemporary vintage, which entails the prosecutor supinely agreeing to charge reductions in order to stay abreast of an unmanageable caseload. Plea-bargaining has been with us for generations and has been the dominant means of disposing of criminal cases in this state for at least the past century.<sup>29</sup> As the New York State Crime Commission wrote in 1928:

“In 1839, the percentage of conviction on pleas of guilty was only 22.8 per cent; by 1926, it had run to 89.7 per cent. This rise was in the City of New York largely between 1839 and 1879. In the rural counties it was more steady and over a longer period. The upward tendency, however, is just as marked in the rural counties as in the city. This demonstrates conclusively that the substitution of conviction after pleas of guilty for jury trials has proceeded progressively for generations. It is due to causes that are more fundamental than the policies of individual district attorneys.”<sup>30</sup>

The statistics are strikingly similar today. Statewide, 91.5% of all convictions were obtained via guilty pleas; the lowest percentage was in New York City (89.4%), the highest was in upstate New York (93.3%).<sup>31</sup>

Moreover, plea-bargaining has long gone hand-in-hand with charge reduction. The 1933 New York State Commission to Investigate Prison Administration and Construction examined the files of a random sample of 242 first-time offenders indicted for Robbery 1<sup>o</sup>, and found that:

“...only 23, or nine percent were actually convicted and sent to prison for this crime, while 110 were sentenced for Robbery in the second

degree and 71 for Robbery in the third degree. The remaining 38 were finally convicted for such diverse, and far less serious crimes as Attempted Robbery, in the first, second or third degrees; Assault, second degree; Grand Larceny, second degree; and for Criminally Receiving Stolen Property."<sup>32</sup>

Today, over a third (35.4%) of felony convictions are to the top count of the indictment (or to an offense in the same felony class); nearly an equal number (32.8%) are for an offense one felony class lower than the top count; and 31.8% represent convictions two or more felony classes lower than the top count (including 18.7% which end in misdemeanor convictions, three-quarters of which were indictments for class D or E felonies). Thus, *over two-thirds* of those indicted for felonies were convicted of the most serious indictment charge, or one charge below; over 80% were convicted of felonies, and those who received only misdemeanor convictions were originally charged with the least serious felonies.<sup>33</sup> This does not seem to us to be either a dramatic break with historical practice, or constitute plea-bargaining run riot.

Nor is the attrition in felony cases a recent development. A survey conducted by the Crime Commission in 1926 disclosed that over 52% of all felony cases brought to arraignment were dismissed at the preliminary examination; about 10% were dismissed by the grand jury; nearly an equal number were dismissed by the court without trial; and of those few cases actually tried, 50% resulted in acquittals. Fewer than one out of ten defendants arraigned for a felony received a prison sentence.<sup>34</sup>

Thus, we do not view plea-bargaining and case attrition as recent contrivances forced upon overburdened prosecutors struggling to remain afloat in a sea of cases. The persistence of plea-bargaining practices over the past century, and the fact that rural areas with low crime rates and light caseloads plea-bargain a higher percentage of their cases than do highly congested courts in metropolitan areas,<sup>35</sup> strongly suggest another explanation.\*

### B. *Why cases filter out*

As we earlier intimated, the true reason why so many arrests never

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\* In addition, a far higher percentage of felony indictments in New York City courts result in prison terms than in less congested courts in upstate counties.<sup>36</sup>

reach the indictment stage lies elsewhere; "with few exceptions, the success of an arrest in court depends crucially on the strength of the evidence that the arresting officer manages to bring to the prosecution."<sup>37</sup>

### 1) *Police investigation:*

The quality of police investigation is a prime determinant of whether an arrest will result in a felony conviction.

This point was graphically illustrated in a study conducted by the Rand Corporation, which compared two California jurisdictions. In Jurisdiction A, investigative reports provided by the police to the prosecutor's office were typewritten and painstaking in detail. They contained statements given by the victim and other witnesses and an account by the arresting officer of the results of any searches, questioning, or follow-up investigations he conducted. The reports from Jurisdiction B were generally handwritten, difficult to read or understand and contained only the major facts of the case.<sup>38</sup>

Convictions and charge reduction rates varied markedly between the two jurisdictions. In Jurisdiction A *no* cases were dismissed and 61% of the defendants pled guilty to the top charge; in Jurisdiction B, 23% of the arrests were dismissed and only 32% pled guilty to the original charge.<sup>39</sup>

The ability of the police to recover tangible evidence also has dramatic impact on whether a felony conviction will be obtained. A study of police operations in Washington, D.C., revealed that the recovery of physical evidence by the police increased the number of convictions by 60% for robberies, 25% for other violent crimes and 36% for nonviolent property offenses.<sup>41</sup>

Of course, many arrests drop out in the complaint room or at arraignment for reasons unrelated to evidence -- as we have already described, they were never *meant* to lead to a conviction, but were merely intended to defuse a potentially explosive situation. In other cases, a policeman's snap judgement about a situation may be proven

\* Additionally, in Jurisdiction A the police saw themselves engaged in a cooperative venture with the prosecutor aimed at obtaining *convictions*; police officers in Jurisdiction B seemed solely concerned with making *arrests*. Which of these two orientations police officers adopt will have a decisive impact on the conviction rate. It was recently reported that in the District of Columbia "8 percent of the police were bringing in 50 percent of the convictable arrests. No matter where those particular police in the 8 percent were assigned in the city, they consistently found physical evidence to support their arrests and brought forth two or more cooperative witnesses." Thirty percent of the police, however, brought in no convictable arrests.<sup>40</sup>

wrong: it may later turn out that a crime was not really committed, or if it was, the defendant was not the perpetrator.

## 2) *Witnesses:*

In addition, the attitude of the victim — as always, the key witness — may have changed. For example:

“An auxiliary police officer watched a woman approach a man as he emerged from a liquor store. The officer thought he saw a knife flash in her hand, and the man seemed to hand her some money. She fled, and the officer went to the aid of the victim, taking him to the hospital for treatment. The officer saw the woman on the street a few days later and arrested her for first degree robbery on the victim’s sworn complaint.”<sup>42</sup>

What the officer did not know was that the defendant was the victim’s girlfriend and had slashed at him with a penknife in an argument over money. In the intervening period, the victim and defendant had reconciled, and the victim demanded that the case be dropped.

This is not a rare occurrence. As we have demonstrated, cases in which the offender is known to the victim comprise a disproportionate number of total arrests. Although only 2 to 6% of the robberies in New York City involve a prior relationship between the victim and assailant, a recent study found that 36% of robbery *arrests* involved such a relationship. “Acquaintance cases” also accounted for 39% of burglary and 32% of grand larceny arrests.<sup>43</sup> This pattern is not unique to New York City. In Washington, D.C., an analysis of arrests over a six year period revealed that only 7% of robberies, but 35% of robbery arrests, involved a victim and assailant who were acquainted;<sup>44</sup> the same phenomenon has been noted elsewhere.<sup>45</sup> Studies further indicate that in a disproportionate number of these cases, the complaining witness demands that the case be dropped, or refuses to cooperate with or testify for the prosecution.<sup>46</sup> Thus, many of these cases simply are dismissed for reasons largely beyond the prosecutor’s control.\*

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\* Victims and witnesses also may not cooperate because of the way they are treated by the criminal justice system. Some communities have established Victim Witness Assistance Programs which notify witnesses of court dates, and assist them with transportation and other supportive services in order to foster better cooperation.<sup>47</sup>

Even the witness who is available and cooperative may pose problems. The testimony of a witness with a criminal record, or one who was intoxicated at the time of the crime, may be given little credence by a judge or jury.<sup>48</sup> And some witnesses are simply more convincing than others; the reasons underlying one plea-bargain (in a New York City robbery) were explained by the prosecutor in these terms:

“The victim was a ‘terrible witness’ who made speeches in a thick foreign accent about how the defendant and others of his race (black) should get the electric chair. She cannot be interrupted or made to answer questions.”<sup>49</sup>

Victims previously acquainted with their assailants often have special credibility problems. “When the defendant and complainant know each other, the robbery becomes diminished in the jury’s eyes,” said one prosecutor. “It’s a dispute and the motive looks like debt collection.”<sup>50</sup> Such cases also frequently present complicated histories of alleged wrongs on both sides which, beyond issues of credibility, make traditional criminal adjudication difficult and often lead to dismissal or charge reduction:\*

“An example — a tenant charged her building superintendent, who lives on her floor, with assault... During the court hearing, the superintendent claimed that she threw the first punch. Furthermore, he was furious because her son had worked for him last summer and was fired for stealing building supplies. The tenant denies these allegations and the parties hurl abuse at each other. The judge, with no time to delve into this complicated relationship and therefore fashion a livable agreement, dismissed the charge with a warning that the parties stay away from each other.”<sup>52</sup>

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\* Some communities have begun to respond to the unique and difficult issues presented by acquaintance cases. In Manhattan, Brooklyn and Rochester, programs are underway which offer mediation, conciliation and arbitration services to the disputants as an alternative to criminal adjudication. In appropriate circumstances these programs have a good record for helping people help themselves to finding workable and durable solutions to the underlying dispute.<sup>51</sup>

Plea bargaining is an attempt to respond to all these problems.<sup>53</sup> Failure to recover physical evidence linking the defendant to the crime, lack of cooperation by the victim or potential difficulties with his testimony, an underlying dispute which may tend to mitigate the seriousness of the crime — all these are factors which determine whether and how much the prosecutor may be willing to reduce a charge.<sup>54</sup> The plea negotiation is thus analogous to settlement of a civil lawsuit short of trial. Its object is to maximize the certainty of obtaining an acceptable disposition by approximating, in terms of the norms of the courthouse, the level of punishment that the case appears to be "worth."<sup>55</sup> In essence, the prosecutor, defense attorney and judge\* act as a surrogate jury; by assessing the evidence in relation to the seriousness of the offense<sup>57</sup> and the defendant's prior record,<sup>58</sup> they arrive at a charge and sentence agreement which they deem to be appropriate in light of what they could reasonably expect to happen if the case proceeded to trial.\*\*

### C. *Restrictions on Plea-Bargaining*

Given our view that attrition and plea-bargaining are made inevitable by evidence and witness-related problems inhering in the nature of the cases themselves, we find little merit in attempts to abolish or severely restrict plea-bargaining. In fact, we believe that such efforts are misguided and doomed to failure.

The most widely known attempt to limit plea-bargaining was embodied in the 1973 revision of New York's drug laws. A study conducted by the Association of the Bar of the City of New York indicates that following this reform, the number of convictions "fell by almost half between 1972 and 1975" (from 6,033 convictions in 1972 to 3,147 convictions in 1975). This represents a decline in the number of felony arrests, a decline in the number of indictments, and a decline in the conviction rate (from 86% in 1972 to 79% in 1976).<sup>60</sup> These plea bargaining restrictions were deemed to be so counter-productive that

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\* In New York, the plea-bargain is not solely, or even primarily, an agreement struck between prosecutor and defense counsel. Judges, prosecutors and defense attorneys interviewed throughout the state indicate that judges "almost always" or "usually" participate in plea discussions. Observers have also concluded that in some New York courts, judges play the *dominant* role in the plea-bargaining process.<sup>56</sup>

\*\* Charge reduction is not a product of plea-bargaining alone. Cross-city comparisons of charge reduction by plea and trial reveal that charge reduction is often at least as prevalent following a jury trial as following a plea negotiation.<sup>59</sup>

they were substantially modified to give prosecutors greater plea-bargaining discretion just three years after their enactment.<sup>61</sup>

A similar no plea-bargain rule for drug cases, adopted in a large midwestern county, experienced an identical fate: 30% fewer cases were filed, 33% more were dismissed, and the conviction rate declined by nearly 20%.<sup>62</sup> In addition, bargaining continued to be widespread — its focus simply shifted from charge to sentence. In the words of one judge in that county, “When faced with an unpleasant policy, resourceful attorneys, assistant prosecutors and judges will generally find acceptable ways around it.”<sup>63</sup>

The experience of Alaska, which in 1977 adopted a “no plea-bargaining” policy for all felony cases, is another case in point. Preliminary reports from Alaska indicate that the effort has met with considerable resistance and has had the primary result of driving plea-bargaining underground.<sup>64</sup> The focus of plea-bargaining has apparently also changed, with defense counsel now negotiating directly with judges. As one defense counsel succinctly put it, “we made the prosecutor irrelevant.”<sup>65</sup>

New Orleans has also embraced a strong anti-plea-bargaining policy for all felonies. The policy is complemented by an equally intense screening process; only very “strong” cases are accepted for prosecution.<sup>66</sup> “As a result, the average length of sentence in New Orleans is high, compared to other major American cities — but the incarceration rate is relatively low. As one observer summed up the New Orleans experiment:

“Under the old regime the prosecutor gave a lot of people a little punishment. Under the new regime the prosecutor is giving a few people a lot of punishment.”<sup>67</sup>

Efforts to abolish plea-bargaining have failed for one simple reason. They deprive prosecutors of the ability to draw distinctions — which might not have been apparent at the time of indictment — between stronger and weaker cases, and to negotiate charge reductions accordingly. A prosecutor is therefore precluded from taking a plea to a lesser charge which the evidence *would* clearly support, and is forced to choose between pressing a higher charge of dubious validity or having the case dismissed outright. In a system so inflexible, unless only stronger cases are prosecuted, more dismissals and trials are the likely result.<sup>69</sup> Plea-bargaining is also reintroduced in new guises: it becomes implicit, rather than explicit; is carried on between defense

counsel and the judge, without the prosecutor; and often simply changes from charge-bargaining to sentence bargaining.<sup>70</sup>

In sum, we believe that plea-bargaining is an inevitable component of our criminal justice system. Attempts to impose blanket restrictions on plea-bargaining are therefore likely to prove unworkable and counter-productive.

This is not to imply that the results of the plea-bargaining process are perfect. Jailed defendants who might be acquitted at trial are sometimes faced with the necessity of choosing between pleading guilty and being sentenced to time already served, or pleading not guilty and staying behind bars — an unduly severe burden on the indigent, who may be unable to make bail.<sup>71</sup> Moreover, prosecutors may sometimes agree to more lenient dispositions than they might otherwise be inclined to accept, if their caseloads afforded them the opportunity for more thorough preparation. It is interesting to note, however, that many New York judges tell us that the main reason they reject prosecutorial sentence recommendations is not because they are too lenient, but because they are too severe.

#### D. *Improving Plea-Bargaining Practices*

In our view, the real problem with plea-bargaining stems less from its results than from the invisibility, and frequent inefficiency, of the process itself. The jury trial is a public event, at which twelve members of the community, after careful deliberation, weigh the evidence and determine the defendant's guilt or innocence of the charges against him. A plea-bargain, on the other hand, is the product of a closed and often hurried colloquy in which decisions are made without reference to articulated standards and without public participation. This *sub rosa* quality of plea-bargaining allows all concerned to avoid responsibility for their decisions — thus opening the door for inequalities and abuse of discretion.<sup>72</sup>

We think that the answer to the problem of unstructured prosecutorial discretion does not lie in driving plea negotiations underground, but in increasing the visibility and accountability of prosecutorial decision-making. Many prosecutors' offices in New York have already begun to take this approach. Two-thirds of the prosecutor's offices in the state which reported to us indicate they have some form of supervisory review of plea-bargaining decisions.<sup>73</sup> Similarly, more than half the prosecutors' offices indicate that they have official guidelines concerning plea-bargaining.<sup>74</sup> While most of the guidelines embody fairly simple across-the-board charge reduction

policies, they are clearly steps in the right direction, which should be energetically pursued.

Not only is the dispositional process often obscured from public view; it is also frequently inefficient. If weak cases lead to dismissals and charge reductions, better screening decisions by the police and prosecutor to weed out those cases earlier in the process would produce higher conviction rates, less charge reduction and substantial savings of time and manpower.

In Detroit, for example, the policy of the police department is *not* to process an arrest to the prosecutorial stage unless the department believes it has evidence sufficient to prove every element of the crime charged. As a result, at least 40% of those arrested for felonies are released, and the charges against many others are immediately reduced to misdemeanors.<sup>75</sup> A recent report compares this system with that of New York City:

“There is no evidence to indicate that the Detroit system is any more effective in dealing with the criminal offender than that employed in New York City. What is apparent is that the process by which the system rids itself of weak or unprosecutable cases is speedier and most probably more cost effective in Detroit than in New York. In Detroit the primary responsibility for the screening out of these cases rests with the police department and is accomplished within hours of the arrest. In New York, the responsibility is shared by the police, the prosecutors, the courts and the defense bar, and may take weeks or months to accomplish the same end.”<sup>76</sup>

Some prosecutors' offices have introduced “front-end loading” techniques — the placement of experienced trial attorneys at the charging stage — in order to reduce the number of weak and over-charged cases. These Early Case Assessment Bureaus (ECAB's) have been effective in increasing the conviction rates of felony cases which reach the Supreme Court level.<sup>77</sup> Diversion of cases from the criminal courts, \* in appropriate circumstances and with the consent of the par-

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\* Diversion typically occurs after the filing of formal charges and before a final adjudication of guilt. It results in dismissal of charges, or the equivalent, if the defendant successfully completes a diversion program.

ties, is another method to more effectively allocate prosecutorial resources.<sup>78</sup>

In the concluding section of this report, we will further discuss these and other mechanisms which can help bring increased uniformity, accountability and efficiency to the presentencing process.

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Having discussed the constraints which determine what occurs before sentence is imposed, we now turn to the central topic of this report: the sentencing of criminal offenders in New York.

*Chapter III*  
*The Sentencing Process and Its Results:*  
*How Judges and the Parole Board Sentence Offenders*

*Introduction*

New York's sentencing laws typically give the court wide latitude in imposing sentence, with little guidance regarding how to exercise that discretion. The result is sentencing disparity: as we shall demonstrate, similar offenders committing similar crimes often receive vastly dissimilar sentences.

In addition, under our present sentencing arrangements, the sentence imposed by the judge simply does not mean what it says. The sentencing judge only sets a broad range of time which an offender *could* serve; it is the Parole Board, an administrative agency, which determines the time that the offender actually *will* serve. In effect, the Parole Board repeats the initial sentencing process and resentsences an offender largely on the basis of the same information known to the judge — but its decision is reached behind closed doors and without important procedural safeguards required in a court of law.

We now proceed to a more detailed discussion of what the judiciary and the Parole Board do under New York's system of indeterminate sentencing, and how they do it.

1. *Judicial Sentencing*

A. *The Framework of Sentencing*

New York's statutory scheme of criminal sanctions is too complex to be briefly stated\* — and we will spare the reader the attempt. Suffice it to say that all crimes are classified by the legislature as either felonies or misdemeanors. Felonies are generally more serious crimes, ranging from murder to grand larceny, for which a prison term in excess of one year may be imposed.<sup>1</sup> Misdemeanors are less serious offenses, such as possession of a gambling device, which may not be punished by more than one year's confinement.\*\*<sup>2</sup>

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\* One difficulty is that in recent years, as legislative dissatisfaction with the indeterminate sentencing system has grown, our sentencing laws have become a patch-work of indeterminate sentences sometimes combined with legislatively prescribed mandatory minimum terms of varying length depending on the type of offense or offender. For a more detailed description of New York's sentencing structure, see the sentencing abstract annexed to this report as Appendix B.

\*\* Because the consequences of felony sentencing are apt to be more severe, and data relating to misdemeanors is scarce, the remainder of our discussion will focus on felony sentencing.<sup>3</sup>

Felonies are separated by the legislature into five classes of descending severity (A, B, C, D and E, the first four of which are further divided into "violent" and "non-violent" felonies); in addition, there are three sub-categories within the A Felony class (A-I, A-II, and A-III). For each felony class (or sub-class), the legislature provides for a broad sentencing range, which may include both incarcerative and non-incarcerative sanctions. The Penal Law also contains provisions for increased penalties for offenders who have been convicted of felonies on one or more previous occasions ("predicate" and "persistent" felony offenders).

### *The Range of Judicial Discretion*

Within the boundaries established by the legislature, the sentencing judge has wide discretion in determining what sentence to impose in a particular case.\*

#### 1. *The type of sanction:*

The first and most basic decision to be made is whether or not to incarcerate a defendant. Except for defendants convicted of all Class A and B Felonies, all Class C Violent Felonies, and some Class D Violent Felonies — where imprisonment is mandatory — a judge may choose to impose an unconditional discharge, suspended sentence, conditional discharge, fine, restitution or probation, none of which require incarceration.

In practice, felony sentencing is usually a choice between probation and incarceration. While 25.7% of all defendants convicted of a major felony\*\* were placed on probation in 1977,<sup>4</sup> very few convicted

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\* Our legal system separates the determination of guilt from sentencing, but this is often a legal fiction. Plea-bargaining, as we described earlier, can frequently also involve sentence bargaining. Defense attorneys may agree to have their client plead to a particular charge in exchange for an agreement by the prosecutor to make a specific sentence recommendation. Since, as our research indicates, judges actively participate in plea-bargaining negotiations as a matter of course, they both *shape* plea-bargains and *confirm* them by agreeing to impose a particular sentence in exchange for a guilty plea.

\*\* Data on the type of sentences imposed as the result of a felony conviction is published only for six major offense categories (murder, rape, robbery, assault, burglary and larceny). Thus, the statistics recited here and on the following page refer to felony convictions involving only these crime categories, which represent a substantial portion of all felony convictions. For a more complete discussion of the types and frequency of dispositions given to offenders, see Appendix A to this report.

felons were given conditional or unconditional discharges,<sup>9</sup> fines, or ordered to make restitution.\*

Once a judge has decided to incarcerate an offender, two options as to the type of sentence still remain open to him. He may sentence the offender to serve time in a local jail, provided that the sentence does not exceed one year. A jail sentence may sometimes be utilized as part of "shock probation" — a short period of incarceration, followed by a longer period of probation supervision. It is estimated that 19.5% of those convicted of major felonies received jail terms in 1977.<sup>7</sup>

## 2. *The length of sentence:*

Most sentences imposed for major felonies, however, require an offender to spend at least a year in state prison.\*\*<sup>8</sup> In such cases, the judge sets a *maximum* sentence somewhere within the broad range prescribed by statute. In some circumstances (involving defendants convicted of certain drug law violations or violent felonies, or second or persistent felony offenders) the Penal Law also requires the judge to set a *minimum* term, again within a prescribed statutory range. In addition, a judge may choose to set a minimum entirely on his own initiative.

The maximum sentence does *not* necessarily determine how long a prison term the offender will actually serve; as we shall explain later in this report, an offender may be released from prison prior to the expiration of his maximum term by "good-time" laws,<sup>9</sup> or by the Parole Board.<sup>10</sup> The maximum does, however, place an upper limit on the length of the term which the offender can be required to serve.

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\* Non-incarcerative options other than probation are not uniformly available on a statewide basis. Some urban communities have developed alternatives to incarceration, such as mediation/arbitration, halfway houses or diversion. There is no systematic collection of information about how frequently these programs are used, although most of the programs have demonstrated positive results.<sup>6</sup>

\*\* For a fuller discussion, see Appendix A to this report.

\*\*\* New York's "good-time" system provides that an inmate may be granted a reduction of up to one-third of his maximum sentence. When an inmate's good-time credits equal the time remaining to be served on his sentence, the inmate is "conditionally released" to supervision by the Division of Parole for either one year or the remainder of the sentence, whichever is longer. About one-quarter of all inmates benefit directly from good-time laws and are "conditionally released."<sup>9</sup>

\*\*\*\* An offender cannot be released on parole before the expiration of his *minimum* term. However, when not required by statute to set a minimum term, most judges refrain from doing so — leaving it to the Parole Board to determine when an inmate will first become eligible for parole release.<sup>10</sup>

It is difficult to overstate the broad scope of judicial discretion in determining the length of a maximum sentence. For a Class B Violent Felony — Rape 1<sup>o</sup>, for example — a maximum may be set at 6 years, or 25 years, or at any point in-between, as the court thinks best. For Manslaughter 2<sup>o</sup>, a Class C Non-Violent Felony, the maximum may range between 3 and 15 years, and no prison sentence at all need be imposed — leaving open the possibility of various non-incarcerative alternatives, such as probation. The Penal Law gives little assistance to the judge in determining where, along the broad compass of sentencing possibilities open to him, he should fix sentence in any one case, for it merely recites that among the purposes of sentencing are “[t]o insure the public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized, the rehabilitation of those convicted, and their confinement when required in the interest of public protection.”<sup>11</sup> With regard to the essential question — *how* a particular sentence should be tailored to these sometimes conflicting objectives — the law stands mute.

### *The Presentence Report*

What guidance the sentencing judge *does* receive is likely to come from the presentence report (“PSR”), which, according to statute,<sup>12</sup> must be prepared by the probation department before sentence may be imposed on any person convicted of a felony.\* The report is required to contain “an analysis of all information relevant to the sentence,” including facts relating to the offense, and to the offender’s criminal record, “social history, employment history, family situation, economic status, education and personal habits.”<sup>14</sup> The report must also include an evaluation of the defendant’s treatment needs and available community resources, plus a recommendation as to the type of sentence to be imposed.\*\*<sup>15</sup>

The purpose of the PSR is to provide “scientific and accurate information and analysis for judicial decision-making.”<sup>17</sup> In practice, however, the PSR is seldom more than a prolix offender biography

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\* It must also be prepared before a convicted misdemeanor may be sentenced to probation, a reformatory, or 90 days imprisonment. A prepleading report may also be ordered prior to a defendant’s actual guilty plea, but use of this device is relatively infrequent.<sup>13</sup>

\*\* For misdemeanors an abbreviated (“short form”) report is authorized and widely used.<sup>16</sup>

which recites facts having little relevance to the sentencing decision.\* Other features of the report, notably the offense description and criminal record, are largely drawn from and essentially duplicate information in the prosecutor's file:

"For example, a major felony repeat offender age 35,... might be the subject of an eight-page single space presentence report which includes three pages on his past criminal record (already in the NYSID printouts) and such "social" information as his high school education, past employment, early family life and personal drinking habits."<sup>19</sup>

Procedures to verify information contained in the PSR are haphazard, and criminal justice practitioners throughout the state — and particularly in New York City — question the accuracy of the reports.<sup>20</sup> Evaluators have consistently described the PSR as mechanical, inaccurate and unfocused. Equally consistently, they have found the reports lacking in necessary sentence and treatment recommendations.<sup>21</sup>

A 1961 report on probation services in New York City, for example, analyzed a substantial number of case records and concluded that "in well over half the cases, the investigation produces a collection of facts which are usable, but which have not been correlated or analyzed."<sup>22</sup> A 1973 study found that matters were even worse: increased probation caseloads had led the reports to be "water[ed] down [in] their informational content"<sup>23</sup> and had substantially increased the risk that the reports contained "unverified and inaccurate information."<sup>24</sup> In 1977, the New York City Economic Development Council reiterated the same criticisms; despite the fact that the City Probation Department has "almost 200 professional staff engaged fulltime in making presentence investigations and reports,"<sup>25</sup> the reports were found to be redundant, repetitive and often irrelevant to the sentencing decision to be made. Evaluations of the PSR from other areas in New York echo the same criticisms.<sup>26</sup>

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\* Both judges and probation officers have repeatedly been found to rely on only a few factors in reaching a decision as to whether or not confinement was appropriate. The nature of the current offense and prior criminal history are the most important determinants of that decision.<sup>11</sup>

Beyond these deficiencies in content, the utility of the PSR is also limited by its timing. Often the PSR is not made available to the judge or defense counsel until a day or two before sentence is to be imposed.<sup>27</sup> Judges thus have little time to digest what information is provided or check its accuracy. Moreover, by that late date a plea or sentence bargain has generally been concluded, rendering the PSR "largely superfluous, at best verifying the judge's perceptions formed at the time the guilty plea is taken."<sup>28</sup>

The sentencing recommendations which are provided in the reports also seem ill-calculated to promote uniform decision-making. Since no general policies or guidelines structure the recommendation process, individual probation officers make decisions on an *ad hoc* basis. Additionally, judges, prosecutors and defense attorneys across the state agree that factors such as the probation department's own supervisory caseload and its perceptions of the judge's customary sentencing practices may strongly influence probation officers' recommendations.<sup>30</sup>

Thus, while the presentence report has traditionally been viewed as a key instrument for sculpting the sentence to fit the unique facts relating to the offender and his offense, it is apparent that the hope far exceeds the reality. The presentence report, as it now exists, fails to provide the basis for informed use of judicial discretion, or to bring to the sentencing decision the order and structure which the penal law itself lacks.

### B. *Sentencing Practices in New York*

The statistical profile which accompanies this report as Appendix A sets forth, in some detail, the type and length of sentences imposed for major offenses in New York State. Here, our discussion will focus on the most startling — and unsettling — aspect of sentencing in New York: the phenomenon of sentencing disparity.

#### *Sentencing Disparity*

"Sentencing disparity" simply means that similar offenders who commit similar crimes under similar circumstances receive substantially different sentences. Disparity comes in various shapes and forms, and may be attributed to any number of factors, from the personality of the sentencing judge, to the geographical location of the

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\* Two-thirds of New York City probation investigation unit supervisors interviewed by an Economic Development Corporation Task Force themselves questioned the value of the reports in the face of widespread plea-bargaining.<sup>29</sup>

courthouse in which he presides, to the race or social class of the defendant. Its effects, however, are uniformly devastating.

First, sentencing disparity does irreparable injury to the quality of justice of our sentencing laws. "One of the most glaring and provocative of inequities in a world not known for fairness is disparity in punishment: when individuals committing like offenses, are treated differently"<sup>1</sup> Second, "[w]here equal treatment is not the rule, potential offenders are encouraged to play the odds, believing that they too will be among the large group that escapes serious sanction";<sup>2</sup> thus, disparity gravely weakens the deterrent value of sentencing. Disparity has also been seen as an impediment to efforts to rehabilitate inmates, and as a cause of prison unrest. Finally, inequality in sentencing brings our entire criminal justice system into public obloquy, weakening the credibility of our courts and respect for the rule of law itself.<sup>3</sup>

#### 1. *Studies of sentencing disparity:*

According to some commentators, the existence of disparity under our present sentencing system is so self-evident a proposition that little empirical verification is required; as Judge Marvin Frankel puts it, "what *would* require proof of a weighty kind, and something astonishing in the way of theoretical explanation, would be the suggestion that assorted judges, subject to little more than their own unfettered wills, could be expected to impose consistent sentences."<sup>4</sup> Nevertheless, substantial evidence exists that sentencing disparity is a wide-spread phenomenon.

Appropriately enough, one of the earliest studies seeking to document disparities in sentencing was conducted in New York City. Focusing on the Magistrates' Courts in the years 1914 - 1916\*, researchers found "almost as many kinds of justice as there are magistrates to administer it."<sup>5</sup> Thus, "one magistrate was particularly severe with some classes of offenses, while not so severe with another. Another would be lenient with nearly all. While yet another would be uniformly severe, except in cases of some particular class of offenses."<sup>6</sup> Analyzing the decisions of individual judges, it was noted that "[i]n the case of disorderly conduct one magistrate suspended sentence in a little more than one out of every fifty of his cases, while another suspended sentence in fifty percent of his cases or in every alternate

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\* Magistrates exercised substantial discretion in imposing sentence, although the indeterminate system had not yet gained complete ascendancy in New York.

one."<sup>7</sup> In sum, "[t]hese studies of the work of the magistrates' records in the New York courts are startling because they show us so clearly to how great an extent justice resolves itself into the personality of the judge."<sup>8</sup>

Later studies, conducted in other jurisdictions and employing more sophisticated techniques, report similar findings. For example, researchers examining sentencing in an Ohio county found that over a two-year period one judge imprisoned defendants convicted of robbery 77% of the time, while another gave prison terms to only 17% of all convicted robbers appearing before him — yet at the same time this second judge incarcerated 62% of all defendants he sentenced for grand larceny.<sup>10</sup> Similarly, a South Carolina study found widespread "sentencing disparities in the sentencing practices of individual judges and disparities between offenses."<sup>11</sup> Another study conducted in the State of Washington concluded that "[f]actors unrelated to the defendant's culpability or rehabilitation potential have great impact on the sentence. Factors from the judge's background ... are extremely important in accounting for particular sentences."<sup>12</sup> Researchers in Texas likewise stated that "different trial courts sentence similar offenders with disparate severity" according to "differences in trial judges' personalities, social backgrounds and attitudes, penal philosophies and temperaments."<sup>13</sup>

Disparity has been found to constitute a significant problem in the federal system as well. Research on sentencing in the Southern District of New York, for instance, disclosed sizable sentencing variation among judges<sup>13</sup> — a finding which was confirmed by a subsequent study conducted among district court judges in the Second Circuit.<sup>16</sup>

The Second Circuit study stands apart from other research into sentencing disparity because of its unique methodology. Judges participating in the study were supplied with twenty identical files compiled from actual cases, and asked to impose sentence in each case.

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\* A more recent study up-dated this research to encompass the years 1917 - 1930, and confirmed the earlier conclusion that there was a "considerable difference of sentencing behavior ... among judges handling fundamentally similar cases."<sup>9</sup>

\*\* Other important research includes the work of Leslie T. Wilkins and his colleagues, in connection with the development of sentencing guidelines. In attempting to isolate factors with a significant influence on sentencing practices (usually within a small geographical area), Wilkins found that variables related to the gravity of the offense and the offender's prior record played a major role; much sentencing variation could not, however, be explained on this basis. The researchers concluded that sentencing guidelines, designed to structure judicial discretion, but not abolish it, provided an effective framework for reducing unwarranted sentencing variation.<sup>14</sup>

While it might be argued that sentencing disparity disclosed by other studies could conceivably be attributable to the fact that judges were deciding different cases, which might, because of their unique facts, justify different sentences, here judges were asked to sentence in precisely the *same* case. The only "variable" which could therefore account for sentencing variation would be the judge doing the sentencing, rather than facts relating to the offense or the offender.

The results of the Second Circuit study led researchers to conclude that "disparity is a serious problem in a substantial proportion of Second Circuit cases."<sup>17</sup> Disparity was found to be a common phenomenon, which could not simply be traced to a few judges with erratic sentencing practices; "[f]or the most part, the pattern displayed is not one of substantial consensus with a few sentences falling outside the area of agreement. Rather, it would appear that *absence of consensus is the norm*."<sup>18</sup> Moreover, disparity could not be laid at the doorstep of geographical differences; disparity among districts was found to be of "secondary importance to disparity *within* districts" — and huge disparities were noted within both the Eastern and Southern Districts of New York.<sup>19</sup>

## 2. *Sentencing Disparity in New York*

Our research has disclosed that New York suffers from the same disparity in sentencing endemic to other jurisdictions which employ the indeterminate sentence.

### a. *What practitioners say:*

This news — if news it is — will hardly come as a shocking revelation to those most experienced and expert in matters pertaining to actual sentencing practices in our courts. A cross-section of 150 judges, prosecutors, and defense attorneys interviewed by the Committee have told us, in no uncertain terms, that disparity is a basic fact of life in New York State.\*

An overwhelming majority of these judges, prosecutors, and defense counsel agree that within their own courts there are judges who are "very lenient" and others who are "more severe." Over 90% state that some judges in their area would sentence the same defendant

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\* The following discussion is based upon survey interviews conducted for the Committee by Louis Harris and Associates. The results of the Harris study are annexed to this report as Appendix D.

more harshly than others — a fact which may explain why prosecutors and defense counsel generally agree that “judge-shopping” is a not infrequent phenomenon.

Most of the prosecutors and defense attorneys, and a plurality of judges, believe that disparity is also a product of geography; in their view, upstate judges tend to mete out stiffer sentences than do judges downstate.

An even more telling indication of sentencing disparity — as well as the confusion which reigns over current sentencing practices — is that, when we asked the judges to estimate the *average* maximum sentence imposed across the state for a first offender convicted of various offenses (Robbery 1<sup>o</sup>, Burglary 3<sup>o</sup>, Manslaughter 1<sup>o</sup>, Assault 1<sup>o</sup>, Robbery 2<sup>o</sup>) — there was absolutely no concensus. For Assault 1<sup>o</sup>, 16% call a maximum sentence of 3 years “average,” while 18% expect a sentence of 10 years; 20% believe 5 years is the average term. For Manslaughter 1<sup>o</sup>, 11% choose a sentence of 5 years or less; 33% believe 15 years or more, and 30% fasten on 10 years. For Robbery 1<sup>o</sup>, 39% expect a sentence of 5 years or less, while 15% expect a sentence of 15 years or more.\*

The implications of the Committee’s survey are obvious and disturbing. If one judge believes a 3 year sentence to be “average,” while another views as “average” a sentence of 5 times that length, when confronted with an “average” case their sentencing practices will differ accordingly. The wildly conflicting views of average sentence length revealed by our study is therefore both an indication and a guarantee of widespread sentencing disparity.

This unfortunate tendency is exacerbated by judicial expectations concerning the sentencing role of the Parole Board. The vast majority of judges report to us that in imposing sentence, they take into account the time that an offender will likely serve before he is released on parole. But when we asked judges to estimate how much time an offender convicted of the crimes listed above would actually serve, there was substantial disagreement. For Robbery 1<sup>o</sup>, 33% expect the defendant to serve 2 years or less; 16% expect him to serve 5 years and

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\* In the main, judges presiding upstate selected somewhat longer sentences. Thus, the median average sentence chosen by upstate judges for Assault 1<sup>o</sup> was 7 years, and by downstate judges, 5 years. The greatest divergence was for Manslaughter 1<sup>o</sup>, where upstate judges selected a median sentence of 15 years, and downstate judges 10 years. Downstate judges selected a slightly longer median sentence for Burglary 3<sup>o</sup> than did their counterparts upstate, however. In any event, upstate judges substantially differed, *among themselves*, in their expectations regarding sentence length, and so did judges from downstate.<sup>20</sup>

46% between 3 and 4 years. For Manslaughter 1<sup>o</sup>, 33% pick 2 to 3 years, 16% between 6-7 years, 21% choose 4 years, and 26% believe 5 years. Amazingly enough, 36% of all judges told us that they believe the Parole Board has no policies which enable them to predict the actual time an inmate will serve, or else they are not sure of what those policies are.\*

In sum, our interviews reveal that active members of both the criminal bench and bar agree that there is widespread sentence disparity in New York. One measure of this disparity is the fact that judges dramatically differ in what they believe to be the average sentence for various kinds of offenses — leading to the conclusion that their sentencing practices must differ as well. Confusion about the Parole Board's release policies also has a confounding influence upon sentences imposed by the judiciary.

b. *Statistical indications of disparity:*

These perceptions of widespread sentence disparity gain further credence from available data, which indicate that there is a wide range of sentencing variation in New York State for offenders convicted of the same crime. While the full range of variation for major index crimes is set forth in Appendix A, it might be useful to provide some examples by way of illustration.

Robbery 1<sup>o</sup> is a Class B felony, with a maximum term of imprisonment of from 3 to 25 years. In 1977, 6% of all defendants convicted of Robbery 1<sup>o</sup> received a 3 year maximum sentence; 6% received a maximum of over 20 years; 14.7% received maximums of 5-7 years; 24.7% maximums of 7-10 years; and 24.1% maximums of 10-15 years. Maximum terms thus run the full sentencing gamut — although all defendants were convicted of precisely the *same* crime.

The same pattern, or lack of one, is repeated for all crimes in which real latitude in sentence length is prescribed by the Penal Law. Variation, moreover, extends not only to sentence *length*, but (when such a choice is available) to the *type* of sentence imposed as well. For example, with regard to defendants convicted of Robbery 3<sup>o</sup>, a D felony, 32.7% received a nonincarcerative sanction; 19.7% were sentenced to local jail; and 47.6% were incarcerated in state prison.

One source of variation seems to be geography. Upstate sentences

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\* Almost half of the judges cite prison over-crowding as the major reason why the Parole Board decides to grant parole to an inmate. What weight judges give to this factor in determining the appropriate length of a sentence we are at a loss to know.

appear to be longer than sentences imposed in New York City.\* With regard to Manslaughter 1<sup>o</sup>, for example, more than half (53.7%) of the defendants sentenced in upstate counties in 1976 received maximum terms of twenty years or more, compared to 16.7% of the New York City sentences. By the same token, almost half (49.6%) of New York City sentences were 10 years or less, as opposed to 20.4% of the upstate sentences.\*\*

While this data is suggestive — especially in light of the research literature which shows disparity to be ubiquitous in other jurisdictions — it cannot conclusively prove the existence of widespread inequality in sentencing in New York State.

As we have earlier indicated, sentences may vary — both among judges and regions in the State — because facts relating to the offense or the offender may also vary, and justify different sanctions. Since methods for keeping criminal justice data in this state are too crude to permit a more detailed analysis, we decided to conduct our own study to shed further light on the problem of sentencing disparity in New York.

c. *The sentencing simulation study:*

The methodology of our study was in most respects similar to that of the research conducted in the Second Circuit. Forty-one County and Supreme Court judges from all corners of New York, selected by stratified random sampling, were asked to review eight actual pre-sentence reports and to indicate the sentence which he or she would have imposed in the case. Unlike the Second Circuit study, however, here judges were also requested to indicate the *objectives* which the sentence was designed to serve (e.g., retribution, rehabilitation, deterrence, or incapacitation)\*\*\* and state their *reasons* for imposing sentence.

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\* Nevertheless, over half (52.2%) of the defendants convicted after indictment in New York City in 1977 were sentenced to state prison, as compared with only one out of four (24.4%) of the upstate defendants.

\*\* These statistics, which appear in Appendix A to this report, were compiled by the Committee staff from unpublished 1976 admissions data available from the New York State Department of Correctional Services. Data from the Division of Criminal Justice Services fails to provide a breakdown between upstate and downstate sentences.

\*\*\*These terms were defined as follows:

“RETRIBUTION - to punish the offender

INCAPACITATION - to confine the offender to prevent him from committing future crimes

REHABILITATION - to provide treatment or other programs which will decrease the likeli-

The advantages of this mode of research are substantial. First, the cases are real, and are presented to judges in the familiar and true-to-life format of a presentence report, which is customarily a basis of judicial decision-making. Second, the judges are all reviewing the same case and are sentencing on the basis of the same information; as in the Second Circuit study, any variation in sentences imposed can only be attributed to differences among *judges*, rather than to differences in the *cases* before them.\*

The results of this simulation study are described in Appendix C to this report. Even a brief summary of our findings, however, should suffice to demonstrate the magnitude of the problem posed by sentencing disparity in New York.

By the way of preface, we confess that we hardly expected to find uniformity in sentencing. Nevertheless, we were simply unprepared for the wide range of sentencing disparity which our study revealed: judges presented with identical presentence reports differed — and differed substantially — in both the *type* and *length* of sentence they imposed. For example:

Case 2 involved a knife-point robbery of an elderly man by a heroin addict. The defendant, who was convicted after trial of Robbery 1<sup>o</sup>, was unemployed, lived with his pregnant wife, and had a minor criminal record. The sentences imposed in this case ranged from the statutory *minimum* of 0-3 years imprisonment to the statutory *maximum* of 8½-25 years\*\* — and practically every other possible intermediate sentence was imposed as well. Within this enormous span of variation, maximum terms clustered at 5, 7, 10, 15 and 18 years. The *actual* sentence which this defendant received, it is interesting to note, was 0-5 years.<sup>22</sup>

In case 3, a defendant with an extensive criminal record was convicted of Robbery 1<sup>o</sup> for the hold-up of a shoe store. The defendant

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hood of the offender's involvement in future crime

GENERAL DETERRENCE - to deter others from committing similar crimes

SPECIAL DETERRENCE - to deter this offender from committing future crimes

OTHER - additional goals which you feel are important."

\* Although no "flesh-and-blood" defendant exists to appear before the sentencing judge, experts agree that this should have little, if any, influence on the range of sentencing disparity.<sup>21</sup>

\*\* Judges were instructed to assume that defendants were not eligible for sentencing under the recently enacted Violent Felony Offender statute which went into effect on September 1, 1978.

did not carry a weapon, but his accomplice was armed with a loaded revolver. While in real life the defendant was sentenced to a term of 0-9 years, sentences here ran the gamut from 0-4 years to 8½-25 years, hitting all points in between.<sup>23</sup>

The defendant in Case 4 shot the man whom he suspected of being his wife's boyfriend, paralyzing his victim for life. The defendant had not previously been convicted of a crime, and claimed that he acted in passion and was "temporarily insane." He subsequently pled guilty to Assault 1<sup>o</sup>. Sentences imposed by judges again ranged from the statutory minimum of 0-3 years to the statutory maximum of 5-15 years. Maximum terms of 7 years or less were imposed by nearly 25% of the judges; 27% imposed 10 year maximums, while 34% imposed maximums of 15 years. The defendant's actual sentence was 0-5 years.<sup>24</sup>

The subject of Case 5 was a defendant who had been convicted of Manslaughter 2<sup>o</sup> for killing his victim with a knife. The crime followed an argument between two men, both of whom were apparently intoxicated at the time. Here, the defendant received sentences ranging from probation, on the one hand, to imprisonment for 5-15 years, on the other. Probation was the sentence prescribed by 20% of the judges (although two judges also tacked on a 60 day jail term); nearly an equal number imposed prison sentences with a maximum term ranging from 12-15 years; other sentences ranged from 0-3 years to 5-10 years (which appears to be an illegal sentence, since the minimum may not exceed one-third of the maximum). In reality, this defendant was sentenced to probation.<sup>25</sup>

The defendant in Case 6 was an illegal alien who made his living by selling marijuana. After a quarrel with two customers, in the course of which one of the customers pulled a knife, the defendant shot the victim dead. Indicted for Murder 2<sup>o</sup>, he pled guilty to Manslaughter 1<sup>o</sup>. Once more, the sentences ranged from the statutory minimum of 0-3 years to the statutory maximum of 8½-25 years. The sentencing variation was vast; about 15% of the judges imposed maximum terms of less than 10 years; about 20% imposed 25 year terms; and 24% imposed terms of 15 years. In reality, this defendant received a sentence of 0-10 years.<sup>26</sup>

Without detailing the other cases in our study, it is enough to state that each of them evidenced similar sentencing patterns.

This wide disparity in sentencing appears to be deeply rooted in the nature of our present sentencing laws. For example, since judges find no guidance in the Penal Law concerning what facts about the offender or the offense are relevant to the sentencing decision, judges

emphasize different aspects of the same case and arrive at different sentences. In Case 5, one judge stressed the defendant's remorse, and imposed probation; another stressed the defendant's poor "impulse control" and handed down a 3-9 year prison term. Nor are judges told in what circumstances a sentence should be designed to serve the differing objectives of retribution, deterrence, incapacitation, or rehabilitation. Thus, in Case 2, deterrence was cited to support a sentence of 0-5 years, while incapacitation was invoked for a sentence of 6-18 years, and retribution was deemed to demand a term of 8½-25. In Case 3, rehabilitation was cited for a sentence of 5-15 years, incapacitation for a term of 8½-25 years, retribution for a sentence of 0-5 years, and deterrence for a 0-10 year term.

Compounding the chaos is the fact that our sentencing laws fail to describe *how* the type or length of a sentence should be calibrated to serve those sentencing objectives. In Case 3, judges who sentenced in order to achieve incapacitation of the offender imposed terms of 0-5 years, 0-7 years, 0-10 years, 0-15 years, and 8½-25 years. Similarly, Case 4 sentences with the objective of retribution ranged from 0-3 years, 0-10 years, 0-15 years, and 5-15 years. The irrationality of the present system is perhaps highlighted by the fact that judges whose sentences are designed to serve the *same* objective still reach no agreement as to how long the sentence should be.

Not only does our study reveal little consistency in sentencing *among* judges; surprisingly, there appears to be little apparent uniformity in the sentencing decisions made by a *single* judge. Specifically, sentencing disparity cannot be explained by the fact that some judges are generally more severe or lenient than others. Our findings indicated that, with a few exceptions, judges are not consistently lenient or severe. Moreover, if the few judges in our sample who could be characterized as "tough" or "easy" sentencers had been excluded from our study, the reduction in sentencing disparity would have been only negligible.<sup>27</sup>

Finally, the sentencing disparity disclosed by this research is not primarily attributable to "geographical" differences among judges. Some of the most severe sentences reflected in our study were imposed by downstate judges, and some of the most lenient were handed out by judges presiding upstate. Although there was a general tendency for upstate judges to impose more severe sentences than their colleagues from downstate, this variation in sentencing patterns was *not* the major reason for sentence disparity.\*

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\* In a recent book, *Criminal Violence, Criminal Justice*, Charles E. Silberman implies that sentencing disparity is primarily a function of different sentencing norms "from

### *Conclusions About Disparity*

A large body of research, as well as plain common sense, supports the conclusion that sentencing disparity goes hand-in-hand with the indeterminate system. Judges, prosecutors, and defense attorneys confirm the existence of widespread disparity in New York, and the results of our sentencing simulation study warrant — indeed, require — precisely the same conclusion. While it is sometimes argued that sentencing variation is due to the unique facts of each case, by having judges impose sentence in precisely the same case, it has been demonstrated that the wide divergence in sentences imposed is due to differences in judges, rather than the cases themselves. In this sense, our present sentencing system does indeed provide “individualized justice” — but with perhaps a different meaning than adherents to indeterminate sentencing attach to those words.

The fault lies not with the judges. Rather, it is our system of sentencing which is to blame. Since the Penal Law deprives the judge of any meaningful standards to guide and structure the sentencing decision, disparity in sentencing is a foregone conclusion. If we are substantially to reduce disparity and its attendant evils, we therefore conclude that fundamental reform of our present sentencing system is a necessity. Later in this report, we shall discuss alternatives for sentencing reform and set forth our recommendations for a new sentencing system designed to enhance the fairness and consistency of penal sanctions.

#### *C. Appellate Review*

One possible mechanism for reducing sentencing disparity — and for developing a common law of sentencing to guide the lower courts — is appellate review. Under our present system of sentencing, however, appellate review has done little to achieve these goals.

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one community to another.” Silberman’s brief discussion of disparity never mentions the substantial body of research literature to the contrary. In addition to other studies which we have already cited, results of a sentencing study recently conducted in Washington, D.C. flatly contradicted Silberman. In the Washington, D.C. study, researchers analyzed sentences imposed in 1,665 cases, and found considerable sentencing disparity. Specifically, they discovered that even if they knew the offender’s prior record of convictions and arrests, the statutory maximum sentence for the crime, and the rate at which the sentencing judge incarcerated the offender, they would only be right about 60% of the time in predicting whether or not a particular offender would be incarcerated. They were much less successful in predicting sentence length — only about 40% of their predictions were correct. Differing sentencing attitudes of individual judges was deemed to be the factor most likely responsible for this disparity.<sup>21</sup>

The reason is obvious: appellate review is limited, at the outset, by the very nature of New York's indeterminate sentencing system itself. Since the original sentencing decision is the product of unstructured judicial discretion, rather than formalized legal criteria, the appellate court is deprived of workable standards by which to review the appropriateness of a sentence.\* In addition, the underlying reasons for a sentence (even if they could be articulated) will likely receive little, if any elaboration by the sentencing judge, leaving the appellate court to guess why a particular sentence was imposed.

As stated in Section 450.30 (1) of the Criminal Procedure Law, a defendant may appeal a sentence "upon the ground that such sentence either was (a) invalid as a matter of law, or (b) harsh or excessive."\*\*\* In general, a sentence will be affirmed unless a "clear abuse of discretion"<sup>2</sup> — also termed extraordinary circumstances — can be demonstrated.\*\*\* Thus, it is not surprising that appellate courts infrequently reverse a sentence, often deferring to the trial court's presumed advantage in having an opportunity to observe the defendant and gain a more intimate understanding of the facts and circumstances underlying the case.<sup>3</sup> Indeed, an appellate court is often content to state, in denying an appeal, simply that "the sentence imposed was well within the statutory maximum for the class C felony conviction, and there was no clear abuse of discretion in the imposition thereof which would warrant our modification of the nine-year term."<sup>6</sup> It is likely to be similarly vague in stating its grounds for modification in the comparatively rare case in which a sentence is found to be "excessive."\*\*\*\*

In sum, appellate review in New York is essentially a sporadic affair: lower court decisions are reviewed largely on an *ad hoc* basis, with little elaboration given of the reasons for affirmance or reversal.

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\* Moreover, because no helpful statistics are compiled relating to actual sentencing practices across New York State, the appellate courts cannot compare any sentence to the norm.

\*\* The state may not appeal a sentence on the ground that it is unduly lenient. The sole ground for an appeal by the prosecutor is that the sentence is invalid as a matter of law.<sup>1</sup>

\*\*\* Appeals are taken to the Appellate Division of the Supreme Court, which has jurisdiction to reduce sentences within appropriate statutory limits.<sup>3</sup> The exercise of such

\*\*\*\*It is impossible to generalize upon grounds for reducing a sentence on appeal, since there are no consistent lines of authority to draw upon. For purposes of illustration, it

Since there is no "common law" governing appellate review of sentencing, different courts stress different considerations; a sentence which one court may believe is harsh and excessive another court may find eminently reasonable. Thus in 1977 the Third Department affirmed a sentence with a maximum of eight years and a minimum of four years for sale of one ounce of marijuana. In its decision, the appellate court merely noted that the defendant had a previous record and could have received an even higher sentence, and thus the trial court did not abuse its discretion.<sup>12</sup> During the same year, however, the Second Department, without offering any explanation, reduced a sentence for the same offense from a maximum of three years imprisonment to a sentence of 60 days and four years probation.<sup>13</sup> The Fourth Department in 1977 reduced the sentence of a defendant convicted of criminal possession of less than one ounce of marijuana from a seven year maximum to a revocable sentence of 60 days imprisonment and five years probation. The court merely stated that this was justified "under all the circumstances," none of which it felt moved to describe in its opinion.<sup>14</sup>

### *Conclusions About Appellate Review*

The major defects of appellate review — lack of uniform criteria for assessing the propriety of a sentence, and failure to clearly enunciate the basis for decision — seem inevitable results of the present indeterminate system. Since the original sentencing decision is made on the basis of vague and often conflicting criteria, appellate review cannot supply the clarity which the penal law itself lacks. While sentences are sporadically reversed on appeal, the appellate courts have developed no set of principles which can give guidance to the lower courts in imposing sentences. Appellate review is thus a largely undeveloped means of promoting consistency in sentencing practices in New York.<sup>15</sup>

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record.<sup>8</sup> Even for a first offender, however, other factors may influence the court, such as the recommendation of the Probation Department, or the defendant's intervention with his codefendant to prevent bodily harm being done to the victim of the crime.<sup>9</sup> The court may note that the defendant is married and has children, was honorably discharged from the armed forces, was gainfully employed at the time of his arrest, and recognizes the error of his ways.<sup>10</sup> A sentence may also be reduced in the interests of justice if, under all the circumstances, the sentence would result in extreme and needless hardship to the defendant or his family. For example, where a policeman had been convicted of obstructing governmental administration, and had subsequently lost his job and pension, while at the same time having a mentally-ill wife and three handicapped children to support, his one year sentence of imprisonment was reduced to six months.<sup>11</sup>

## 2. *The Parole Board*

Ultimate sentencing power in New York resides not with the courts, but with the New York State Division of Parole. The sentencing judge determines how long a period of imprisonment a convicted offender *may* serve, but it is the Parole Board which determines the length of the sentence he actually *will* serve.

### A. *The Evolution of Parole*

The Parole Board was originally established as the linchpin of the indeterminate sentencing system.\*<sup>1</sup> Under the indeterminate model, crime is viewed as an illness, to be cured during the offender's term of imprisonment. Since it is impossible to predict, at the time of sentencing, how long this cure might take to accomplish, the judge sets only the outer limits of the sentence. It is the task of the Parole Board, so the traditional theory goes, to determine when and if an inmate has in fact been "rehabilitated," and to release him, before the expiration of his sentence, if the Parole Board decides that he has been cured of crime.

From the outset, then, the Parole Board's mandate — and its very reason for existence — was clear: its job was to assess an inmate's progress towards rehabilitation following the imposition of sentence, and to determine whether he was sufficiently reformed to be safely released on parole.

Within the past two years, the Parole Board has, for good reason, largely ceased to perform this role. While it continues to make release decisions for all inmates incarcerated in state prison, those decisions are now primarily based upon facts known to the judge at the time of sentencing, rather than upon subsequent evidence of rehabilitation. Having outlived the mission it was designed to fulfill, the Parole Board has come to serve a judicial resentencing function, while retaining the raiments of an administrative agency.

This dramatic reversal in the historical role of the Parole Board is largely the result of a rising tide of criticism in the past decade — criticism aimed at both the unbounded discretion traditionally exercised by parole boards, and the very assumptions upon which the indeterminate sentencing system is built.

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\* At first, the prison superintendent and members of the prison's Board of Visitors were authorized to decide whether an inmate has been reformed and should be released on parole. In time, this power shifted to a group comprised of the head of the state prison system and a panel of gubernatorial appointees. A permanent full-time Parole Board was finally created in 1930 to select inmates for parole release.<sup>2</sup>

*The Assault on Parole*

The clarion was first sounded by Kenneth Culp Davis, an eminent legal scholar, who termed parole decision-making a "national disgrace":

"In granting or denying parole, the Board makes no attempt to structure its discretionary power through rules, policy statements, or guidelines; it does not structure through statements of findings or reasons; it has no system of precedents; the degree of openness of proceedings and records is about the least possible, and procedural safeguards are almost totally absent ... Moreover, checking of discretion is minimal; board members do not check each other by deliberating together about decisions; administrative check of board decisions is almost nonexistent; and judicial review is customarily unavailable."<sup>3</sup>

Other voices joined in condemning the arbitrary and capricious manner of parole decision-making, and the unfairness of parole board policies and practices<sup>4</sup> — criticisms echoed by the courts, which were forced to intervene to protect the constitutional rights of inmates.<sup>5</sup> In New York State, the Special Commission on Attica found that "the parole system was a primary source of tension and bitterness within the [prison] walls,"<sup>6</sup> and that parole decision-making "merely confirms to inmates, including those receiving favorable decisions, that the system is indeed capricious and demeaning."<sup>7</sup> A study conducted by the Citizens Inquiry on Parole called the operation of parole in New York "oppressive and unfair."<sup>8</sup> The report went on to state:

"Perhaps unlike any other administrative process which affects important interests in significant ways, the parole system has virtually no rules, standards, or mechanisms to insure consistency and fairness. The criteria used by the parole board are numerous, ambiguous, inconsistent in purpose, and, in some cases, illegal."<sup>9</sup>

The study concluded that "parole in New York is oppressive and arbitrary, cannot fulfill its stated goals, and is a corrupting influence within the penal system. It should therefore be abolished."<sup>10</sup>

Finally, a report issued by the staff of the Codes Committee of the New York State Assembly chastised the Parole Board for "the unguided manner in which it makes its minimum period of imprisonment and release decisions"<sup>11</sup> and stated that "the time is long overdue for reform of the Board's decision-making process."<sup>12</sup>

In addition to questioning parole board practices and procedures, many commentators expressed more far-reaching doubts about the essential role of the parole board and the justification for the indeterminate sentence itself. They argued that the offender's purported progress towards rehabilitation should not effect the length of his sentence, for two reasons. First, mounting evidence supported the conclusion that participation in prison programs has no appreciable effect on whether the inmate will commit new crimes when he is released.<sup>13</sup> As the Citizens Inquiry wrote:

"The failure of treatment drastically undercuts parole. The whole justification for a parole board and a deferred sentencing scheme is that effective 'treatment' or 'rehabilitative' programs are available in prison. The basic job of the Parole Board is to evaluate each inmate's progress in these programs and to release him at the right moment. If these programs are ineffective, the parole board has little to evaluate in setting the parole eligibility date or deciding whether to grant or deny parole."<sup>14</sup>

Second, it was argued that social science data demonstrated that parole boards — or any other panel of experts including psychiatrists — are simply incapable of predicting when or if an offender has been rehabilitated, and is safe to be returned to society.<sup>15</sup> The task conferred upon the parole board — assessing whether or not an inmate has been reformed — was thus clearly beyond its powers.\*

### *The Advent of Parole Guidelines*

This widespread dissatisfaction with the vast discretionary powers

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\* These arguments shall be analyzed at greater length in our discussion of the goals of sentencing.

of the Parole Board culminated in the Parole Reform Act of 1977, which provided that the Parole Board should adopt written guidelines for its use in making parole decisions.\* In addition, after years of foot-dragging in the courts, the Parole Board was required to give meaningful reasons for its decisions to grant or deny parole to an inmate.<sup>17</sup> Finally, to reduce the uncertainty which had previously characterized parole, the statute also demanded that, within the first 120 days of his prison term, the Parole Board set a minimum period of incarceration ("MPI") for each offender who had not received a judicially imposed minimum sentence, at the expiration of which he would first become eligible for parole release.<sup>18</sup>

Spurred on by this statute, and drawing upon an earlier model of parole guidelines developed by the United States Parole Commission, in January, 1978 the New York State Parole Board promulgated guidelines for both MPI and parole release decisions.<sup>19</sup>

The guidelines represent a sharp departure from traditional parole board practices. Rather than clinging to the fiction that there are objective indices to measure an inmate's rehabilitation, the guidelines are based primarily on two factors — the severity of the offense and prior criminal history of the offender.

## B. *Parole Decision-Making*

### 1. *How the guidelines work:*

Under New York's parole guidelines, the seriousness of the offense and the inmate's past criminal record are each assigned a "score," and the two "scores" are added together to derive the offender's MPI and release date.

As used in the guidelines, the "offense score" is comprised of the felony class of conviction (5 points for an A felony, 4 points for a B felony, etc.) and two additional items which may or may not relate to the offense for which the offender was convicted — whether, *in the Parole Board's view*, the "actual" offense<sup>20</sup> involved use of a weapon, or forcible physical contact with a victim, points being allo-

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\* The statute continued to require the Parole Board to assess whether an inmate could safely be returned to the community; parole release was justified "if there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law, and his release is not incompatible with the welfare of society, and will not so depreciate the seriousness of his crime as to undermine respect for law." Executive Law §259-i. The Parole Board was also required to consider the inmate's prison record and release plans. In practice, the absence of release plans serves only to temporarily delay an inmate's release.<sup>16</sup>

cated for each.\* The "criminal history score" consists of the number of prior misdemeanor convictions; the number of prior jail terms served; the number of prior felony convictions; the number of prior prison terms; the number of prior probation or parole revocations; and whether the offender was on parole or probation at the time of the current offense — again, with a certain number of points given to each, and the total number of points determining whether an offender has a good, moderate, or serious criminal history.

Thus, the guidelines take the following form:

#### Prior Criminal History Score

Offense Severity Score	0 - 1 (Good)	2 - 5 (Moderate)	6 - 11 (Serious)
8 - 9 Most Severe	Specific ranges are not given due to the limited number of cases and the extreme variation possible within the category.		
7	40 - 48 Months	48 - 60 Months	60 - 90 Months
6	32 - 40 Months	40 - 50 Months	50 - 60 Months
4 - 5	26 - 32 Months	32 - 40 Months	40 - 50 Months
2 - 3	18 - 26 Months	26 - 34 Months	34 - 44 Months
1 Least Severe	12 - 18 Months	18-24 Months	24 - 36 Months

(Parole Guidelines, Division of Parole, October 20, 1978)

No specific weight is assigned by the guidelines to "rehabilitation" or participation in prison programs. Indeed, since an MPI — which represents a "realistic"<sup>21</sup> release date, according to the Parole

\* The practical effect of this "retial by Parole Board" is illustrated in *Cwilka v. N. Y. State Board of Parole*, — Misc. 2d — (Sup. Ct., Dutchess Co., 1978), where the Board allocated points for the death of a victim even where the defendant had actually been *acquitted* of felony murder.

Board — is set shortly after an inmate arrives in prison, rehabilitative progress can have little, if any, real influence on that decision. Once an MPI has been set, release will ordinarily be granted unless it is “contra-indicated,” in the words of the Chairman of the Parole Board, by a poor institutional record or patently inadequate plans for employment or housing upon release.\* Thus, demonstrable rehabilitative progress is *not* a primary factor in the grant of parole release.

While the guidelines “represent the policy of the Board concerning the customary total time to be served before release,”<sup>22</sup> members of the Parole Board may depart from the guidelines where they find “aggravating” or “mitigating” factors.<sup>23</sup> While the “Decision Notice”<sup>24</sup> to be completed by Board members in making MPI decisions (and thus setting a presumptive release date) lists 22 separate grounds\*\* for not following the guidelines, none relate to participation in prison programs or rehabilitative progress. Similarly, the Notice form for the release decision contains *no* provision for advancing the release date because of evidence of rehabilitation; a poor institutional record is only a possible reason for ignoring the guidelines and denying parole release.<sup>25</sup>

## 2. *The structure of parole decision-making:*

While the Parole Board has come to occupy an increasingly judicial role — resentencing offenders on essentially the same facts known to the sentencing judge — its decision-making process more closely reflects the nature of an administrative agency than a court of law.

Parole Board decision-making has, as its starting point, the inmate’s “case file.” Compiled by an institutional parole officer (who is likely to be relatively inexperienced in comparison with parole officers who work “in the field”), the case file consists of the pre-sentence report; a psychological profile of the inmate (if one is avail-

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\* In making release decisions for cases in which the guidelines have not been previously applied (i.e., MPI’s set before the advent of guidelines, or cases in which the court has imposed a minimum term), in addition to the guidelines the Board “shall consider” the offender’s “institutional record including program goals and accomplishments, vocational education training or work assignments, therapy and interpersonal relationship with staff and inmates,” 9 N.Y.C.R.R. §8002.3, but the guidelines provide for no specific weight to be given to these factors and no objective way of measuring them.

\*\* These grounds are, in the main, extremely general, such as the offense “involved weapon usage” or “caused death of victim” or that the offender has a “history of assaultive behavior” — even though these very same facts are used in deriving the guideline “score.”

able); a recommendation from the sentencing judge or the prosecutor's office (if one has been made\*); and, infrequently, a copy of the sentencing minutes.\*\*<sup>26</sup>

Most important is the pre-parole summary contained in the file, which recites the facts about the offense and the offender derived from the presentence report and gained from interviews with the inmate, his visitors, and prison personnel. Since much of this information is highly subjective, assessing its probative value is a difficult task — although one of vital importance to the inmate, since his guideline "score" will largely be based upon facts presented in the pre-parole summary. In addition, the pre-parole summary may influence Board members in deciding whether to go outside the guidelines in making their parole decisions.

The significance of the pre-parole summary is further underscored by the fact that inmates generally do not have an opportunity to study it — or the rest of the contents of their case file — before Board members make their parole decision.\*\*\* Thus, the contents of the case file — accurate or not — may essentially go unchallenged, while forming the basis of the MPI or release decision.<sup>28</sup>

Besides the case file, the only other source of information upon which the Board bases its parole decision is the parole "hearing" with the inmate.

The hearing is nominally conducted by three members of the Parole Board. In fact, only one Board member has usually read an inmate's case file, and he conducts the interview; the other two Board members are occupied with reading the files of other inmates who are scheduled to appear before them later in the day, and give only limited attention to either the Board member's questions or the inmate's responses. The hearing is not open to the public, and the inmate does not have the right to be represented by counsel.<sup>29</sup> In deciding to grant or deny parole, the two Board members not actively participating invariably defer to the views of the Board member who has conducted the hearing.<sup>31</sup>

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\* According to the Division of Parole, prosecutors recommendations are found in only 10% of the files, and only the New York County District Attorney's Office submits recommendations to the Parole Board on a regular basis.

\*\* For cases involving release (as opposed to MPI) decisions, the file will also include a report on prison program participation, the inmate's disciplinary record, and, if available, his post-release plans.<sup>27</sup>

\*\*\*Documents other than the PSI — especially those termed "confidential" — are inaccessible to inmates. In addition, an inmate's prison records must be obtained through a separate, and time-consuming, procedure.<sup>30</sup>

Due to tremendous time pressures on the Board — in 1976, it held 9,753 parole hearings, nearly a 50% increase over the 1972 figure — hearings are extraordinarily brief.<sup>32</sup> According to the Attica Commission, the Citizen's Inquiry on Parole,<sup>33</sup> and our own observations, hearings customarily last from four to twenty-five minutes, with the average taking between six and eight minutes.<sup>34</sup> Given its brevity, the parole hearing is likely to have only a limited impact on the parole decision. In fact, during the hearings we observed, at least one member of the Parole Board made some of his decisions (and completed the necessary forms) *before* the inmate ever came into the room to be interviewed. Nor does the hearing seem to function well as a fact-finding device: faulty information in the case file may not be challenged by the inmate because he is simply unaware of it, or because he is reluctant to adopt an attitude which the Board members — who hold his fate in their hands — may regard as unrepentant or argumentative.<sup>35</sup> In any event, the time pressures on the Board members conducting the hearing, the lack of legal representation and failure to make full disclosure of the contents of the case file, all make the parole hearing a less than satisfactory forum for fact-finding — and hardly a paragon of due process.

Following the hearing, a decision is made to set an MPI or to grant or deny parole release, and inmates are notified of the decision within a few days thereafter. The notification they receive also states — if the decision is outside the guidelines — a standardized reason, such as "Bizarre nature of offense" or "History of assaultive behavior," to justify the deviation. If the decision is *within* the guidelines, the guidelines are cited as the reason for the decision.<sup>36</sup>

### 3. *Appellate review of parole decisions:*

The determinations of a three-member panel of the Parole Board are not final, but are subject to "appellate review" by the full Board of Parole. Pursuant to statute and regulation, procedures have been established for processing appeals from MPI and release decisions.<sup>37</sup> These procedures guarantee inmates the right to counsel and other due process rights on appeal, but in reality do not provide practical safeguards.

The right to counsel is of primary importance at the fact-finding stage — the parole hearing. Allowing representation by counsel only at the appellate stage accomplishes little, since introduction of new evidence is rarely permitted, and personal appearances before the Board are discouraged.<sup>38</sup> Evidence of the ineffectuality of this review

process is that, according to information obtained from the Board, the full Board of Parole affirms three-quarters of the panel decisions; of the remaining cases 17% are "modified" only to the extent of requiring the panel to give new reasons; 6% become academic or moot while the appeal is pending; and only 5% result in a reduction of time an inmate will serve. Thus, in a six-month period of 1973, only *two* inmates received any significant benefit from their right to review.<sup>39</sup>

Court review is possible, but discouraged by the Executive Law which provides that "any action by the Parole Board pursuant to this article shall be deemed a judicial function and shall not be reviewable if done in accordance with law."<sup>40</sup> In addition, traditional judicial deference to decisions made by an administrative agency further insulates Parole Board determinations from effective judicial review.<sup>41</sup>

### C. Parole Release Practices

The resentencing power exercised by the Parole Board has a major impact on nearly all inmates in state prison. For approximately 70% the practical effect of parole is to reduce their judge-imposed sentences by releasing them from incarceration before the expiration of their maximum terms.<sup>42</sup>

The reduction in sentence length achieved by parole release has been substantial, as can be seen by the chart below:<sup>\*\*</sup>

<u>Offense</u>	<u>Median Maximum Sentence</u>	<u>Median Time Actually Served</u>
Manslaughter 1°	140.6 months	49.6 months
Rape 1°	120.0 months	43.8 months
Robbery 1°	107.6 months	36.5 months
Robbery 2°	60.7 months	29.1 months
Assault 1°	82.0 months	33.6 months
Assault 2°	49.9 months	25.6 months
Burglary 3°	47.9 months	23.3 months
Criminal Possession of Weapon 3°	49.1 months	24.1 months

\* Only 5.9% of all inmates serve their full maximum sentences. About 25% are conditionally released by operation of good time laws after completion of two-thirds of their maximum terms; the rest are released on parole.<sup>43</sup>

\*\* This data is based upon research conducted by the Committee staff, with the aid of a sample of cases of inmates released on parole between January 1 and June 30, 1977. The sample was obtained from the Parole Board and the Vera Institute of Justice. See Appendix A, pp. 85-87, and footnote 35 at pp. 99-100.

Whether the Parole Board reduces — or compounds — judicially created sentence disparity does not appear susceptible of proof, given the presently existing state of the data.\* While there is, as we have seen, substantial variation in the length of sentences imposed on offenders convicted of the same offense, variation in the time actually *served* by offenders is still striking. For example, in the first six months of 1977, offenders convicted of Manslaughter 1<sup>o</sup> served terms ranging from 13.7 to 137.7 months; those convicted of Robbery 1<sup>o</sup>, 12.0 to 172.2 months; for Assault 1<sup>o</sup>, 15.3 to 65.0 months.\*\* While *some* reduction in sentence disparity may be expected simply because the Parole Board reduces sentence length, how significant this reduction is, or whether or not the Parole Board may create *new* disparities, is impossible to tell.\*\*

There are, however, obvious restrictions on the ability of the Parole Board to have a substantial impact on disparity. The Parole Board can do nothing to rectify the most basic of all disparities, namely the "in/out" decision — the decision whether or not to incarcerate — since it can affect only the sentences of offenders already committed to prison. The Parole Board's capacity to remedy other disparities is hampered by judicially imposed maximum and minimum terms, mandatory minimum sentences provided by statute, and laws relating to conditional release.\*\*\*

#### D. *Other Purposes of Parole Release*

It is sometimes claimed that the Parole Board, by resentencing

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\* The Parole Board could provide no evidence of the effect of its decisions on judicially-created sentence disparity. The Committee was informed by the Chairman of Parole Board that the Board did not compile statistics which have a bearing on the question. In addition, with respect to the factors which influence Parole decision-making, the results of a recent study conducted for the Division of Parole were not made available to the Committee.

\*\* Because the Board declined to provide us with relevant data, we do not know how often its release decisions fall outside its own guidelines — and thus fall prey to disparity. Refusal by the Parole Board to participate in a parole decision-making simulation study, similar to the study we conducted with judges across the state, further reduced our ability to assess the uniformity and rationality of parole decisions.

\*\*\* The argument that the "collegial" nature of parole decision-making results in a reduction of disparity " we regard largely as a myth. As we have indicated, parole decisions are generally made by a single Board member, and confirmed by the two other Board members sitting alongside him in the hearing room — who know little about the case under consideration — usually without significant discussion. Such "collegiality" accomplishes nothing except to preserve the anonymity of the Board member really responsible for the determination.

offenders, serves other purposes as well, which deserve mention here.\*

1. *Regulation of the prison population:*

Some assert that parole provides a mechanism for relieving prison overcrowding, by releasing more inmates when the size of the prison population threatens to exceed the capacity of existing prison facilities.\*\*<sup>46</sup> However, the present Chairman of the Parole Board has categorically denied that population pressures have any influence on parole decisions.<sup>47</sup> Nor do we believe that this is a function that the Parole Board should perform: a decision to alter the length of sentences because of lack of prison space should be made by the legislature, if it is to be made at all.

2. *Maintaining prison discipline:*

Parole release is sometimes thought to provide an important incentive for good-behavior while inmates are imprisoned. Prison officials to whom we have spoken do not agree. They believe that control over the conduct of inmates can be adequately maintained by a good-time system, quite apart from parole. In fact, correctional officials and inmates have consistently told us that parole release actually promotes prison unrest, rather than prison discipline, since it is viewed as a fundamentally unfair process, and hence breeds resentment and hostility among inmates.<sup>48</sup>

3. *Reducing crime:*

It has, in the past, been contended that parole release can reduce crime by providing for accelerated release for those who have been rehabilitated, and deferred release for those who are deemed to be still "dangerous." This attempt to assess "rehabilitation" has been all but abandoned by the Parole Board's own guidelines, as well as thoroughly discredited by a substantial body of research, as we shall describe later in this report.

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\* The Division of Parole also provides post-release supervision for inmates released, prior to the expiration of their sentences, by the Parole Board or via conditional release. Parole supervision will be discussed later in this report.

\*\* The logical corollary of this claim is that the Parole Board releases fewer inmates (i.e., makes inmates serve longer sentences) when the prison system is under-capacity.

#### 4. *Allowing for "symbolic" sentences:*

Many of the staunchest advocates of parole release see, as its main virtue, that it allows the perpetuation of a convenient fiction: it permits the judge to impose a high maximum sentence, which is largely symbolic in nature and designed to satisfy the public's presumed desire for vengeance, while at the same time providing a mechanism for substantially — and quietly — reducing the length of the prison term that the offender will actually serve.

This claim fills us with profound disquiet. We do not believe that confusing the public about the meaning of the judge's sentence, or the length of time an offender will actually serve, is a worthy objective of our sentencing laws — in fact, we view such obfuscation as a major *weakness* of our present sentencing system. We say this not only because we believe that government should be honest with the public, but also because the lack of candor which plagues our present sentencing system is enormously counter-productive.

First, it breeds public cynicism. People may not know much about present Parole Board practices, but they *are* aware that offenders are often released before the termination of their sentences. From this, many citizens draw the conclusion that the criminal justice system is patently dishonest, since sentences say one thing and yet obviously mean another. The public thus loses respect for its elected officials, for the courts, and the law itself.

Second, the shroud of mystery which parole release places over the sentencing process makes meaningful discussion about sentencing policy nearly impossible. Public debate about sentencing will never rise above the level of slogans and platitudes until sentencing decisions are openly made and easily comprehensible. Nor will those who make sentencing decisions ever be held accountable unless the public can readily see and clearly understand what those decisions really are.\*

#### *Conclusions About Parole*

The New York State Parole Board now performs precisely the opposite task from the one it was originally created to accomplish. No longer is evidence of an inmate's rehabilitation the primary deter-

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\* For example, the Parole Board has recently adopted new guidelines which generally increase the time to be served by offenders, without public debate and largely without public knowledge. Our present system, which fosters lack of accountability for sentencing decisions, creates an atmosphere in which such basic questions of public policy are decided by an administrative agency in such a behind-the-scenes fashion.\*

minant of when he will be released on parole; instead, the Board makes parole decisions by recomputing the judicially imposed sentence on the basis of the same factors — offense severity and criminal history — considered by the sentencing judge. The Parole Board has thus come to adopt an increasingly judicial role, in essence repeating the original sentencing process itself.

While parole guidelines are a commendable advance over prior Parole Board practices, they raise a fundamental question: why should the Parole Board perform its present resentencing role?

The only real answer appears to be that, given the irrationality of our current sentencing practices, the Parole Board, armed with its guidelines, can make an attempt to reduce gross sentencing disparities. Such a response, however, supplies its own refutation.

For if sentencing disparity is rooted in the nature of our sentencing laws — as we believe it is — the problem should be resolved at its source, through fundamental reform of New York's sentencing system. If our sentencing laws were fair, consistent and uniformly applied, there would simply be no need for resentencing via Parole Board guidelines.

There can be no doubt that this is by far the preferable solution. First, as we have already indicated, there are severe constraints on the ability of the Parole Board to eliminate disparity. But our doubts about continuing the Parole Board's present resentencing role have another, deeper mooring, as well.

We believe that sentencing is a uniquely judicial function. It should be performed in a public place — the courtroom — by a public official entrusted by the community with the responsibility for enforcing its laws and doing justice to its citizens — the judge. The meaning of the sentence, when it is imposed, should be clear to all those with a stake in the sentencing process: the victim, the defendant, and society-at-large.

In our view, the Parole Board is ill-equipped, by its status as an administrative agency, its lack of public visibility or accountability, and the summary nature of its proceedings, to determine — as it now does — the punishment appropriate for different offenses and offenders. While recognizing the hard work, intelligence, and dedication of its members — including its able and energetic Chairman — these qualities alone cannot justify the central role which the Parole Board now plays in the sentencing process. The Parole Board is simply the wrong forum for deciding how many years a man will spend behind prison walls.

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Any discussion of the sentencing process and its results would be incomplete without an examination of what criminal sanction actually mean, as they are applied in practice. Accordingly, we will now proceed to describe imprisonment, parole supervision, and probation as they operate in New York State today.

#### Chapter IV Imprisonment

Prisons are integral to our sentencing system in at least two respects. First, most offenders convicted of a felony are sentenced to a prison term. This fact alone, however, understates the true significance of prisons, for they have a symbolic meaning as well; prisons are places of banishment for those who have transgressed society's most fundamental rules. For these reasons, no description of our present sentencing practices — or prescription for change — can stop short of an evaluation of what prisons do to those sentenced to serve a term of confinement within their walls.

While prisons may seem to us an inevitable fact of social life, it was not always so. As we have earlier described, prisons are a relatively recent innovation, created as an alternative to the gallows or corporal punishment, which served as the main weapons for combating crime in pre-Revolutionary America.<sup>1</sup>

From the beginning, however, thinking about prisons has had a schizophrenic quality. It was clear that imprisonment — separating the offender from society and depriving him of essential freedoms as recompense for commission of a wrongful act — was punishment. At the same time, it was argued that this punishment could actually *help* the offender by providing a means for his rehabilitation. Rehabilitation therefore came to provide a justification for the prison, and high-sounding theory has consistently obscured the less exalted realities of prison life.

Thus the Quakers of Pennsylvania, who invented the prison, saw it as a vehicle for delivering the offender from the sin and indolence all too rampant in the outside world, by isolating him in an institution, apart from the community. There, he would have time to do penance for his misdeeds, and be transformed by diligent labor, solitary confinement, strict silence, and Bible study into a law-abiding citizen. While the rehabilitative ideology of the penitentiary (as it was appropriately called) fostered the massive expansion of prisons, the reality was far different; as described by Charles Dickens, who visited the Quaker prison Cherry Hill, the penitentiary resulted in "dreadful punishment which inflicts immense... torture and agony on the prisoners. The silent regime," he said, "buried men alive and was... immeasurably worse than any torture of the body."<sup>2</sup>

Auburn Prison, constructed in New York in 1819, was a variation of the same theme. If the Quaker penitentiary resembled a monastery, however, Auburn resembled a huge factory. Located in the countryside far from all corrupting influences, Auburn aimed to

achieve the offender's salvation through hard work and discipline, in the totally ordered world constructed inside the fortress-like prison. During the day, inmates worked together, in silence, doing a variety of jobs designed to make the prison a self-supporting community. In the evening, they were returned to the solitude of their cells, in an unalterable routine which made each day a carbon copy of the last.

At Auburn, obedience, as well as the sweat of one's brow, was seen as a key to reforming the inmate. Strict discipline, harsh corporal punishments for even minor infractions, enforced silence, the grotesque lock-step in which inmates were forced to walk, and striped uniforms — all these became hallmarks of this rehabilitative model, and were followed in other prisons, such as Sing Sing and Clinton, built to replicate Auburn.

Advocates of this new penology rhapsodized over its possibilities: "Could we all be put on prison fare, for the space of two or three generations, the world would ultimately be the better for it,"<sup>3</sup> claimed one. Others saw the bleaker realities of prison life; rather than reforming the inmate, prison "operates with alarming efficacy to increase, diffuse and extend the love of vice and a knowledge of the arts and practices of criminality."<sup>4</sup>

In time, the brutality — and the failure — of such rehabilitative efforts became too clear to ignore. In 1870, it was argued that rehabilitation should take another form: "Reformation, not vindictive suffering, should be the purpose of penal treatment of prisoners."<sup>5</sup> Thus, "organized persuasion" would replace the coercion of Auburn:

"Since hope is a more potent agent than fear, it should be made an ever present force in the minds of prisoners by a well devised and skillfully applied system of rewards for good conduct, industry and attention to learning. Rewards, more than punishment, are essential to every good prison system."<sup>6</sup>

On this principle, an institution for young offenders was constructed in Elmira, New York. A major innovation was to be the classification of prisoners "based on character" and their amenability to treatment. Credits were to be given to the well-behaved inmate, and increased emphasis was to be placed on providing a proper education to young offenders.

Champions of this "reformatory" movement were certain of its

eventual success — assuming that they were given sufficient time to rehabilitate the offender. According to their theory, the offender should remain in prison until he had been reformed. Since the time it might take to achieve this result could not be predicted when sentence was imposed, a definite term should not be set; rather, a long period of confinement should be permitted with discretion given to the prison managers to release the offender at any point within that span. This marked the birth of the indeterminate sentence — a device which may actually have *increased* the time an offender would serve in prison, although justified as serving the offender's own best interests.<sup>7</sup>

Nevertheless, the Elmira Reformatory did not prove to be a success in rehabilitating offenders.\* While originally designed for first offenders amenable to treatment, within ten years Elmira had turned into just another prison. By 1930, more than three-quarters of the inmates at Elmira had prior criminal records.<sup>9</sup> More important, the use of the indeterminate sentence caused no apparent reduction in crime.<sup>10</sup>

The most recent attempt to find redeeming rehabilitative value in the punishment of imprisonment parallels the advent of the "social sciences." As social work, psychology and psychiatry gained popular acceptance, it was postulated that these enlightened techniques could be applied within the prison to cure the pathology of criminal conduct. The prison thus came to be seen by some reformers as a hospital — albeit one in which the patient is chained to his bed — where the inmate could be effectively treated for his emotional problems or vocational handicaps.<sup>11</sup> While some still cling to this view — many for lack of a better alternative — faith has been shaken by evidence that with a few isolated exceptions, no form of correctional treatment has been shown to have real value in reducing recidivism.<sup>12</sup>

We believe that the history of prison reform provides an object lesson that "benevolent intentions do not necessarily produce beneficent results."<sup>13</sup> As David Rothman, an eminent historian, puts it: "Each generation discovers anew the scandals of incarceration, each sets out to correct them, and each passes on a legacy of failure."<sup>14</sup> In spite of this legacy of failure, Rothman notes,

"the ideal of rehabilitation, the promise of helping offenders, was so grand a goal, that

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\* It is ironic — but perhaps instructive — to note that Zebulon Brockway, the creator of Elmira and this humane approach to penology, was publicly accused of physical beating young inmates within a few years after Elmira opened its doors.<sup>8</sup>

[reformers] were reluctant to give it up... this response has the flavor of the biblical story of Sodom and Gomorrah — if it took three good men to save the city, surely one good prison could salvage incarceration. That 999 failures might speak of something more than the inadequacies of personnel and administrators was lost sight of in the face of one ostensibly well-functioning institution.”<sup>15</sup>

The rhetoric of rehabilitation should not cloud our view of what actually occurs in our prisons today. Rehabilitation is relatively low in the hierarchy of goals held by prison managers — and is certainly subordinate to the overriding imperatives of prison “security” and smooth administrative functioning, with which it is frequently in conflict. In terms of budgetary allocations, prisoner classification and transfer policies, and program management, rehabilitation is now what it always has been — a disfavored stepchild of the correctional system. The facts are clear: whatever purposes may be served by a sentence of imprisonment, rehabilitation of the offender is unlikely to be one of them.

### 1. *Who Is In The Prisons*

As of January 15, 1979, the New York State Department of Correctional Services (“DOCS”) had custody of approximately 20,675 inmates (including 579 women), all of whom had been sentenced to prison terms exceeding one year.<sup>16</sup> About 55% of the inmates are black, 25% are white and 20% Hispanic. Just over half of the 8,328 offenders with court commitments to state prison in 1977 had been convicted of serious violent crimes, including Murder (3.1%); Manslaughter (6.9%); Robbery (33.7%); Assault (4.5%); Rape and other sex offenses (4.1%), and Arson (1.1%). Others were convicted of Burglary (13.6%), Grand Larceny (3.1%), Drug crimes (13.2%), Weapon offenses (4.8%) or Forgery (1.2%); 5.8% were denominated as Youthful Offenders.<sup>17</sup>

Most prisoners — 57% — had previously served time in a federal, state or local correctional facility.\* As for other identifying characteristics, over two-thirds come from New York City, and nearly half are younger than 25 years old when they are committed.<sup>18</sup> Many seem

\* Approximately one-third of New York’s prisoners are second felony offenders, according to information supplied by prison officials to the Committee staff.

to be drug or alcohol dependent: over 62% of those released from prison in 1976 were considered to have drug or alcohol problems.<sup>19</sup>

An additional fact about offenders in state prison is that there are so many more of them now than just eight years ago — the prison population has grown by nearly 8,000 inmates since 1970.\* While differing explanations are offered for this phenomenon, it would appear that relatively fewer offenders are being sentenced to prison but they are serving longer terms — thus increasing the size of the prison population, and causing severe pressures on existing prison facilities.\*\*<sup>21</sup>

## 2. *Classification and Movement*

While classification of prisoners was initially instituted at Elmira to assess the rehabilitative needs and potential of new inmates, it has largely ceased to perform this role. Instead, the classification process is now intended to screen inmates according to the "risk" they present, and house them in an institution with an appropriate level of security. Most inmates (approximately 73%) are deemed by prison authorities to require "maximum" security,\*\*\* and are placed in large, fortress-like maximum security institutions, four of which were built in the 19th century.\*\*\*\* All — except for Ossining — are located in rural areas, far from the inmates' homes and families.

### A. *How Classification Works*

After sentencing (frequently followed by many additional months of delay and idleness) the inmate arrives at Clinton or Elmira prison, or some other classification center. There he is assigned to a particular security designation — maximum, medium or minimum. While the mechanism for making classification decisions has become more

\* Comparative prison population figures are as follows: 15,313 prisoners in 1950; 17,207 prisoners in 1960; 19,073 prisoners in 1965; 12,996 prisoners in 1970; and 14,386 prisoners in 1975.<sup>20</sup>

\*\* The population crunch is expected to continue: the Department of Correctional Services estimates that it will require the capacity to house 26,841 offenders by March 31, 1983.<sup>22</sup>

\*\*\* Approximately 20% are in medium security facilities, and 7% in minimum security camps or community facilities. There are 9 existing maximum security facilities, 10 medium security facilities, and 13 minimum or community facilities.<sup>23</sup>

\*\*\*\*It was about institutions such as these that one prisoner wrote, on the walls of his cell: "To the builders of this nightmare... if men's buildings are a reflection of what they are, this one portrays the ugliness of all humanity."<sup>24</sup>

elaborate, the basis for those decisions has changed little in the past hundred years: prior criminal history and the length of the inmate's sentence largely determine how he is classified. Inmates serving long sentences, or convicted of violent crimes, or with serious criminal records, are automatically assigned to one of the upstate maximum security facilities. Younger inmates who have been convicted of less serious crimes and who have less serious records, will likely be placed in medium or minimum security facilities. The vast bulk of inmates, however, fall between these two extremes: nevertheless, they too are likely to be sent to maximum security institutions.

The reason is simple. Prisons are meant to confine those who do not want to be there, and to keep them away from the larger society which fears them and wants them removed from its midst. Security is thus the paramount consideration of prison administrators. Prison officials know that they will be roundly criticized whenever an inmate escapes; few repercussions are to be feared, however, when thousands of inmates leave prison, at the expiration of their terms, unreformed. Thus, when in doubt, prison managers will err on the side of caution in making classification decisions, and inmates are assigned to a prison primarily because of the height of its walls rather than the match between its vocational, educational or other programs and the inmate's needs.\*<sup>25</sup>

Over-classification means that an inmate will be confined in a more isolated, regimented and tightly controlled institution than his situation actually warrants, weakening his ties to family and friends and undermining his ability to function in a less structured environment.<sup>26</sup> He will live side-by-side with more violent and hardened offenders than he is.<sup>27</sup> Moreover, maximum security facilities are costly to run, because of the need for additional guards and surveillance.\*\*

As Russell Oswald, former Commissioner of Corrections, admitted:

"There are a lot of people in the maximum security facilities (in New York) who do not

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\* The Department of Correctional Services has recently received a small federal grant to study "risk assessment" in the classification process, with a view to increasing the objectivity of inmate classification decisions and the empirical data on which such decisions should be based. We encourage this study, which is long overdue.

\*\* Surprisingly enough, the cost of operating less secure facilities in New York seems to be the same or more than the cost of running maximum security institutions. The reason appears to be that the same command formula is used for all medium and maximum security institutions, resulting in comparative overstaffing of the smaller less-secure facilities.

need to be there, and we are just wasting money by having them there, and also human values as well.<sup>28</sup>

### B. *Transfer Policies*

Compounding this failure to give sufficient weight to an inmate's rehabilitative needs in classifying and assigning him to a particular facility is the fact that, wherever he lands, he is unlikely to stay long. Due to lack of space in a badly overcrowded prison system, the inmate's term will be an odyssey from institution to institution — wherever a bed is available for an inmate with his security designation.

Until this decade, it was customary to keep an inmate in one prison throughout almost his entire sentence. Virtually no prisons were located near urban areas, and the vast majority of facilities were maximum security. The dramatic increase in New York's prison population, however, has been accommodated by an expansion in the number of medium and minimum security beds.\* The safest way to fill these beds is to place inmates approaching the end of their sentences in these less secure facilities, on the grounds that they are less likely to seek to escape. The constant exodus of these inmates, upon completion of their sentences, however, has a domino effect: *other* inmates must be continuously moved from one facility to another in order to find accommodations for *new* inmates in maximum security institutions.\*\*

As a result, inmates are constantly moved around, from prison to prison, like chessmen on a chessboard. The current rate of turnover for an individual prison can exceed two hundred percent in a year. This constant stream of inmates being transferred between institutions makes meaningful participation in rehabilitative programs difficult, if not impossible.\*\*\*<sup>30</sup>

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\* Between 1973 and 1976 over 3,000 new prison beds were added to the state prison system, all of which were in medium or minimum security facilities.

\*\* Transfers are frequently *lateral* in nature — from one maximum security facility to another — and made for a variety of reasons, including to break up suspected prison gangs,<sup>29</sup> and to move an inmate to a facility closer to the *next* facility to which he is scheduled to be moved. While we support, in principal, phased declassification of prisoners as they serve out their terms and demonstrate an ability to successfully function in less restricted environments closer to their homes and families, present transfer policies operate in a manner which is needlessly disruptive of programs within the prisons.

\*\*\* In addition, as then Commissioner of Corrections, Benjamin Ward stated, "the rapid movement of people pretty much destroys any justification for a classification system."<sup>32</sup>

“There is no real evaluation of a prisoner’s personality, worth, or potential for change. No real effort is made to place men where they belong or in programs of their choice... *Good programs* do exist... (but) when an inmate happens to stumble on to a constructive channel, that’s surely an accident. But just as soon as he’s beginning in earnest to go a little ways down that positive path, as often as not, he’s arbitrarily transferred to another prison where he’ll have to go through the same hit or miss process all over again.”<sup>31</sup>

In short, the frequent turnover of inmates is enough, in and of itself, to sabotage efforts at rehabilitation, because it destroys the continuity which program participation requires.\*

### 3. *Prison Programs*

The sorts of programs theoretically open to the inmate include educational and vocational training, counselling, a job working in the prison or, infrequently, working outside prison walls on temporary release. The quality and quantity of programs *actually* available to him, however, will be subordinate, as always, to the concern for security and the needs of the prison itself.

That security is the primary purpose of penal institutions can be seen simply by comparing the amount of money spent on it, as opposed to rehabilitative programs. Out of total expenditures of over \$280 million for the state prison system in fiscal 1978 (including estimated fringe benefits and retirement contributions, but excluding capital costs), only about 10% was spent on rehabilitative programs, as

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\* Prison officials have recently begun the development of “learning modules” in an attempt to limit the disruptive impact of transfers. These modules are intended to standardize the skills taught to inmates participating in specific programs at various institutions. Each module is designed to be of short duration, and to measure progress by an objective test, so that an inmate who successfully completed one module in Prison A may begin the next module at Prison B. While this approach is sound in theory, several practical difficulties — such as assuring that similar programs exist throughout the prison system, while avoiding needless duplication and waste of resources — may limit its effect in practice.

contrasted to nearly 50% on security.\* The money available for rehabilitative programs is thus limited, at the outset, by the fact that security gobbles up the lion's share of the prison budget.

The type of program to which an inmate will be assigned depends on a variety of factors, of which his needs and wishes are not necessarily foremost. First, inmates who are considered "security risks" may be precluded from holding certain jobs, or participating in programs such as temporary or work release. In addition, fiscal pressures demand that the prison be made as self-supporting as possible, thus requiring inmate labor for routine maintenance functions (like cooking and cleaning). Fulfilling these institutional requirements may take precedence over rehabilitative programs for prisoners. Of course, such jobs also serve another purpose — they keep inmates busy and out of trouble.\*\*<sup>34</sup> Finally, specific programs may be available only at some institutions, or may be over-enrolled.\*\*\*

With this preface, what follows is a brief survey — intended to be illustrative, rather than exhaustive — of "program services" which are presently available to inmates.

#### A. *Educational Programs*

Many inmates lack basic reading and writing skills. Of those sentenced to prison in 1973, 80% did not complete high school, and most dropped out before reaching the tenth grade. In response to these severe educational handicaps endemic to the prison population, the total education expenditure in fiscal 1978 was just over \$5 million — or approximately 2.5% of total prison costs.

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\* Virtually all of the security cost is for guard's salaries. An additional \$13 million — about 6% of prison expenditures — is devoted to prison industries. As we shall later discuss, these expenditures do *not* have rehabilitation as their primary objectives, and cannot be included in the rehabilitation "budget."

Much of the budgetary and auditing information contained in this section of our report will appear in a forthcoming study to be published jointly by the Citizens Inquiry on Parole and Criminal Justice, Inc. and the Correctional Association of New York, which graciously allowed us access to their data.<sup>33</sup>

\*\* These jobs also have some advantages for inmates in the "irregular economy" of the prison; in addition, residence in particular housing blocks may also be available only to those performing specific institutional jobs.

\*\*\* At the same time, many educational, vocational, and industrial programs are actually *under-enrolled* — at least in part a commentary on how valuable inmates think these programs really are.<sup>35</sup> In fact, the number of inmates who sit idly by in prison, doing *nothing*, ranges between 10% and 20% of the population at any given time.<sup>36</sup>

The kinds of educational programs which exist are easily stated. Basic literacy tutoring is provided to approximately 1,000 inmates (according to 1976 figures) by VISTA volunteers, paid with federal funds. The primary emphasis of prison educational programs, however, is at the secondary school level, where, as of 1975, there were over 6,000 inmates enrolled. These programs produce over a thousand high school equivalency diplomas a year. Classes at the college level are also available in some institutions; since 1975, the number of inmates participating in college programming has nearly doubled, and now exceeds 3,000.

Beyond this bare-bones summary, little can be said about the performance of prison educational programs, since so few meaningful evaluations have been done. We note, however, some obvious problems. Budgetary constraints are particularly severe in light of the fact that student-prisoners pose educational challenges which demand special skills on the part of their instructors and enriched programs which are more costly than the average.<sup>37</sup> Moreover, the presence of students in the classroom who do not belong there — inmates with emotional problems, or inmates feigning participation merely to impress the Parole Board — has been a severely disruptive influence. Finally, there are limits on what can reasonably expect educational rehabilitation to achieve.<sup>38</sup> As New York's Special Committee on Criminal Offenders stated:

“Education may not be an appropriate form of treatment for all inmates. The effectiveness of such programs is likely to depend upon the skill levels the offender brings into the institution, the motivation the individual has to learn, the enthusiasm with which he accepts the program, and his degree of involvement in it... [T]he relationship between [improved reading and arithmetic skills, and grade level achievement] and behavior both within and outside of the institution is unclear.”<sup>39</sup>

#### B. *Vocational Programs*

New York's prison population is as lacking in vocational skills as it is in education. A survey conducted in 1973 of newly sentenced prisoners found that 56% were unemployed when they committed their offense; 31% had temporary employment, and only 13% had

steady jobs. The vast majority — 68% — had no marketable skills, and 18% were semi-skilled. Thus, 86% were condemned to a lifetime of unskilled jobs at low pay, if they could find jobs at all.<sup>40</sup>

In fiscal 1978, money budgeted for vocational education amounted to just under \$4 million — less than 2% of total anticipated prison expenditures. These vocational programs make use of 175 vocational shops located in 17 institutions. Trades being taught include barbering, baking, masonry, woodworking, upholstery, auto mechanics, tailoring, metal fabrication, plumbing, brickmaking, and printing.

Management errors have severely lessened the potential value of many of these programs\* First, inmates are often being trained for jobs which they will never be able to obtain after they leave prison. Construction, for example, is a depressed industry in this part of the country, yet a quarter of the shops teach construction skills. Conversely, although service industries are an expanding sector of the economy, service trades are vastly underrepresented in vocational programs, and many of those that *are* taught — like barbering — are now in decline.<sup>42</sup>

Not only do prisons teach inmates the wrong skills; there is also little effort made to help inmates find jobs in the community in the field in which they have been trained.<sup>43</sup> Combined, these failures unrealistically and cruelly raise the expectations of inmates about the possibilities of obtaining work upon release — and increase their bitterness when those hopes are dashed.

Another, equally serious error, frustrates rehabilitative efforts. There is virtually no coordination between vocational, educational, and industrial programs. The inmate is therefore deprived of the chance to acquire educational skills which may be necessary to the job (learning to be a draftsman is difficult if you can't read or write) or the opportunity to hone his skills with on-the-job training.\*\*

In sum, although data is spotty, we must conclude that it is unlikely that vocational programs, as they presently operate, succeed in providing inmates with marketable skills necessary for economic survival upon release.

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\* In reality, we have little idea what that potential value really is. Surprisingly few studies have attempted to evaluate the effect of improved vocational skills on subsequent criminal conduct. What research there is generally concludes that programs have little or no impact on recidivism.<sup>41</sup>

\*\* An additional problem with vocational — as well as educational and industrial — programs is that inmate participation is frequently disrupted during the course of the day, because of other competing demands on the inmate's time. Attempts to minimize these conflicts through utilization of the Comprehensive Program Day have been disappointing.<sup>44</sup>

### C. *Prison Industries*

New York spends approximately \$13 million — 6% of total prison expenditures — on its prison industries program. The stated purpose of prison industries is to “prepare inmates for employment when they return to society by providing on-the-job training in marketable skills,” and to produce goods for the state at a reasonable cost. With remarkable evenhandedness, the program fails to achieve either objective.

Prison industries manufacture a variety of products ranging from soap to license plates, using inmate labor. According to “state use laws” these goods can be sold only to state or local governments.<sup>45</sup> The industries program is not large; there are only 1,500 industrial jobs, or enough for only 8% of the prison population. Nevertheless, only 85% of the available jobs are filled.<sup>46</sup>

It is obvious that prison industries have little rehabilitative potential for inmates: men will not be materially assisted in reforming themselves by making state-issue clothes, shoes, license plates and metal bookcases — jobs which provide little experience translatable into employment opportunities in the outside world. What is more startling is that even though inmates are paid “wages” which range from \$0.35 to \$1.15 a day for their labor, the industries program still manages to *lose* money (about \$4 million in fiscal 1978), despite its monopoly position in the market. Even with an under-educated and poorly trained work force, the only conceivable explanation is that the industries program suffers from management failings of monumental proportions.<sup>47</sup>

There is still a deeper reason for the morass into which prison industries have fallen. A major purpose of prison industries has always been to keep inmates *busy*, and hence out of trouble. Thus, the problems which plague prison industries — lack of accountability or program objectives, low productivity and heavy overstaffing, are all tolerated because the program need not work; it is enough that it simply exists. As it stands, the prisons industry program is a failure, by any standard.<sup>48</sup>

### D. *Temporary Release*

The state prison system does operate one program which is designed solely to help reintegrate the offender into the community — temporary release (which garnered, in fiscal 1978, under \$1 million or less than one-half of a percent of total prison expenditures). The tem-

porary release program involves placing inmates in the community to work, attend school, seek jobs, or maintain family ties. The program has attempted to offer improved employment opportunities to inmates and to reduce recidivism. Despite the program's apparent promise, it has been poorly managed, and as a result its use has been legislatively curtailed.

New York State's first temporary release statute was passed in 1969.<sup>49</sup> At first, the program merely authorized prison officials to release inmates for a portion of the day to work on jobs outside the prison, in order to allow inmates to earn money to support themselves and their families, to help improve their job skills, and to assist them in securing post-release employment.

In the course of the next eight years, however, the temporary release program came to be used as an umbrella to provide statutory authorization for a number of other release programs. Today, prison officials have authority to release offenders so that they can attend college, look for a job, make supervised visits to their families, attend funerals, or obtain specialized medical care. Participation has usually been limited to inmates close to the expiration of their sentences. Under the current restrictions, inmates not within a year of release or parole consideration are ineligible for the program.<sup>50</sup>

Despite its high promise, the temporary release program was operated by prison officials in a fashion pre-ordained to fail. Until 1976, the process by which inmates were selected for temporary release was haphazard and inconsistent.<sup>51</sup> No information was kept about the effect of the program on recidivism rates or subsequent employment;<sup>52</sup> for those on educational release, no academic records were kept.<sup>53</sup> These omissions prevented the program from demonstrating any possible achievements. Finally, security measures at work release facilities in New York City were completely inadequate.

When legislative interest in the temporary release program was piqued by a series of highly-publicized accounts of crimes by participants, a resulting inquiry exposed how poorly the temporary release program was run. As a consequence, subsequent legislation has drastically reduced the program's size and importance.<sup>54</sup>

### E. *Counselling Programs*

In addition to vocational and educational needs, many prisoners require assistance with emotional or personality problems, as well as alcohol or drug dependence. In fiscal 1978, almost \$8 million (or

between 3 - 4% of total expenditures) was spend in providing these counselling services.

*Guidance counsellors:* More than half of this budget was used to pay guidance counsellors, whose job it is to coordinate prisoners with appropriate "treatment" programs. They help inmates get new job assignments, change cells, or transfer to another prison. They do not provide "therapy" to inmates, but act instead as resource brokers.<sup>55</sup> Much of the time of guidance counsellors is spent on routine administrative tasks, and the proportion of counsellors to inmates is extraordinarily low — there is approximately one counsellor for every 250-300 inmates in the state prison system (at Ossining, two counsellors supposedly serve approximately 1,100 prisoners).<sup>56</sup> Given ratios such as these, it is difficult to see how counsellors can give any individualized attention to developing treatment programs for an inmate's needs.

*Psychiatric treatment:* The cost of most psychiatric and psychological treatment in prisons is borne by the New York State Department of Mental Hygiene (whose contribution exceeds \$1.5 million). The need is great, since with the closing of Matteawan, many convicted inmates with severe mental problems were transferred into regular maximum security prisons, to mingle with the general population. Of the DOCS budget, only about \$300,000 is spent on providing psychiatric and psychological services (including therapy) — a pitifully small figure compared to any reasonable estimate of inmate needs. As a result, it would appear that only the most severely disturbed inmates receive substantial treatment for their psychological problems.

*Drug and alcohol abuse:* More than 60% of inmates in New York State prisons "are either identified as drug abusers or are incarcerated for drug related crimes."<sup>57</sup> Many other inmates have alcohol problems. Nevertheless, it would appear that they receive relatively little treatment while imprisoned. Except for a few small, specialized institutions which offer intensive treatment to a mere handful of inmates, the primary form of treatment for drug abuse appears to be various counselling programs, largely run by outside groups on a volunteer basis (according to DOCS, about 950 inmates are presently enrolled in such programs).<sup>58</sup> In addition, approximately 140 inmates are presently receiving treatment for alcohol abuse at Arthur Kill and Woodbourne; an additional 850 inmates participate in programs run by Alcoholics

Anonymous.<sup>59</sup> Suffice it to say that this appears to be a distressingly meager arsenal of programs to deal with a problem of the magnitude of substance abuse.

### *Conclusions*

Prisons in New York State — and elsewhere — are primarily places of confinement. As the Jones Commission stated after examining New York's prison system just a few years ago:

“It is difficult, if not impossible, to operate a system that has a chance of fulfilling the stated objectives [of rehabilitation, deterrence, incapacitation and retribution] where virtually the only instrumentality for incarceration is a remote bastille built to house 1500 to 2000 men... The rigid way in which these institutions must be administered and the effects of depersonalization and regimentation are inconsistent with training the individual to be self-supporting and responsible.”<sup>60</sup>

While rehabilitative programs do exist, they are largely adornments to prison life, not its central feature. What rehabilitative potential existing programs might otherwise possess is diminished, from the start, by classification policies which essentially ignore rehabilitation; transfer policies which create often insuperable barriers to meaningful program participation; and programs which are often under-funded, poorly managed, or ill-coordinated.

One important lesson to be drawn, in our view, is that prison is not likely to be a place of moral or social uplift for the inmate; on the contrary, we are fortunate, as things now stand, if a man emerges from his years in prison no *worse* than he was when he began his term. For whatever reasons we may imprison an offender — a subject we discuss later in this report — let us do so without illusions: we are not imprisoning a man to rehabilitate him, for if that is our aim, there are better places to achieve it than behind prison walls.

These conclusions are not intended as criticism of the present Commissioner of Corrections or his predecessor, both of whom have demonstrated commitment to rehabilitative prison programs, against heavy odds. Nor do we mean to say that *no* rehabilitative efforts presently succeed. Our point is simply this: rehabilitative programs

— even if they were better run and better funded — face enormous difficulties. They are conducted, not in the sterile atmosphere of a laboratory, but in the harsh environment of a prison — a place where men are caged, away from family and friends, and surrounded by the regimentation and violence which form a daily backdrop to prison life.<sup>61</sup> To demand of our sporadic and relatively meager rehabilitative efforts that they overcome all of these alienating influences and miraculously achieve the salvation of masses of inmates is simply unrealistic.<sup>62</sup>

The efficacy of prison programs should be judged by a more modest test. The question should be: do existing programs offer, to inmates who really wish to improve their lives, the tools to do so? At the present time, the answer to this question is “no.” Later in this report, we make several recommendations designed to help our prisons attain this vital objective.

*Chapter V*  
*Post-Release Supervision*

Most inmates, when they are released from prison, still live — at least in a figurative sense — within the shadow of prison walls. Except for those relatively few inmates who serve their full sentences, the rest (prisoners released on parole, or via conditional release) must undergo a period of post-release supervision by the Division of Parole.\*

The inmate will be supervised by one of 373 field parole officers, to whom he will be assigned on a random basis.\*\* The objectives of supervision are ostensibly two-fold: to assist the offender in reintegrating himself into the community by supplying him with basic social services, and to watch over his activities to insure that he is not slipping back into crime. In reality, the supervision process is aimed more at surveillance than assistance;<sup>3</sup> armed with the power to return the offender to prison for violation of rules governing his conduct during this supervisory period, the parole officer is more apt to assume the role of a policeman, rather than a social worker. The result is failure on both counts: while the offender receives little help with his problems, the community derives only small benefit in terms of increased safety from the nearly \$1,000 a year it spends scrutinizing the comportment of a single parolee.<sup>4</sup>

1. *The Delivery of Social Services*

The plight of the released prisoner was described in stark terms by George Bernard Shaw over fifty years ago:

“He is, at the expiration of his sentence, flung out of the prison into the streets to earn his living in a labor market where nobody will employ an ex-prisoner... terrified at the unaccustomed task of providing food and lodging

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\* At the end of 1976, the Division of Parole was supervising 11,020 ex-inmates; a total of 19,900 ex-inmates had undergone some period of supervision for all or part of the year. The term of post-release supervision is determined by the length of the unexpired portion of the inmate's maximum sentence; the average period is approximately two years.<sup>1</sup>

\*\* With the exception of a few New York City parolees assigned to specialized caseloads (alcohol or drug abuser, gifted, mentally ill or juvenile parolees), the selection process is random in nature, based on the releasee's area of residence and the caseload of the parole officer (which in New York averages between 45-60).<sup>2</sup>

for himself. He seeks the only company in which he is welcome; the society of criminals; and sooner or later, according to his luck, he finds himself in prison again... The criminal, far from being deterred from crime, is forced into it, and the citizen whom his punishment was meant to protect suffers from his degradations."<sup>5</sup>

The picture remains much the same today. The months following release are experienced by the offender as "a period of confusion filled with anxiety, missed cues, embarrassment, over-tense impulses, and excitement followed by depression."<sup>6</sup> Dealing with a world so extraordinarily different from that of the prison presents immense difficulties — especially since, as one study puts it:

"[Typical parolees] were neither wise nor competent to begin with; they chose crime, and they were caught. They are neither well-educated nor of high intelligence. Now they have been trained by prison experience to be dependent, and, to make things worse, they are upset. Such persons find it difficult to make choices, to decide on courses of action. It is hard for them to fill out a job application, get a drivers license, or deal with utility companies and landlords. In general... small problems become large and large ones overwhelming for the average parolee."<sup>7</sup>

The problems facing a recently-released inmate are, in fact, "overwhelming" enough to tax anyone's ability to cope. They are both pressing and basic: the need for money, a place to sleep, and a job to do.

#### A. *Financial Needs*

When an inmate is released from prison he is likely to be broke. He is given "gate money" of \$40 — an amount so small that "you've got to do a mugging to make it through the weekend," as one parole officer phrased it — a suit of clothes, and little else to assist him in his new life of freedom.<sup>8</sup> If he finds this insufficient to keep body and

soul together, an emergency loan — up to \$9 — is also available.<sup>9</sup>

It is hardly surprising that such desperate financial circumstances have been found to be a major factor contributing to failure on parole. Accordingly, other jurisdictions — reflecting perhaps on the anomaly of spending many thousands of dollars a year to imprison a man, yet denying him sufficient resources upon release to keep him from promptly returning — have provided inmates with loans or subsistence payments.<sup>10</sup> Despite the fact that both the American Bar Association<sup>11</sup> and the National Advisory Commission on Criminal Justice Standards and Goals<sup>12</sup> have urged that adequate transitional aid be given to offenders, the Division of Parole has established no funding mechanism sufficient to give meaningful financial assistance to parolees.

### B. *Employment*

Nor does parole supervision provide adequate assistance to the offender in helping him find a job so that he can become self-supporting.

The task is, to be sure, a substantial one. It has been accurately stated that:

“The manpower literature presents a bleak picture of the employment status and prospects of released prisoners. They tend to come disproportionately from vocationally disadvantaged groups — uneducated, untrained, victimized by discrimination. Their prison training is unlikely to give them marketable skills. Furthermore employers generally are reluctant to hire persons with criminal records.”<sup>13</sup>

This mirrors the situation in New York. As we have already discussed, the educational level of inmates is low (in 1973, their median grade level was 8.1);<sup>14</sup> as of five years ago — and there is little reason to believe that the situation is much brighter today — 68.4% had received no vocational training in prison; 82% had never participated in a prison industry program; 68% were unskilled, and 18% semi-skilled.<sup>15</sup> Finding jobs for individuals such as these requires exceptional skill, diligence and commitment — a challenge which the Division of Parole has largely failed to meet.

First, there is no effective job placement program for parolees.

Despite the legal requirement that before an inmate can be released on parole he must have a job or "reasonable assurance" of a job, little is done to help an inmate find a job while he is still in prison.<sup>16</sup> As a result, nearly *half* (44.6%) of all parolees do *not* have jobs upon release, but only an "assurance" of one; of those who *do* have work, only 5.1% have gotten it through the assistance of parole officials — less than one-quarter of the number (22.5%) who have found work through their own efforts.<sup>17</sup>

Nor do a parolee's work prospects improve much following his release. Only half of all parolees work at full-time jobs, and many are paid below the minimum wage.<sup>18</sup> Those who are unemployed and seek out the help of their parole officer in an attempt to find work are generally disappointed, for few services are provided to parolees — and these on an erratic basis. One striking statistic is the inconsistency of placement activities by different parole offices; for example, in 1976 the parole offices in Rochester and Elmira *each* had more verified job placements than the entire New York City office. Some parole officers use a "hip pocket" system of saving jobs for especially favored parolees; other content themselves with referring parolees to the New York State Employment Services, whose effectiveness has been sporadic, at best, with only 76 verified placements for parolees in 1976.<sup>19</sup> Considering the barriers ex-offenders face in the job market, merely referring them to another bureaucracy is not likely to work.

Nor has the Division of Parole taken other initiatives. Until recent months — just as the program is being curtailed — the Division of Parole has made little use of the CETA program as a source of subsidized work for parolees.<sup>20</sup> Nor has it actively entered the field of actually *developing* jobs for parolees, by initiating programs such as WILDCAT in New York City, which have proven to be cost-effective methods of meeting the employment needs of the under-skilled offender.<sup>21</sup> Finally, wide-scale educational efforts have not been undertaken to break down the long-standing hostility of employers to hiring offenders — one of the most serious impediments to a parolee seeking to enter the job market.<sup>22</sup>

### C. Housing

An ex-inmate also needs a place to live. Although releasees are required to have an approved residence as part of their parole plan, not all do. While some are able to find housing with friends or relatives, many releasees, especially those who are single and unattached,

have real problems finding housing, many for lack of funds to rent an apartment or put down for a security deposit. An inmate's parole officer will likely provide him with little assistance in solving his housing problems.

While the parole officer may refer the offender to a public or private welfare agency, this is an inadequate response. First, such agencies are often mired in bureaucratic delay, and may be unable to provide housing on an emergency basis.<sup>23</sup> While maintaining a stock of housing to accommodate newly released inmates appears to be a promising approach, community residences funded by the Division of Parole contain only 56 beds for 11,000 releasees.\* The absence of a comprehensive statewide plan for developing half-way houses, community residences and emergency housing is difficult to justify.<sup>25</sup>

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In sum, the basic needs of the parolee receive short shrift from post-release supervision. Instead, most parole officers concentrate their efforts on surveillance — watching the offender to make sure that he is abiding by the law and the terms of his parole release.

## 2. *Surveillance*

The core of post-release supervision is surveillance of the offender. While "surveillance" may conjure up images of cloak-and-dagger operations or private detectives, the reality — at least with regard to parole supervision — is far more routine and less exotic.

The primary method of "surveillance" is simply face-to-face meetings between the parole officer and a parolee to whom he is assigned. The meeting may occur in the parole office, the parolee's home, or his place of work. How frequently such meetings will occur depends upon a variety of factors, including the "level of supervision"<sup>\*\*</sup> — intensive, active, or reduced — which the parolee must undergo.<sup>26</sup> In addi-

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\* These accommodations, grandly titled "Parole Resource Centers," are actually beds in a few YMCA's.<sup>24</sup>

\*\* "Intensive supervision" entails a weekly or bi-weekly meeting at the parole office; one visit at the parolee's place of employment each month; and one visit at his home each three months. According to the Parole Officer's Manual, a newly-released parolee requires three months of intensive supervision. "Active supervision" involves monthly office reporting, a home visit once a month, and an employment check every two months; two years of active supervision are necessary before a releasee can be put on "reduced supervision," which may involve only one contact a year between parole officer and parolee.

tion a more intrusive method of surveillance is open to the parole officer; he may search the parolee's person or lodgings at will.

These surveillance techniques are said to be necessary, in the words of one parole officer, because "the heart and soul of parole is the ability to intervene in a situation where an individual is showing signs of deteriorating into new criminal activity."<sup>27</sup> Nevertheless, while the preoccupation with surveillance deflects parole officers from the task of providing social services to parolees, and raises nearly insuperable barriers of distrust between them, the routine nature of surveillance activities render them largely ineffectual in uncovering evidence of crime.

### A. *Office Visits*

A principal component of surveillance is the "office visit." Newly released parolees are required, once a week, to meet with their parole officer.<sup>28</sup> However, little of value happens during the course of these visits, which are short and ritualistic in nature, beyond a mechanical "checking-in."<sup>29</sup> Frequently, the parole officer may in fact be out of the office when the parolee arrives, leaving it to a colleague to meet with the parolee. This type of visit produces impressive statistics (152,292 office visits were made by parolees in 1976)<sup>30</sup> but little else. One recent study of federal parole officers found that the average interview lasted only three minutes;<sup>31</sup> while parolees in New York may fare somewhat better, it appears that conversation between parole officer and parolee is more apt to consist of terse answers to a few factual questions aimed at keeping tabs on the parolee, rather than any meaningful exchange.\*

### *Job and Home Visits*

Parole officers customarily use job and home visits to check on facts relating to a parolee's employment and living arrangements.

In theory, visits by the parole officer to the parolee's home can provide insight into the parolee's life style and family relationships. In addition, skilled and attentive parole officers can use these occasions to provide individual and family counselling. The reality, however,

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\* It is interesting to note that for well over half of New York's parolees, office visits occur in the Parole Office located in the shadow of the Port Authority Bus Terminal, an area far removed from most social service agencies and which might itself be termed a "delinquency area" — "centers of organized vice such as prostitution and gambling" — by parole officers.<sup>32</sup>

is that home visits are used primarily as an investigative and surveillance device to verify residence and compliance with curfew requirements. Like the office visit, the questions asked by the parole officer and the responses by the parolee (and his family) are largely ritualistic in tone, and constitute a set of formalities to be gone through as quickly as possible.<sup>33</sup>

Parole officers are also required to check on the employment status of their charges.<sup>34</sup> Although such verification must officially take place on the actual job-site, many parole officers do *not* make such visits, but rely instead on pay stubs or telephone contact.\*

### *Searches and Seizures*

Parole officers in New York State, by virtue of judicial decisions, have a special dispensation from the Fourth Amendment's prohibition against unreasonable searches and seizures.<sup>35</sup> In practice, this means that parole officers have authority to randomly search releasees in the parole office, on the street, or in their homes.

While most parole officers exercise restraint in exercising their powers to search, some officers routinely search parolees. This sort of hit-and-miss activity is unlikely to be successful in producing evidence of criminal conduct, but random searches ("tosses," as they are sometimes called) may, on occasion, turn up evidence of some violation of a condition of parole — such as failure to notify to the parole officer of a change in address, marital status, or employment. There is no evidence, however, from jurisdictions which do *not* authorize blanket searches, that the effectiveness of parole supervision is thereby diminished, or the risk of recidivism increased. The benefits of permitting such warrantless searches and seizures are thus highly questionable — as is the efficacy of surveillance in general.

The reasons are obvious. Parole officers supervising over 50 parolees can never be expected to detect an activity as clandestine in nature as crime — which is unlikely to be committed during the course of an office visit, at the workplace, or in the parolee's home. As one study found:

“The [parole] agent's ordinary field activities seemed never to turn up evidence of criminal behavior, except in the case of occasional drug

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\* One reason is that a job visit might jeopardize the parolee's employment, since he may have obtained his job without revealing his criminal record; in addition, conditions at the workplace may make conversation impossible.

use... it was rare for *any* facts gathered in routine field visits (with the possible exception of a complaint from a family member) to result in the type of investigation that led to revocation.

"This finding was particularly surprising, since the agents spend a large portion of their time making the required surprise visits in the field, and according to all parole doctrines frequent contacts in the field are peculiarly important for protecting the public from the danger of criminal behavior by parolees."<sup>36</sup>

### *The Parole Agreement*

Part and parcel of this misplaced emphasis on surveillance is the parole agreement which must be signed by the parolee before his release from prison. In it, the inmate agrees to abide by specified rules of conduct, and to submit to surveillance and warrantless searches in return for early release. While theoretically a voluntary "contract," the parole agreement is obviously signed under duress; if it can be termed a contract at all, it certainly is a contract of adhesion.

Some rules of conduct contained in the parole agreement — such as conducting oneself "as a good citizen," and behaving in a manner which is not a "menace to the safety or well-being of myself, other individuals, or to society" — are so vague as to invite abuse.<sup>37</sup> Others are petty and degrading — e.g., "I will consult with my Parole Officer before applying for a license to marry." The real effect of these rules is not to prevent crime or help the parolee with his problems, but to remind him that his freedom is dependent on the continued goodwill of his parole officer, since any violation of the parole agreement can form the basis for a proceeding to revoke parole.<sup>38</sup>

New York's parole agreement has long been the object of pointed criticism. In 1972, the Attica Commission called it "a major factor in the pervasive discontent of those who awaited parole."<sup>39</sup> A year later the National Advisory Commission on Criminal Justice Standards and Goals stated:

"The chief expression of the coercive power of parole agencies, and consequently a potential source of great abuse, is found in the conditions

governing the conduct of parolees and measures taken to enforce those rules. Some of the major criticisms against parole rules are that they often are so vague as to invite serious problems of interpretation by both the parolee and the parole officer, and that they frequently embrace such a wide portion of the parolee's potential and actual behavior as to become unnecessarily restrictive of his freedom and do little to prevent crime."<sup>40</sup>

Finally, in 1976 the staff of the Assembly Codes Committee urged "the elimination of vague and meaningless conditions, reduction of general conditions, and that additional conditions be related to the individual needs and problems of the offender."<sup>41</sup>

Despite these criticisms, the substance of the standard New York parole agreement has not materially changed in recent years. It remains more restrictive than the parole agreement currently in use in almost any other American jurisdiction.<sup>42</sup> The effect is to further distort the supervision process: while research demonstrates that such restrictions do little to protect society against crime,\* policing compliance with these restrictions becomes a major focus of parole supervision, and prevents a positive relationship from being fostered between the parole officer and his charge.

### *Parole Revocation*

Parole revocation is the sword of Damocles which constantly hangs over the heads of parolees. An inmate released on parole stands approximately a one in three chance of returning to prison to serve all or part of his remaining sentence.<sup>44</sup> Parole may be revoked if a parolee is arrested for a new crime (which accounts for 81% of all revocations)<sup>45</sup> or if he violates a condition of the parole agreement.

It is not necessary, for the purposes of this report, to describe the entire parole revocation process here.<sup>46</sup> What *is* important to note is that revocation is commenced and prosecuted by the parole officer,\*\*

\* Research in other jurisdictions has demonstrated that the presence of numerous restrictive conditions in the parole agreement does *not* serve any real law enforcement purpose. California, for example, found that a significant reduction in the number of parole conditions can occur without reducing returns to prison.<sup>43</sup>

\*\* To complete the process is time consuming for all concerned. Counsel to the Parole Board has told us that the Board spends two-thirds of its time hearing revocation cases, and most field parole officers devote much of their attention to processing revocations.

who has enormous discretion in choosing whether or not to begin such proceedings.

Revocation proceedings are often instituted when a parole officer is informed by the police that a parolee has been arrested for commission of a crime, or that he has been engaging (or is about to engage) in illegal conduct. Nevertheless, the parole officer may choose *not* to revoke parole if he regards the conduct as not warranting such a severe sanction, or for any other reason that satisfies him. Similarly, given the breadth of restrictions in the parole agreement, it would not be difficult to find evidence of *some* lapse — on the part of even the most model citizen — if a parole officer wished to secure a revocation. Thus, the power to revoke is exercised selectively, and may be influenced by such extraneous factors as prison overcrowding, office practices in the area where the parole officer is located, or bureaucratic incentives (and disincentives) for beginning revocation proceedings.<sup>47</sup>

Regardless of how it is exercised, however, the power to revoke has a clear impact on the perceptions of the parolee: the parole officer is someone to be feared, not trusted; a policeman, rather than a source of aid and comfort.

### *Conclusions*

Parole supervision in New York overemphasizes surveillance of parolees at the expense of providing them with meaningful social services. Surveillance activities often duplicate the work of the police,<sup>48</sup> are time consuming, and ordinarily prove to be ineffectual in discovering crime. Meanwhile, the basic needs of newly released prisoners — for emergency funds, housing, employment, and counseling — go largely unattended.

This stress on the coercive powers of the parole officer also has another effect: it makes provision of social services to the parolee a difficult task, even if the parole officer were willing and able to undertake it. A releasee will have difficulty in seeking help from his parole officer for a drinking problem if this would be tantamount to an admission that he had been drinking heavily, in violation of the terms of his parole agreement — an admission which the parole officer could then use to revoke his parole. Until the parole officer is seen more as an ally than an adversary, the parolee's needs cannot be met simply because they will never be understood.

We do not, however, adopt the conclusion reached by some, that post-release supervision should be an entirely voluntary process, with

no elements of surveillance or compulsion attached.<sup>50</sup> Our reluctance to embrace such a radical departure from current practices stems from basically two sources.

First, according to one group of studies, "the abolition of parole supervision would result in substantial increases in arrest, conviction and returns to prison."<sup>51</sup> We recognize, however, that other studies reach contrary conclusions,<sup>52</sup> and that even those studies which claim that parole supervision *does* reduce crime fail to identify the reason for this success<sup>53</sup> — whether the fact that parolees know that they are being "watched," as opposed to the fact that they may be receiving social services, is the prime determinant of why parolees appear to do better with supervision than without it. Given the equivocal nature of the data, and the possibility that supervision — for whatever reason — may prevent crime, we are hesitant to urge its abolition.

Moreover, common sense tells us that post-release supervision can, if properly implemented, help protect the community against crime and serve the interests of the offender as well. The period immediately following an inmate's release is the time when he is most in need of help, and the time in which he is most likely to commit new crimes. Thus, a short period of supervision following release — consisting of providing the inmate with social services, and requiring him to conform to a small number of well-articulated rules designed to encourage him to take advantage of those services and remain crime-free<sup>54</sup> — appears to be the most sensible solution, and one that we shall spell out in somewhat greater detail later in this report.

There are, however, some caveats about the model of post-release supervision that we propose. It will require that the orientation of parole officers change — and change dramatically — from viewing their primary job as surveillance, to seeing their main task as providing assistance to the offender. This is more easily said than done. Parole officers are considered to be law enforcement officials: they carry guns, conduct searches, and spend most of their time on tasks related to surveillance. Altering this perspective — and reallocating resources to provision of social services, rather than policing — will require a change in direction beginning at the top of the Division of Parole, and filtering down through the ranks of parole officers. This will be a task of enormous difficulty, which will demand considerable skills of both management and persuasion.<sup>56</sup>

It will also require money. Any effective program for meeting the financial, employment, housing and counselling needs of releasees will be expensive — though less expensive, in all probability, than incarcerating them if they recidivate. Parole officers will have to be

retrained to provide counselling and more specialized services. There must be extensive experimentation to determine the optimum mix and size of their caseload.<sup>57</sup> Perhaps some social services may ultimately be provided to releasees by private agencies on a contractual basis. It will, in sum, be more costly and more difficult to create a system of post-release supervision which avoids ritual and supplies meaningful assistance. We nevertheless believe that the investment is well worth making.

## Chapter VI

### Probation

In approximately two out of five felony cases the sentencing judge finds prison to be an inappropriate disposition and imposes a non-incarcerative alternative instead.<sup>1</sup> Probation, a relatively recent sentencing innovation, is the almost invariable choice;<sup>2</sup> for misdemeanants, it is even more frequently employed.<sup>3</sup> Thus, approximately 55,000 offenders were under the supervision of local probation departments in 1977 — almost three times the number incarcerated in New York's prisons.<sup>4</sup>

Despite the central role which probation plays in sentencing, its performance has received decidedly mixed reviews. Probation has been variously heralded as "the brightest hope of corrections"<sup>5</sup> and deplored as a sanction that has simply never lived up to its promise. In fact, both views are correct: although probation often amounts to little more than a suspended sentence, it has nonetheless proven to be at least as effective as incarceration in preventing recidivism — and at a fraction of the cost.

#### 1. *What is Probation?*

Probation is a revocable sentence which permits the convicted offender to remain in the community provided that he leads a law-abiding life and fulfills specific conditions imposed by the court. In New York, some of these conditions (reporting to a probation officer, remaining in the jurisdiction, etc.)<sup>6</sup> are mandated by statute; others (making restitution, pursuing a course of study or vocational training, undergoing psychotherapy, etc.)<sup>7</sup> may be imposed by the judge. Failure to abide by the conditions of probation may lead to institution of revocation proceedings and ultimately to incarceration.

Probation is also — at least ostensibly — a process of supervision. According to probation regulations, at the beginning of the probationary term a "supervision program" must be developed, which is designed to assist the probationer in overcoming specific problems (such as drug addiction, alcoholism or unemployment) contributing to his criminal behavior.<sup>8</sup> The probationer is then to be referred to appropriate community agencies for assistance with his particular needs. A probation officer is required to monitor the probationer's progress in completing his supervision plan, as well as his compliance with the conditions of probation.<sup>9</sup> The officer is also charged with providing counselling and other assistance that the probationer may require.<sup>10</sup>

Probation is administered by a large and complex — though highly decentralized — bureaucracy. In New York, fifty-nine separate local agencies at the county and municipal level provide probation services, under the overall supervision of the New York State Department of Probation. In 1977, these agencies employed 2,068 professional probation officers, most with advanced degrees in social work, and spent \$78 million on the supervision of probationers.<sup>11</sup> Probation departments perform other tasks as well: in particular, local departments spend the bulk of their time and budget preparing presentence investigation reports for the courts, rather than supervising probationers. In addition, they provide numerous services to the family courts, including investigation, intake and screening of family and juvenile cases.

#### A. *The Origins of Probation*

Although probation is a relatively recent sentencing innovation, New York courts have always relied heavily upon some form of community release for less serious offenders. Prior to the advent of probation, fines, restitution, and various forms of the suspended sentence were frequently employed as sanctions.<sup>12</sup>

What differentiates probation from these earlier forms of community release — and what led to the rapid growth in its use as a disposition — is the concept of supervision. The invention of probation supervision is popularly credited to John Augustus, a Boston cobbler who in 1841 volunteered to put up bail for a defendant charged with drunkenness. Three weeks later, the defendant returned to court with such convincing signs of reform that he was sentenced to a token fine of one cent, rather than the traditional sentence of incarceration. After this success Augustus extended his labors and ultimately “bailed on probation” thousands of defendants.<sup>13</sup>

Augustus also developed most of the features which later became characteristic of the modern probation system: he confined his efforts primarily to less serious offenders and accepted a new probationer only after conducting a careful investigation to determine whether he was likely to benefit from supervision. In taking on a probationer, Augustus agreed to note his general conduct, and provide assistance with employment, housing or other problems which had fostered his delinquent behavior.

## B. *The Promise of Probation*

Although begun as a small-scale experiment by volunteers, Augustus' practice was soon widely copied. The principal reason for the rapid expansion of probation was its promise as an alternative to imprisonment. By the turn of the century, many reformers had concluded, as did the first New York Commission to investigate probation practices, that incarceration, "with all that this implies of association with more hardened offenders, loss of self-respect and serious handicap for the future,"<sup>14</sup> was a drastic and costly sanction that often did more harm than good, particularly for the youthful or less serious offender. Traditional community sanctions — the suspended sentence and monetary penalties — did not appear to be desirable alternatives because they provided "no oversight... as to the offender's conduct."<sup>15</sup>

Probation, in theory at least, offered to reformers the advantages of control without the disadvantages of prison.<sup>16</sup> It could also claim the virtue of economy, both in terms of "the actual savings by reducing the number of persons committed to penal institutions",<sup>17</sup> and because under probation supervision "the offender could support his family and the state would be saved his maintenance."<sup>18</sup>

Early advocates of probation were also strongly influenced by the medical model of crime, which was then becoming dominant. The developing discipline of social casework promised a means of treating the impressionable offender which avoided the costs and contaminating effects of the prison. Accordingly, the scientific selection of candidates for probation was emphasized and periods of supervision, originally only a few weeks in duration, were gradually lengthened in order to provide for the development of treatment plans and their fulfillment. Paid professionals also began to take the place of volunteers in order to carry out these tasks.<sup>19</sup>

The results, however, were disappointing. Supervision, as described by a 1926 crime report, "in most cases...[exists] in name only":

"Probation generally consists of the offender's reporting at stated intervals... either in writing or along with a number of other probationers at the probation officer's office.\*<sup>21</sup>

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\* This colloquy is quoted by the Commission as an example of the probable content of most office visits:

"As to working out any individual plan or scheme of treatment for the probationer based on his social history and personality, there is little evidence that it is given much thought, much less given any scientific or systematic consideration."<sup>22</sup>

Perhaps because of these shortcomings, it appears that probation, rather than being used as an alternative to incarceration, merely took the place of the suspended sentence.<sup>23</sup> Indeed, in communities such as New York City, the substitution of probation for the suspended sentence produced an apparent *increase* in the proportion of defendants who were sentenced to incarceration and the costly dehumanizing influence of the prison.\*<sup>24</sup>

## 2. *Probation Supervision Today*

Despite better trained personnel and increasingly complex regulations, probation today continues to fall short of its full potential as a cost-effective means of rehabilitation in the community. The evidence suggests that probation, in most cases, is still no more than a suspended sentence: supervision frequently entails nothing more than an occasional office visit, and the provision of meaningful services to the probationer is rare. Additionally, the selection of probationers is haphazard and generally unrelated to the defendant's needs or suitability for probation supervision.

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"Come in Mike. Are you working?" "Yes."

"Are you home with your family?" "Yes."

"Are you drinking any?" "No."

"Do you make any hooch?" "No."

And then — seemingly in sudden inspiration:

"If you are not making any hooch, are you selling any?" "No."

"Have you any money for the fine?" "Yes."

"All right, here's your receipt. Now be good. Good-bye." "Good-bye."<sup>25</sup>

\* In their zeal to recommend for probation the most promising candidates, the new profession apparently fostered this conservatism. The 1925 Crime Commission reports the greatest use of the suspended sentence, including probation, in upstate rural areas where probation services were largely nonexistent, the lowest use in New York City where probation services were highly developed. This unexpected phenomenon they attribute to the simple fact that the New York City Department of Probation imposed a stringent screening process on prospective probationers.<sup>25</sup>

### A. *The Selection of Probationers*

New York's current sentencing scheme places substantial reliance on the professional expertise of probation officers to evaluate when probation is the most appropriate disposition. The presentence investigation reports prepared by probation departments are purported to provide a scientific appraisal of both the offender's needs and available treatment alternatives, in order to enable the judge to single out those offenders whose criminality results from problems which probation supervision might resolve.<sup>26</sup> But as we described in an earlier chapter, it is a rare presentence report which fulfills this goal.

In general, the reports do not describe treatment alternatives nor — even more important — do they state whether the offender *needs* probation services.<sup>27</sup> The result is that probation may be too frequently employed for offenders who need no supervision and for whom another community sanction — fine, restitution, or community service — would be a more appropriate and less costly disposition.\* Other offenders who *could* benefit from probation and who would be good risks may nonetheless be sentenced to local jail, or even to state prison.

Our knowledge of how the selection process really works is significantly limited by the fact that probation departments keep little useful information describing the characteristics of those who are chosen for probation. Available statistics do not describe the offenses for which probationers were convicted, their prior criminal history, their social and educational background, or the type of service needs they present; age, race and the felony or misdemeanor class of conviction are the only items of information recorded.<sup>29</sup> From the available data, one can ascertain that probationers are generally young, and are most frequently convicted of misdemeanors, but that is all.\*\*<sup>30</sup>

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\* Evidence of this phenomenon is the large number of probationers who are maintained in a so called "administrative caseload." These are probationers whom the probation department feels do not need and would not benefit from probation supervision.<sup>28</sup>

\*\* We do know, however, that certain groups of offenders may not receive probation because they are ineligible by statute. Conviction of any Class A, Class B, and certain "designated" Class C or D felonies now mandates a sentence of imprisonment;<sup>31</sup> an offender convicted as a second or habitual felony offender is also ineligible to receive a sentence of probation.<sup>32</sup>

Nor are their rehabilitative needs exhaustively catalogued. By interpolating from our knowledge of the prison population, we can only guess that a substantial number of probationers are under-educated, unskilled, and are drug or alcohol dependent.<sup>33</sup>

### B. *The Content of Probation Supervision*

Today, despite elaborate regulations, probation supervision in most cases still exists "in name only".

The stated aspirations of probation are embodied in a set of standards promulgated by the State Division of Probation.<sup>34</sup> These standards focus primarily on the number of "contacts" to be made with the probationer, which varies from one to four per month, depending on the probationer's "supervision classification."<sup>35</sup> In addition, one to four "collateral" contacts with the probationer's family, friends or other sources which might be helpful in assessing his progress, are also required. No guidance is provided, however, as to *how* the required contacts are to be made, their *length*, or what the probation officer should actually *do* during the time he spends with the probationer.<sup>36</sup>

In reality, supervision practices seldom come close to meeting these minimal requirements. Probation supervision has been repeatedly described as inadequate and ineffectual.<sup>37</sup> Interestingly enough, evaluations of supervision practices in New York during the sixties and early seventies describe exactly the same deficiencies as had been cited during probation's infancy,<sup>38</sup> and recent studies report no appreciable change. As one report summed up current supervision practices in New York City:

"Home visits are infrequent or nonexistent. Most contacts consist of reporting to the branch headquarters, on a monthly basis or even less frequently. Many of these visits are reportedly brief."<sup>39</sup>

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\* The supervision classification is determined by the amount of time the offender has been on probation (i.e., all probationers receive intensive supervision for the first three months) and adjustment to the conditions of probation. The regulations require four direct and four "collateral" contacts per month for "intensive supervision" cases, two direct and two collateral contacts for "active supervision" cases, and one direct and one collateral contact for "special supervision" cases.<sup>35</sup>

The evaluators also found that service plans are seldom formulated, and that community resources are poorly utilized. Revocation procedures, for which there are no uniform standards, are also described as uneven and erratic.

Reports on other probation agencies elsewhere in the state have similarly stressed the *pro forma* quality of supervision, the lack of coordination with community resources, and the inadequacy of supervision plans and service delivery.<sup>40</sup> In an analysis of supervision practices in Monroe County, for example, the State Division of Probation found that community treatment resources were greatly underutilized:

“[O]f 524 cases under scrutiny only 160 referrals were made, roughly one referral in every three cases. In these referrals, many, but an undetermined amount of them, were not probation initiated.”<sup>41</sup>

What probation officers *do* spend much of their time on, by contrast, is simply filling out forms:

“Much Probation Officer activity consists of following-up on rearrest notices (the “hit list”), in notifying the court, in eventual filing of violation petitions, and in preparing progress reports as requested by the court... Substantial time is also spent on filing for early discharge of probationers.”<sup>42</sup>

It must be noted that inadequate supervision is not a phenomenon unique to New York State. A recent report on state and county probation systems across the nation found that probation officers spent only 22% of their time with offenders; the average time for case supervision was 34 minutes per month per probationer, including all paperwork and collateral contacts. Although provision of needed services was found to be significantly related to successful probation, only a small percentage of the service needs of probationers were met via probation supervision.<sup>43</sup>

### C. *Why is Probation Supervision So Inadequate?*

Despite substantial changes in regulations, training and funding,

the quality of probation supervision has remained remarkably constant over the years — and remarkably low.

Several factors contribute to the inadequacy of probation supervision. Probation departments are underfunded and understaffed. They have also been plagued by ineffective administration and planning. Most important, the goal of delivering services to probationers that will enable them to avoid future criminality has not been clearly established or given the necessary priority. In terms of manpower and resources, providing services to the courts has been emphasized at the expense of providing supervision to probationers. Compounding these problems is the fact that probation is often treated as a catch-all disposition, handed to virtually every defendant felt unsuitable for incarceration, without regard to actual need for supervision.

#### 1. *Inadequate resources:*

Probation departments have been denied resources adequate to perform quality supervision. Although probation is the sanction most frequently employed in New York, it receives an extremely small share of the correctional dollar; the state prison system spent at least \$234,000,000 in 1977,<sup>44</sup> while probation departments were allotted no more than \$78,000,000.<sup>45</sup> The percentage level of state aid to probation has also declined in recent years.<sup>46</sup> As a result, support staff in most local departments is minimal, and working conditions and salary levels are often below those of competing employers. Some departments (like New York City's) thus simply cannot attract or keep top quality personnel.

A major consequence of inadequate resources is too many probationers for too few probation officers. Caseloads in some local departments require an officer to supervise more than 150 individuals.<sup>47</sup> While caseload statistics are themselves often misleading,\* there can be no doubt that many probation officers are simply unable to do anything more than provide five minute office visits to probationers.

This is not to say, however, that more money will automatically guarantee better probation. Reduction in the size of caseloads is probably a *necessary* condition for quality supervision, but it is certainly not a *sufficient* condition. Years of caseload variation studies

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\* Largely because cases on "administrative caseload," which we alluded to earlier, are counted as part of probation's caseload, though they require and receive no effort from probation officers.

aimed at determining the "ideal" ratio of probationers to staff, have failed to establish that for adult probationers, caseload size has any appreciable impact on probation outcome:

"The weight of the scientifically valid evidence is on the side of the hypothesis that caseload reduction alone does not significantly reduce recidivism."<sup>48</sup>

An officer with fewer cases has more time to help a probationer, but he must be willing and able to make use of that time if it is to be of any real benefit.

## 2. *Poor management:*

The type of direction and oversight necessary for effective use of the probation officer's time has not come from those who administer probation. Rather, the effect of management policy often is to discourage more than perfunctory supervision and tie probation officers to their desks with red tape. A recent evaluation of probation practices in New York City, for example, found that despite the problem of large caseloads, the principal impediment to community work by probation officers was simply administrative policy:

"[I]n order for a probation officer to enter the field at the present time, the officer must first document in detail the reason for such field visits, complete a detailed 'supervision work plan sheet,' secure the approval of a supervisor, and check in (via time clocks) at the appropriate branch office beforehand. To compound matters, supervision cases in many of the branches are assigned on a borough-wide basis, thus significantly increasing the travel time required to make home or collateral visits."<sup>49</sup>

This is not to say that all probation agencies pose such obstacles to effective probation work. Officers from some counties report that community work is encouraged and fostered.<sup>50</sup> Such encouragement is not, however, the norm. On the contrary, the administration of probation in New York is generally characterized by bureaucratic ritual and mechanistic routine.<sup>51</sup>

Quality control and program evaluation are also virtually non-existent. Local probation departments generally lack sufficient resources or management sophistication to perform these tasks, and the State Division of Probation — which has been entrusted with overall planning and evaluation of probation in New York State — has been largely ineffectual in providing needed direction or in securing compliance with its own standards.<sup>52</sup>

### 3. *Fragmented goals and priorities:*

Compounding this lack of intelligent and forceful management — and flowing inexorably from it — is the fact that the activities of probation departments in New York have not been organized around the central goal of providing services to probationers.

In reality, conducting presentence investigations for the courts — not probation supervision — is the chief priority of most probation departments. This is amply demonstrated by the way in which probation departments spend their money: 50% of all probation dollars is devoted to presentence reports, while only 40% goes to probation supervision.<sup>53</sup> Otherwise put, the cost of preparing a single Supreme Court presentence report in New York City is \$310, while the cost for a year of Supreme Court probation supervision is only \$266.<sup>54</sup> Torn between two tasks, probation departments perform neither very well — and supervision of probationers, in particular, is given short shrift.

Moreover, because the real purpose of probation supervision — delivering social services to the probationer — has not been clearly defined, insufficient attention is paid to assessing the needs of potential candidates for probation, or determining what programs could best meet those needs. As a result, community sanctions *other* than probation have never been energetically or systematically developed across the state — although prosecutors, defense attorneys and judges cite the lack of such alternative dispositions as a pressing problem.<sup>55</sup> While newly developed sentencing options such as day fines,\* community service\*\* and restitution centers\*\*\* have been successfully employed in other jurisdictions, they exist in New York in only a few locations and on an experimental basis.

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\* Day fines are calculated on the basis of average daily income rather than at a flat rate. They are widely utilized in several European countries and have been favorably evaluated by numerous commentators.<sup>56</sup>

\*\* Community service is a form of in-kind reparation by means of labor in the

In addition, the supervision process itself has not been structured to promote the delivery of social services. Supervision is now little more than a mechanical reporting-in process, whose sole requirement, in actual practice, is that the probation officer make a specified number of "contacts" with the probationer, regardless of their purpose, quality, duration, or results. Such a system can never hope to meet the needs of probationers. For one thing, it demands too much of the individual probation officer, who simply cannot be expected to possess the skills necessary to handle, on his own, the variety of problems which contribute to delinquent behavior. The role of the probation officer should be to direct the probationer to specialized agencies which can frequently provide better and more intensive help to the probationer.<sup>59</sup> While probation departments have recognized that the probation officer should act as "resource broker", probation practices still tend to follow the same outmoded reporting-in routines. Unless management takes vigorous corrective action, little will change.

Another example of fragmented priorities is the fact that many probation officers whom we interviewed seemed uncertain whether helping the probationer to avoid future delinquent behavior was more important than dogging his steps and turning up violations. In our view, probation officers who are encouraged to play private detective at the expense of providing probation services are unlikely to be of much assistance to the probationer — and will accomplish little else, besides.

As we earlier discussed, research regarding parole supervision — where surveillance has traditionally been stressed — has concluded that parole officers are generally unsuccessful at discovering new criminal activity.<sup>60</sup> As one commentator aptly put it, "What the parole officer can do... can be better done by the police."<sup>61</sup> Common sense leads to the same conclusion. Short of twenty-four hour supervision, the likelihood that the probation officer will apprehend a probationer in the midst of planning or executing a criminal act is virtually nil; if information is available that links the probationer to a crime already committed, the police are certainly better equipped to effect an arrest. Nor is there any evidence that the deterrent effect

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community. It is widely employed in Great Britain, and has been successfully implemented in several American jurisdictions.<sup>62</sup>

\*\*\* Restitution centers are community facilities where the offender resides while working to make reparation for his offense. They have been successfully implemented in Minnesota and Georgia as a means of early prison release.<sup>63</sup>

of probation supervision is enhanced by increased emphasis on surveillance.<sup>62</sup>

#### D. *How Probation Succeeds*

Despite these glaring deficiencies in the supervision process, it is startling — and essential — to note that probation has repeatedly been found to be at least as effective — and for many offenders *more* effective — than incarceration in preventing future criminal activity.

The primary reason for probation's success is that the probationer avoids the damaging effects of a prison sentence and the resulting difficulties of reintegration into the community — the very problems which led early probation advocates to seek its widespread use as an alternative to incarceration. As the National Advisory Commission on Criminal Justice Standards and Goals stressed:

“Nearly two centuries of experience with the penitentiary has brought us to the realization that its benefits are transient at best. At its worst, the prison offers an insidiously false security as those who were banished return to the social scene of their former crimes. The former prisoner seldom comes back the better for the experience of confinement... Attitudes are brutalized and self-confidence is lost.”<sup>63</sup>

The damage done by prison life is apparently strong enough that *any* type of probation or community sanction (whether or not it involves supervision) is at least as effective in preventing recidivism as incarceration, if not *more* so. A substantial body of research supports this view.

One Wisconsin study followed 5,274 male offenders and compared reconviction rates, over a two-year period, of those placed on probation with those sent to prison and paroled. Among offenders convicted of the same type of offense, and having a similar criminal record and marital status (the factors most highly predictive of recidivism in this group), the success rate of probation, measured by recidivism, was about the same as that of imprisonment — and was significantly *better* for first offenders.<sup>64</sup>

Similar findings were made in California. Comparison of recidivism rates of 2,148 adults placed on probation with 2,561 similar offenders

(in terms of age, criminal history, and race) who had been jailed revealed that probationers did substantially better: they were arrested for a new crime or technical violation of probation considerably less often than those who had been incarcerated (48.5% versus 65.8%).<sup>65</sup>

Another research team compared the reconviction rates of offenders (again with similar offenses, records and backgrounds) who had received sentences of incarceration, probation and fines. The reconviction rate of the group that was fined was lower than that of *both* the probationers and prison inmates, whose rates were roughly the same.<sup>66</sup> Offenders sentenced to residential restitution programs have also been found to succeed at least as well in avoiding future criminal activity as similar offenders who were incarcerated.<sup>67</sup>

Other studies, in other jurisdictions, have generally substantiated these findings.<sup>68</sup>

These results are even more dramatic when the cost of institutional commitment is compared with that of probation or other community sanctions. A year of incarceration in one of New York's state prisons costs at least \$15,000; a year of probation supervision approximately \$300,<sup>69</sup> and a simple fine or restitution order approximately nothing.

Because of the comparative costs and benefits of incarceration, probation and community sanctions, virtually every major study in recent years — including the Model Penal Code<sup>70</sup> and standards promulgated by the American Bar Association,<sup>71</sup> the National Council on Crime and Delinquency,<sup>72</sup> the National Advisory Council on Criminal Justice Standards and Goals,<sup>73</sup> the New York State Division of Criminal Justice Services,<sup>74</sup> and the National Conference of Commissioners on Uniform State Laws<sup>75</sup> — has concluded that a sentence of incarceration should be imposed only when nothing less will do, and that probation or some other form of community sanction should be the presumptive sentence for crimes which do not entail serious harm. The advantages of probation and other community sanctions vis-a-vis incarceration have also led several states to implement financial incentive programs designed to encourage the development of a broad range of sentencing options at the local level, and to encourage their use.<sup>76</sup>

### *Conclusions About Probation*

Notwithstanding the fact that probation supervision is often an empty ritual, which fails to provide meaningful assistance to probationers, we believe that as a cost-effective alternative to incarcer-

ation, probation is still one of the brightest hopes of corrections. In order to make that hope a reality, however, a wider range of community sanctions must be established, and delivery of services to probationers must be made the central focus of probation. Better management and increased funding are also a *sine qua non* for improving the quality of probation supervision. Later in this report, we will outline, in more detail, our proposals for revamping probation and developing other alternatives to incarceration as an integral part of our system of sentencing.

\* \* \*

This concludes our examination of how New York's present sentencing system actually works, and what happens before and after sentencing. We turn now to a discussion of how sentencing, and the criminal justice process as a whole, should be altered to enhance the equity and effectiveness of criminal sanctions. This second part of our report begins with a question fundamental to sentencing reform: what are the goals of sentencing, and how are they to be achieved through reform of New York's indeterminate system?

**PART II:**

**A PROPOSAL FOR  
SENTENCING REFORM**

## *Chapter VII* *The Goals of Sentencing*

A new sentencing system for New York should be designed to achieve goals which are both rational and attainable. Before we can choose among alternatives for reform, we must define with some specificity the goals which our sentencing laws should serve.

Without repeating here all that legal and moral philosophers have written concerning the proper role of penal sanctions, we believe that two preeminent goals of sentencing are commended by both learned treatises and plain common sense.

First, a sentencing system should aim to do justice to all those with a stake in the sentencing process: the offender, the victim, and the public-at-large. Second, to the extent possible, sentencing laws should protect the public by preventing crime.

How these two goals should shape the form and substance of our sentencing laws is a subject which requires further elaboration.

### *Doing Justice*

If our sentencing laws are to accomplish the initial goal of doing justice, they must be fair, consistent and uniformly applied.

— Fairness requires that the severity of criminal sanctions be directly related to the seriousness of the offense and the offender's prior criminal record. The sanction to be imposed should be no more severe than is strictly necessary to achieve legitimate sentencing goals.

— Consistency demands a graduated system of penalties proportionate to the harm caused by criminal conduct.

— Uniformity mandates that similar crimes committed under similar circumstances by similar offenders should receive similar treatment.

While the elimination of unwarranted sentence disparity is essential to increasing the equity of penal sanctions, we strongly believe that no sentencing system can be just which entirely eliminates judicial discretion and mechanically applies a set of penalties to preconceived categories of offenders and offenses. Judicial discretion must be retained to tailor penal sanctions to the unusual case and unforeseen combination of circumstances, but that discretion must be guided, structured, and subject to meaningful appellate review.

### *Protection of the Public*

The second goal of sentencing — protecting the public from

crime — raises special problems which require more extended discussion.

It is now widely recognized that crime is essentially a product of social, economic, and cultural forces which lie beyond the reach of the criminal justice system.<sup>1</sup> Our sentencing laws, while they may succeed, to a lesser or greater extent, in controlling the incidence of crime, cannot “cure” the crime problem, since they cannot exorcise the social ills which breed lawless conduct. This is the responsibility of other social institutions. Nor are criminal sanctions our only — or even our best — defense against crime. Most men and women refrain from committing serious crimes not out of fear of punishment, but because they have imbibed certain values which constitute our society’s idea of right and wrong. Thus it may be that “[t]he socialization process keeps most people law-abiding, not the police...”<sup>2</sup>

In order to protect society against those who do not exercise such self-restraint, our sentencing laws have traditionally adopted three objectives as techniques for crime control:

- to deter future criminal conduct through the threat of sanctions;
- to incapacitate offenders so that they cannot commit future crimes; and
- to rehabilitate offenders so that they will become law-abiding members of society.

While we believe that each of these sentencing objectives has an appropriate role to play in a rational sentencing system, it is important to be precise and realistic about what that role should be. We now turn to an examination of how each of these objectives should influence the type or length of sanctions to be imposed on offenders.

### 1. *Deterrence*

A long established purpose of penal sanctions is to discourage people from breaking the law by threatening to punish them for their illegal acts. This idea of “deterrence” is not peculiar to criminal law; it is also embodied in the civil law, taking the guise of compensatory or punitive damages. As a means of furthering the goal of crime control, we believe that deterrence is a manifestly proper objective of sentencing. Still, a practical question remains: how should considerations of deterrence affect the sentences we impose?

There has been much debate over whether deterrence "works".\* In our view, this controversy is far too abstract to be of any interest. We know from daily life that the threat of unpleasant consequences tends to deflect us from certain forms of behavior; similarly, it is too clear for argument that *some* punishment deters *some* potential offenders in *some* circumstances from committing *some* crimes. On the other hand, it is always possible to find examples where the threat of sanctions has failed to deter. The critical question is not *whether* criminal sanctions deter, but a far narrower one: would one sanction provide a more effective deterrent for a given offense than another? If so, how should this be reflected in a rational sentencing scheme?

We recognize that, to many, the answer may be self-evident. There is a widespread belief that by increasing the severity of sanctions, we can prevent crime. As one criminologist has put it:

"People more often seem to think in a straight line about the deterrent effect of sanctions: if penalties have a deterrent effect in one situation, they will have a deterrent effect in all; if some people are deterred by threats, then all will be deterred; if doubling the penalty produces an extra measure of deterrence, then trebling the penalty will do still better. Carried to what may be an unfair extreme, this style of thinking imagines a world in which... the threat of punishment will result in an orderly process of elimination in which the crime rate will diminish as the penalty scale increases by degrees from small fines to capital punishment, with each step upward as effective as its predecessor."<sup>4</sup>

We are convinced that reality is neither so simple nor so tidy. Our ability to deter crime by providing for more severe punishment may actually be limited by a variety of factors.

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\* A distinction is often drawn between "special" deterrence — the effect that the threat of sanctions may have on the already-punished offender's future conduct — and "general" deterrence, which refers to the effect which the threat of sanctions may have on the future behavior of others. It has been suggested that this is not a useful distinction, since special deterrence is merely one instance of general deterrence.<sup>3</sup> The following discussion focuses largely on general deterrence; special deterrence is subsumed in the pages we devote to rehabilitation.

*Increasing the Severity of Punishment*

At the core of deterrence theory is an assumption that men are rational, and will seek to avoid the pain of punishment. By increasing the severity of punishment, so the theory goes, the potential harm to the wrong-doer will come to outweigh the potential benefits of criminal activity, and individuals will thus be deterred from crime.

These assumptions seem to bear little relationship to much present-day criminal conduct. Far from being based on a reasoned, detached calculus of pleasure and pain, a considerable amount of crime — especially violent crime — appears to be impulsive and irrational, and little affected by fear of sanctions.<sup>5</sup> Moreover, a large percentage of offenders have been found to be under the influence of drugs, or alcohol, or both at the time the offense was committed; many others commit crime because they need money to support their drug or alcohol addiction.<sup>6</sup> Some offenders may be willing to risk future punishment — however severe — in return for immediate satisfaction or gain.<sup>7</sup> Criminals such as these would appear to be largely beyond the reach of deterrence, and relatively insensitive to changes in the level of sanctions.

Other offenders, of course, *do* coolly calculate whether or not to commit crime. Even in their case, however, merely raising penalties may prove an ineffective method of deterring crime. Some individuals, for example, responding to high rates of unemployment or other career barriers posed by racial discrimination and inadequate educational and job opportunities, believe that they have no acceptable alternatives to crime, however severe criminal sanctions may be. Such a decision, is, to their minds, a rational — and inescapable — career choice; and, as such, their behavior would seem to be beyond the power of the criminal law to deter.<sup>8</sup> Others may simply not know what punishment awaits them if they are convicted of a crime because of inconsistent or obscure sentencing practices. In fact, researchers have found that it is “probable that in most serious offenses the offender is not aware of the true possibilities of being caught, nor is he aware of the likely penalty should he be caught.”<sup>9</sup>

Given these inherent limitations on deterrence, it should not be surprising that a number of empirical studies attempting to measure the deterrent effect of different levels of punishment have arrived at mixed conclusions.

Several researchers have attempted to analyze how crime rates have varied over time as the severity of sanctions are increased or de-

creased.\* While their results are not always in harmony, the weight of the evidence is that "severity of punishment does not appear to be significantly related to variations in crime rates"<sup>11</sup> — except possibly for crimes for which the clearance rates are extraordinarily high. This gives rise to speculation that changes in the severity of sanctions may have a deterrent effect only when a high level of certainty of punishment has also been achieved.<sup>12</sup>

### *Increasing the Certainty of Punishment*

A substantial barrier to translating more severe penalties into lower crime rates is that punishment — whatever its severity — is far from certain. Since not all those who commit crimes are arrested or convicted, many will never reach the sentencing stage. Offenders may thus entertain the substantial hope that they can avoid punishment altogether, undermining any deterrent effect which increased sanctions might otherwise have.

From at least the time of Beccaria,<sup>13</sup> it has been argued that certainty of punishment is a more effective deterrent to crime than severity of punishment. In an effort to test this hypothesis, several studies have attempted to examine what happens to the crime rate when the certainty of punishment is enhanced.

Some researchers have focused on police attempts to deter crime by making the threat of arrest more credible. Two experiments conducted in New York City — placing more transit police in subways at night, and concentration of extra patrols in Manhattan's 20th District — coincide with a decrease in crime.<sup>14</sup> The use of intensive patrol

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\* One serious problem with these and related studies is that they require comparison of criminal justice statistics reported over a space of many years. We have described elsewhere in this report the glaring inadequacies of criminal justice data; these problems are compounded by the fact that reporting practices have changed dramatically with time. For example, police and other criminal justice agencies have become significantly more thorough in compiling arrest information than they were in the past; it is thus possible to blindly examine statistics relating to reported crimes and sentencing practices and conclude that crime had increased or decreased due to a change in the severity of sanctions, when in fact all that had occurred was a change in the method of crime reporting.<sup>10</sup> Other equally serious difficulties in interpolating data obviously exist: for example, where there are high crime rates and short sentences, an observer might conclude that the weakness of the sanction was a cause of crime. An equally plausible explanation, however, is that high crime rates, combined with the limited resources of the criminal justice system (in terms of police, prosecutors, judges, and prison capacity) made for shorter sentences, rather than *vice versa*. The problems of causation are impossible to untangle and greatly undermine our confidence in the results of this research.

techniques in Kansas City, however, produced no drop in crime.<sup>15</sup> An English experiment gave rise to mixed results: more stringent enforcement of drunk driving laws apparently had a short-term deterrent effect, which was quickly dissipated when the police reverted to less rigorous enforcement patterns.<sup>16</sup>

Other studies have focused on sentencing itself, in order to determine the possible effects of increasing the certainty of conviction and imprisonment. When researchers compared various levels of certainty of punishment with crime rates, it appeared that increasing the certainty of sanctions was a deterrent to crime.<sup>17</sup>

### *Severity vs. Certainty*

It should be noted that increasing the severity of punishment, at least beyond a certain level, may so weaken the certainty of punishment as to undermine the deterrent effects of sentencing. Commentators have suggested that "excessively severe penalties may actually reduce the risk of conviction, thereby leading to results contrary to their purpose... [T]he public is less inclined to inform the police, the prosecuting authorities are less disposed to prosecute and juries are less apt to convict."<sup>18</sup>

The Baumes Laws, which we have already discussed, are a case in point. The 1973 revision of New York's drug laws provide a more recent example. Designed to reduce both illicit use of drugs and street crimes committed by addicts, the sanctions contained in the new law earned it the title of "The Nation's Toughest Drug Law."<sup>19</sup> Life imprisonment was made mandatory for certain drug offenses, and other criminal penalties for sale or possession of controlled substances were substantially increased; there were also mandatory prison terms for repeat offenders and provisions strictly limiting plea-bargaining.

Notwithstanding these stiff penalties, a joint report issued by the Association of the Bar of the City of New York and the Drug Abuse Council found that the revised law had no deterrent effect — it failed to reduce heroin use or drug-related property crime.<sup>20</sup> The reason appeared to be, at least in part, that the severe sanctions contained in the 1973 law reduced the certainty of punishment. There were actually *fewer* arrests for drug offenses after the new law than before; a *smaller* percentage of repeat offenders who were arrested were indicted; a *smaller* percentage of these offenders who were indicted were convicted; and the time to process cases increased considerably.<sup>21</sup> The Bar Association report concluded that the law failed because the criminal justice system as a whole did not increase the threat to the offender, despite the increase in statutory penalties.<sup>22</sup>

### *Conclusions About Deterrence*

While deterrence is a valid sentencing objective, there is little reliable knowledge concerning what type and length of sanctions are most effective in deterring crime. Studies which have been done provide little guidance — except to convince us that statistical methods for evaluating the effects of harsher punishment are too crude, and the problems of defining cause and effect too complex, to justify saying anything with confidence. We subscribe to the view of one eminent criminologist that “[o]nly an incorrigible ideologue would regard such evidence as conclusive one way or another.”<sup>23</sup>

While there are, as we have indicated, limitations on our ability to deter crime, we are convinced that *some* crimes are more “deterable” than others. We thus find logic in the statement that “[s]imple common sense indicates that a threat of punishment does not play the same role in offenses as different as murder, rape, tax-evasion, shoplifting, or illegal parking.”<sup>24</sup> It has often been argued by criminologists that legal sanctions have little power to deter crimes of passion — such as murder — while they may have greater deterrent effect over some “rational” crimes committed for material gain.<sup>25</sup> Similarly, it has been remarked that “carefully planned acts are more easily deterred than those that result from a sudden, emotional impulse.”<sup>26</sup> The difficulty is to pin-point precisely what penalty levels will most effectively deter which crimes and which types of offenders — a task for which more empirical research is urgently required.

More categorical is our finding that increasing the certainty of punishment will likely have some deterrent effect on crime. In our view, this certainty can best be achieved through a system of relatively fixed, consistent sanctions to be imposed on similar offenders who commit similar crimes.

### *2. Incapacitation*

A second objective of sentencing has been to prevent crime by isolating and restraining offenders. The rationale for this strategy, commonly termed “incapacitation,” is simple and straight-forward:

“The purpose of isolating — or, more accurately, closely supervising — offenders is obvious: Whatever they may do when they are released, they cannot harm society while confined or closely supervised. The gains from

merely incapacitating convicted criminals may be very large. If much or most serious crime is committed by repeaters, separating repeaters from the rest of society, even for relatively brief periods of time, may produce major reductions in crime rates."<sup>27</sup>

The proposition that a prison sentence, even if it achieves nothing else, at least prevents the offender from committing new crimes against the community as long as he is behind bars, has a certain irrefutable logic. But this general statement provides an insufficient guide to sentencing policy, since for reasons of simple humanity and fiscal solvency, no one is prepared to advocate a sentencing scheme which would impose life imprisonment on all felons. The relevant question is again a specific one: What type and length of sentence, applied to what kinds of offenders and offenses, can most effectively reduce crime through incapacitation?

We must state at the outset that there is simply no way of knowing, with any degree of certainty, how much crime would be committed by those now imprisoned if they were at liberty, or how the crime rate would be affected if their sentences were increased or reduced. Because of low clearance rates, an inmate's prior record of arrests or convictions may provide an inaccurate reflection of his past criminal conduct. Moreover, studies have indicated that hard-core professional criminals are more likely to evade arrest and conviction than less serious offenders,<sup>28</sup> and hence may be under-represented in the prison population as a whole. Thus many offenders who commit the highest number of crimes may be relatively unaffected by changes in the length of sentence, since they are more successful than the ordinary felon in avoiding prison.

#### *Prevention of Crime Through Incapacitation: Conflicting Estimates*

Different studies using different assumptions arrive at different conclusions about the effect of longer sentences. Some studies predict that modifying sentence length would have little impact on crime. For example:

- a one year increase in all sentences would reduce index crime by no more than 4%;<sup>29</sup>
- a 50% reduction in the average time served by offenders would result in a 5.6% increase in all index crimes;<sup>30</sup>

- incarcerating all convicted felons for a period of five years would reduce violent crime by only 4%.<sup>31</sup>

Other researchers have predicted contrary results:

- adding one additional year of incarceration for all robbers would reduce the incidence of robbery between 35%-48%;<sup>32</sup>
- a five year mandatory term for every convicted mugger would reduce muggings "by a factor of five".<sup>33</sup>

A recent — and to date, the leading — study was conducted by the National Academy of Sciences in an attempt to reconcile these conflicting estimates.<sup>34</sup> On the assumption that incarcerated offenders would commit, on the average, ten index crimes per year if released, the study found that in order to reduce crime by 1%, the prison population of New York would have to be increased by 26%.<sup>35</sup> The study concluded that New York must increase its prison population by more than 150% in order to achieve a 10% reduction in index crimes through incapacitation.<sup>36</sup>

#### *The Effect on the Size of the Prison Population*

This conclusion that the prison population must be drastically expanded for incapacitation to have any effect on crime has been consistently echoed by other researchers. A recent study by the Rand Corporation stated that:

"A three year commitment for all convicted defendants, if applied exclusively to burglary, would result in a 500 percent increase in the number of offenders incarcerated for this crime and a 50 percent decrease in the burglary rate... A 50 percent reduction in robberies would require at least a 200 percent increase in the incarcerated robber population and an average term exceeding five years."<sup>37</sup>

On the basis of these and other estimates, experts have been led to conclude that "incapacitation is likely to make only a dent in crime rates even as large public expenditures in terms of prison usage are applied".<sup>38</sup>

The reason why incapacitation is such a costly strategy is that it is a terribly blunt instrument. Not all convicted offenders will commit further crimes when they are released; a policy which increases the prison terms of *all* offenders in order to prevent *some* inmates from committing crimes upon release is bound to be inefficient. Yet efforts to make the period of incarceration more accurately reflect the "social risk" posed by the individual offender have, in the main, proven futile. The difficulty is a basic one: we cannot predict with accuracy whether or not an offender will commit future crimes.

### *Predicting Future Criminal Conduct*

While parole boards have traditionally made release decisions based on judgements concerning whether an inmate presented an undue risk to the safety of the community, it is well-established that not even the most expert "psychiatrists nor anyone else have reliably demonstrated an ability to predict future violence or dangerousness."<sup>39</sup> At least eight studies have conducted "natural experiments," in this area, arising out of situations in which appellate courts, for constitutional reasons, ordered "dangerous offenders" to be released from prisons and hospitals for the criminally insane. Panels of psychiatric experts attempted to predict, before their release, which of the inmates would in fact commit future acts of violence. The results are consistent and startling: the great majority of persons predicted to be dangerous were not, in reality, found to have been guilty of violent acts after their release. Violence was vastly over-predicted — while 15-20 percent of those offenders considered to be dangerous *did* commit acts of violence, 80-85 percent of the supposedly "dangerous" offenders proved to be non-violent when they were returned to society.<sup>40</sup>

Because attempts to make individual predictions of dangerousness have been so thoroughly discredited, emphasis has recently shifted to use of various actuarial techniques as a prediction tool. Thus, a "violence prediction scale," based on certain objective factors, was developed by the California Department of Corrections — and proved inaccurate for 86% of the offenders whom it identified as "dangerous" but who were not subsequently arrested for any crime while at risk on parole.<sup>41</sup> More recent studies conducted in Washington, D.C., using sophisticated statistical techniques also failed to predict, with accuracy, which offenders would recidivate: while correctly identifying 901 offenders as likely to recidivate, researchers misidentified 1,451 offenders as future recidivists, and failed to identify 275 people who actually did recidivate.<sup>42</sup>

In sum, it is clear that many offenders who are likely to be serious recidivists can be accurately identified — but “a larger number of nonserious recidivists and persons who would not commit future crimes are bound to be mistakenly identified as future offenders.”<sup>43</sup> The reason, of course, is that “[u]nlike the incipient tubercular, the potential recidivist does not carry easily spotted symptoms of his condition...”<sup>44</sup> Rather, as one researcher puts it, “save for perhaps the grossest kind of ‘psychotic behavior’, there are few, if any, correlations between diagnosis and patterns of behavior.”<sup>45</sup>

### *Prior Criminal Record and Future Criminal Conduct*

It is commonly believed, however, that there is at least one “easily spotted symptom” of future recidivism — a history of past crimes. Predicate and habitual felon statutes are based, in part, on precisely this assumption.\* Research has found, however, that prior criminal record is far from an infallible guide to future criminal conduct.

The Rand study of habitual felons, for example, concluded that “[a]lthough the length and seriousness of a defendant’s prior record give an indication of his propensity toward future serious crime, the predictive value of this information by itself is weak.”<sup>46</sup> Specifically, the Rand researchers found that “arrest records do not suffice in distinguishing among the more serious and the less serious habitual offenders. When we compare the rap sheets of the intensives [offenders] as a whole with those of the intermittents [offenders] as a whole, no significant differences emerged between the types — not only in arrests, but also in convictions and incarcerations. Yet, by their interview responses, we know that the intensives, less than one-third of the sample, had committed a disproportionately large number of the offenses reported.”<sup>47</sup>

This inability to determine which offenders will recidivate by referring solely to prior criminal record, frustrates attempt to prevent crime through mandatory sentencing for habitual felons. In fact, one study has asserted that “mandatory-minimum sentencing policies that focus only on defendants with prior records, although they may accord better with the notion of just deserts, appear to be less effective in reducing crime than policies that ignore prior record.”<sup>48</sup>

There are two basic reasons why an offender’s prior record, in and of itself, may have only limited predictive value. First, because of

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\* Statutes providing for increased penalties for repeat offenders can also be supported on an entirely independent ground: offenders who persist in committing crimes simply *deserve* more punishment than first-time offenders.

low clearance rates, there may be little correlation between his actual criminal conduct and his record of arrests or convictions. Second, older offenders are likely to have the longest criminal records — yet research indicates that *younger* offenders are more criminally active than older offenders, and that individual offense rates decline markedly with age.<sup>49</sup> The result may be that habitual offender statutes are ineffective in terms of achieving the maximum incapacitative effect since they mete out the stiffest sentences to the wrong people — older offenders who are near the end of their criminal careers.<sup>50</sup>

### *Conclusions About Incapacitation*

Incapacitation of offenders through imprisonment is a valid sentencing objective; nevertheless, our present lack of knowledge severely limits the role which incapacitation can play as a purpose of sentencing. Specifically, we do not know what length of sentence, for which types of offenders or offenses, will have the maximum effect in preventing crime through incapacitation — or how much crime could be prevented. It is clear, however, that incapacitation is an extraordinarily expensive strategy — too expensive, in terms of increased prison costs, to be applied indiscriminately, especially for benefits which are so speculative.

Our belief that criminal sanctions should be calibrated to both the seriousness of the offense *and* the prior criminal record of the offender is thus premised more on considerations of justice than crime control. Repeat offenders merit additional punishment because of their sustained unwillingness to abide by the law. If increased penalties for recidivists also have some marginal utility for crime control, we regard this as a subsidiary benefit, rather than a primary purpose, of our sentencing laws.

### 3. *Rehabilitation*

Under the indeterminate sentencing system, criminal conduct is considered to be akin to an illness, which is to be cured during the offender's term of incarceration. Since the judge cannot predict, at the time of sentencing, when this cure will occur, he sets only the outer limits of the sentence; it is traditionally the task of the parole board to determine when and if an offender has been rehabilitated and to release him at the appropriate moment.

We believe that this mode of sentencing simply fails to correspond to reality. While rehabilitation of the offender may properly be a con-

sideration in imposing a non-incarcerative sanction, we conclude that rehabilitation should *not* be a justification for imposing a term of confinement, nor should it influence the length of a prison sentence.

In our view, the indeterminate system is misguided, first of all, in assuming that prison provides a conducive environment in which to achieve the rehabilitation of offenders. All the evidence is to the contrary.

### *The Rehabilitative Effect of Prison*

That exposure to prison may actually harm, rather than help, the reformation of offenders is indicated by several studies exploring the relationship between the length of an inmate's prison term and his future criminal conduct. In Florida, for example, when a large number of inmates were ordered released before the expiration of their terms because of *Gideon v. Wainright*, researchers "matched" them with similar offenders who remained to serve out their full sentences. The results were startling: those serving shorter terms were found to have a significantly *lower* recidivism rate.<sup>51</sup> Other studies have found that "success rates decrease or remain fairly consistent with increased time served in prison."<sup>52</sup> In short, the evidence indicates that inmates serving briefer sentences will tend to do better upon release, or at least no worse, than similar offenders serving more extended terms.<sup>53</sup>

These findings raise the possibility that far from providing a "cure" for crime, prisons themselves may be criminogenic — they may *breed* crime. As researchers have stated:

"It is difficult to escape the conclusion that the act of incarcerating a person at all will impair whatever potential he has for crime-free future adjustment and that, regardless of which 'treatments' are administered while he is in prison, the longer he is kept there the more likely will he deteriorate and the more likely it is that he will recidivate. In any event, it seems almost certain that releasing men from prison earlier than is now customary in California would not increase recidivism."<sup>54</sup>

If the prison environment itself hampers efforts at rehabilitation, exposure to various types of programs seems unable to overcome these ill effects. Studies indicate that, in general, "formal education gained

in prison has little relationship to post-release success<sup>55</sup> measured in terms of recidivism. Nor do offenders who participate in vocational training programs have lower recidivism rates than other offenders.<sup>56</sup> Similarly, group counselling has been found to have little or no impact on recidivism.<sup>57</sup>

Our lack of knowledge concerning *how* to rehabilitate offenders through imprisonment is matched only by our inability to predict *when* or *if* an offender has, in fact, been reformed. As we have remarked in connection with our discussion of incapacitation, it has long been established that it is beyond the powers of the parole board (or any other groups of experts) to determine when an offender has been rehabilitated, or which offenders pose no further risk of criminal conduct.<sup>58</sup> The New York State Parole Board (as well as its federal counterpart) has recognized this fact in abandoning rehabilitation as a criterion for making release decisions — basing them instead on the seriousness of the offense and the offender's prior criminal record. It is not hyperbole to state that the basic justification for the indeterminate sentence has thus been rejected by the Parole Board itself.

### *Rehabilitation as a Goal of the Correctional System*

These facts compel the conclusion that the objective of rehabilitation should play no role in shaping a sentence of incarceration. Once it is determined that a prison sentence will be imposed, rehabilitation should, however, be a paramount goal of the *correctional* system. Let us be clearly understood: an offender should not be sentenced to a prison term in order to rehabilitate him — but once he is sentenced to prison, a primary task of prison officials is to enhance the inmate's possibilities for re-integration into society as a law-abiding citizen. We do not reject rehabilitation; we reject attempts to *coerce* rehabilitation through sentencing.\*

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\* Norval Morris has described how attempts to coerce rehabilitation actually sabotage the rehabilitative enterprise. As he puts it:

“Unwisely we link the time to be served to involvement in, and apparent response to, prison treatment programs. What is launched as an incentive system turns out to be a barrier to the treatment itself. It may be that, setting aside physiological methods of changing people — surgery, drugs, and the steadying effects of the passage of time — rehabilitation can be given only to a volunteer. We do not know how many volunteers we attract to prison programs. What is sadder, they themselves do not know.”<sup>59</sup>

We again emphasize that the objective of rehabilitation should be a consideration in determining whether a non-prison sentence would be more appropriate than confinement for crimes which do not involve serious harm. Research indicates that the recidivism rate for probationers is no higher, and perhaps lower, than that of similar offenders who are sentenced to prison.<sup>60</sup>

Apparently, then, probation is equally as effective as incarceration in reducing recidivism. Since the preservation of family ties, a place to live, and a paying job seem to be closely related to reducing recidivism<sup>61</sup> and are disrupted, if not destroyed, by imprisonment, the rehabilitation of some offenders may therefore be better promoted by a non-prison sentence.

\* \* \*

### *Conclusions*

Two goals should animate our sentencing laws: to do justice by imposing sanctions calibrated to the severity of the offense and the offender's prior criminal record, and to protect the public by preventing crime. We have frankly stated the inherent limitations on the ability of *any* sentencing scheme to control crime — limitations which lead us to conclude that, while our sentencing laws should make provision for the informed use of deterrence and incapacitation in appropriate circumstances, they cannot be the primary determinant of the type or length of the sentence to be imposed. Justice must dictate the boundaries of sentencing. To the extent that we possess — or come to possess — reliable knowledge concerning the effect of sentencing on crime, we may raise or lower sentences *within* those boundaries, but not exceed them in the direction of either leniency or severity.

It is abundantly clear to us that the goals of sentencing which we have enunciated here cannot be accomplished within the confines of the indeterminate system. Nor can indeterminacy, which gives rise to sentencing practices widely viewed as arbitrary, inconsistent, or plain incomprehensible, promote respect for the law, which is ultimately the true means of assuring law-abiding behavior. While we recognize that perfection cannot be expected from any sentencing scheme, we believe that the indeterminate sentencing system is a failure, and should be abandoned. Thus we now turn to an examination of determinate sentencing models which have been proposed or adopted in other jurisdictions as alternatives to the indeterminate system.

*Chapter VIII*  
*Alternative Sentencing Models*

Determinate sentencing means different things to different people. To some, it conjures up the image of a mechanical, inflexible sentencing system, unable or unwilling to take into account the uniqueness of the offender or the offense. To others, determinate sentencing is the best hope for increasing the uniformity and consistency of our sentencing laws, while providing safeguards for the informed exercise of judicial discretion which is an essential element of justice.

In fact, both views may be correct — depending upon which *model* of determinate sentencing is in the eye of the beholder. Determinate sentencing is not a monolith.<sup>1</sup> Proposals that bear its label run the gamut from simple-minded Procrustean measures that would impose the same sanction for an astonishing variety of offenses (and offenders), to sophisticated schemes designed to achieve uniformity while recognizing diversity. The *differences* between various models of determinate sentencing may, in several important respects, seem far more striking than the similarities.

Central to all determinate sentencing models, however, is the aim of enhancing the certainty and consistency of sentencing. In order to achieve this goal, proponents of determinate sentencing believe that judicial discretion in imposing sentence should be limited, or at least guided and structured. Determinate schemes generally would do this through a system of relatively fixed sanctions, calibrated primarily to the nature of the offense and prior criminal record of the offender. Advocates of determinacy believe that such a system would cure a major evil fostered by indeterminacy — sentence disparity — which is seen to be both unjust and to undermine the deterrent effect of the law.

Proponents of determinate sentencing also agree that rehabilitation, a prime justification for the indeterminate sentence, should *not* be the basis for imposing a sentence of incarceration. In their view, rehabilitation is an inappropriate sentencing goal for at least two reasons, which we have described at length earlier in this report. First, prisons have been notoriously ineffective in reforming offenders. Second, parole boards are simply unable to tell when or if an offender has in fact been rehabilitated. Those favoring determinacy have therefore been led to conclude that the length of a prison term should not depend upon the offender's purported progress towards rehabilitation.

Beyond these fundamental areas of agreement, determinate sen-

tencing models diverge — and diverge sharply — in how they set about achieving their goals. What follows is an analysis of the various determinate sentencing schemes which have been proposed or adopted in other jurisdictions, and our assessment of the strengths and weaknesses of each.

### *Flat Sentencing\**

Flat sentencing merely means that the sentence meted out by the judge is the sentence the offender will actually serve, except as it is reduced by good-time.<sup>4</sup>

A flat-time system does little to restrict the discretion of the sentencing judge. The legislature merely places crimes into a small number of broad categories, and provides a relatively wide sentencing range for each (usually with enhanced terms for repeat offenders). The judge must then impose a “flat” sentence, i.e., 5 years, anywhere within the prescribed range. Under such a system, parole release is abolished.

Flat sentencing has simplicity to recommend it — and little else. It does not succeed in reducing sentence disparity, since the judge is given no guidance as to where, within the permissible sentencing range, to impose sentence. Thus in Maine, a first offender convicted of rape could receive a “flat sentence” of anywhere from 0 to 20 years,<sup>5</sup> and in Illinois the sentence could be from 6 to 60 years.<sup>6</sup> In essence, the only thing that flat sentencing accomplishes is to abolish parole, without remedying any of the other weaknesses of the indeterminate system.

### *Mandatory Sentencing*

Mandatory sentencing is at the opposite extreme, for it would strip the judge — as well as the Parole Board — of *all* discretion in imposing sentence.

Under a mandatory sentencing scheme, the legislature prescribes a single penalty which *must* be imposed by the sentencing judge following conviction of a broadly defined offense — i.e., 15 years for Assault 1<sup>o</sup>. Parole release is abolished. Although no mandatory sentencing systems are now in existence,\*\* nevertheless mandatory

\* Schemes which are variations of the flat-time model have been enacted in Maine<sup>7</sup> and Illinois.<sup>8</sup>

\*\* New York’s ill-fated Baumes Laws, which were described earlier in this report, are an example of this approach to determinate sentencing.

sentencing seems to be a common, if mistaken, image of what determinate sentencing must entail.

A variant of mandatory sentencing has, however, been employed within the framework of an indeterminate system in the form of mandatory *minimum* sentences. Here the legislature requires that a specified minimum period of imprisonment must be imposed by the sentencing judge, who has discretion to set the maximum term anywhere within broad statutory limits. The parole board cannot release the offender prior to the expiration of the minimum term.

The flaws of mandatory sentencing are too obvious to require extended discussion.<sup>7</sup> First and foremost, a mandatory system would indiscriminately lump together vastly different sorts of criminal conduct, and rigidly insist that the same penalty be imposed for each. In New York, for example, the statutory definition of Robbery<sup>10</sup> includes both the professional criminal who robs a bank, holding a machine gun on the teller and customers, and a husband who hits his wife in the course of a domestic quarrel, and walks out of the house with a few dollars worth of food stamps. Under a mandatory system, a judge would be forced to impose an identical sentence in *both* cases. By stripping the judge of discretion to take into account the peculiar characteristics of the offense and the offender — and to mold his sentence accordingly — mandatory sentencing would produce results which are arbitrary and unfair. It would also give rise to its own kind of sentence disparity, by requiring similar penalties for substantially dissimilar cases.

Moreover, such a system would inevitably defeat its own aims. The certainty of punishment would not be enhanced — it would be *reduced*. Whenever mandatory sanctions have been prescribed, “the same results follow — they are met with nonenforcement and nullification.”<sup>8</sup> Police, prosecutors, judges and juries are, in many instances, simply unwilling to impose punishment so poorly tailored to fit the crime.<sup>9</sup> An illustration is provided by the Baumes Laws, which were repealed because they were a hinderance, rather than a help, in combatting crime; the 1973 revision of New York’s drug laws, to which we have referred earlier in this report, is a more recent, but equally compelling, example.

Certainty of punishment would be undermined in still another respect. Since the crime of conviction would *automatically* determine the sentence, the prosecutor, as a result of his charging and plea-bargaining decisions, would have substantial power to decide what sentence the defendant would receive.<sup>10</sup> Prosecutors may vary in their charging and plea-bargaining practices, and thus the potential

for disparity and uncertainty would be reintroduced into the system.

Mandatory *minimum* sentencing suffers from some of the same infirmities, and has an additional defect as well. It only addresses half the problem: while a specific minimum sentence is required, the judge continues to exercise unfettered discretion in setting the maximum term — and thus sentencing disparity will likely remain a widespread phenomenon.

### *Presumptive Sentencing*

Presumptive sentencing is a slightly less drastic version of mandatory sentencing. It provides the judge with at least *some* leeway in imposing sentence, but still draws fairly rigid boundaries beyond which he cannot go.

In order to narrow offense categories so that the punishment may more closely fit the crime than it does under mandatory sentencing, a presumptive sentencing model envisions a drastically revised — and enlarged — penal code with many degrees of each crime according to specific elements of the offense.<sup>11</sup> For each degree, the legislature would establish a presumptive sentence, with a narrow range of variation permitted for aggravating or mitigating circumstances as defined by statute. Enhanced terms are prescribed for repeat offenders, and parole release is abolished.

California is the principal jurisdiction which has embraced a variant of presumptive sentencing.\* Under the California system (which falls far short of the detailed penal code we earlier described),<sup>13</sup> felonies are divided into four categories (not counting Murder 1<sup>o</sup>, for which life imprisonment is required). For each category of felony three possible incarcerative sentences are prescribed (i.e., for Category 1, 7-6-5 years). The sentencing judge *must* impose the middle term, unless specific aggravating or mitigating circumstances are alleged and proven — in which case, the higher or lower term must be imposed. The sentence may, in addition, be enhanced within specified limits, based on prior criminal record, use of a weapon, infliction of great bodily harm or large property loss. Judges retain the discretion to sentence concurrently or consecutively and, for most crimes, to grant probation.<sup>14</sup>

The California statute illustrates how even a fairly sophisticated presumptive sentencing system fails to cure the basic defects of mandatory sentencing. Offense categories remain over-broad, and fail to take into account the nuances of behavior, intention and harm which are difficult to fit into neat statutory pigeon-holes.

\* Indiana has also adopted a crude version of a presumptive sentencing statute.<sup>12</sup>

The reason is obvious. As a prominent criminologist has written:

“How can the legislature — far removed in thought from the actual crime and criminal in question — intuitively pre-determine the ‘best’ sentence for a particular offender and offense years before the crime is committed? In such a system insufficient regard is given to the human element or to the collective wisdom and experience of judges.”<sup>15</sup>

Moreover, if the legislature actually *tried* to anticipate every conceivable offense and offender variation, the result would be a penal law of enormous length and complexity, replete with hair-splitting distinctions. We doubt whether any legislature would be willing or able to spend all its time hammering out a definition of Robbery in the 68th Degree (and deciding upon the appropriate penalty); but even if it were, it is doubtful whether all offense variations could really be anticipated. Because such individual differences cannot be taken into account by such a system, presumptive sentencing, like mandatory sentencing, must inevitably produce unjust results.

Presumptive models also fail to provide judges with real guidance as to whether or not to incarcerate. For example, under the California statute, a convicted rapist must receive a term of 3, 4, or 5 years — or probation.<sup>16</sup> The statute fails to provide the judge with meaningful standards to aid him in deciding whether or not to impose probation; it also — absurdly, in our view — requires that he impose a prison term of at least 3 years, or *no* prison term at all.

Finally, like mandatory sentencing (although perhaps to a lesser degree), this model, because of its rigidity, may decrease the certainty of punishment and unduly increase the power of prosecutors. In California, for example, the prosecutor’s decision to allege aggravating or mitigating circumstances has itself become a subject for plea-bargaining, and a new source of sentencing disparity.

### *Sentencing Guidelines*

Sentencing guidelines represent an entirely different approach to determinate sentencing.<sup>17</sup>

A system of sentencing guidelines steers a middle course between the inflexibility of mandatory or presumptive sentences, and the virtually unfettered judicial discretion which marks indeterminate

and flat sentencing. Under sentencing guidelines, the discretion of a judge to impose sentence based on the facts of the individual case is preserved; but the exercise of that discretion is assisted by guidelines, which embody specific sentencing criteria and reflect prevailing sentencing norms.

The sentencing guidelines model envisions that the legislature will retain its traditional role of setting maximum terms. Rather than requiring judges to blindly improvise in deciding where to set a particular sentence, however, an independent Sentencing Commission would be appointed — often jointly by the legislature, the judiciary, and the executive — to establish sentencing guidelines within these broad statutory boundaries.\* These guidelines would be used by the sentencing judge in imposing sentence — although he would be free to depart from them, when he deems appropriate. When sentencing outside the range designated in the guidelines, however, the judge must make, on the record, findings of fact sufficient to justify this deviation, and the sentence would then be subject to appellate review.\*\*

Sentencing guidelines would be based primarily on two factors: the severity of the offense and the offender's prior criminal history. Offenses would be ranked in order of their seriousness (without disturbing existing felony classes),<sup>19</sup> and the Commission would also specify a limited number of aggravating circumstances (such as gratuitous harm to a victim) and mitigating circumstances (that the crime was committed under duress, for example) which would enhance or decrease the severity of the offense. Factors relating to the offender's prior criminal history would include the number and type

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\* An alternative method involves judicial creation and implementation of guidelines on a voluntary basis. We reject this strategy for three reasons. First, the judiciary has done little to promote consistency in its own decision-making, and the efforts which it has made — primarily through sentencing councils — have proved to have disappointing results.<sup>18</sup> Second, the task of determining what are appropriate sentencing guidelines for different classes of offenders and offenses presents broad questions of public policy which should not be decided by the judiciary alone. Finally, the task of creating, implementing and modifying sentencing guidelines requires on-going research with regard to both sentencing practices and the effect of the guidelines on other components of the criminal justice system, which could best be conducted by an independent commission.

\*\* The sentencing guidelines model is embodied in the proposed Kennedy-McClellan bill (S. 1437) in the U.S. Congress; proposed legislation in Virginia;<sup>20</sup> and legislation enacted in Minnesota<sup>21</sup> and Pennsylvania.<sup>22</sup> That the construction and implementation of guidelines is a feasible project has been amply demonstrated. Sentencing guidelines are now operational in Denver, Colorado; Essex County, New Jersey; Cook County, Illinois; and Maricopa County, Arizona.<sup>23</sup>

of prior convictions, the number of prior incarcerations, and whether the defendant was on parole or probation at the time the offense was committed.

For each combination of offense and offender — and taking into consideration aggravating or mitigating circumstances — the guidelines would provide a narrow sentencing range. One example is provided in Chart 1 on the following page.

A judge would impose a sentence within the guideline range, unless the unusual nature of the case — in particular, aggravating or mitigating circumstances which were not adequately taken into account by the guidelines — justified a different sentence. Either party could appeal such a sentence, leaving it to the appellate courts to determine whether such a deviation was warranted. In this way, the higher courts would be able, in the course of time, to construct a common law of sentencing to which the lower courts could look for guidance.\*

The role of the Sentencing Commission is a key element of the guidelines model — and in our view, a cardinal virtue. Unlike the legislature, such a commission would have the time, the expertise and the flexibility to establish guidelines on the basis of careful and exhaustive study of existing sentencing practices,<sup>25</sup> and to prescribe sentences designed to make informed use — when appropriate — of incapacitation and deterrence. The Commission would also monitor the operation of its guidelines, and periodically alter them on the basis of on-going research regarding their effectiveness and impact on other components of the criminal justice system.

In addition, while the Sentencing Commission would be removed from partisan politics, it would be a publicly accountable body. First, its rule-making would be on the record and open to public scrutiny. Second, its membership would be appointed by the three branches of government. Third, it would follow the broad principles enunciated by the people's elected representatives — the legislature — in establishing sentencing guidelines. The legislature would give policy direction to the Sentencing Commission regarding the primary factors which should determine the type and length of sentence appropriate for different offenses and offenders, and establish presumptions for

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\* In addition, unlike mandatory or presumptive sentencing, under sentencing guidelines the prosecutor's charging or plea-bargaining decisions would *not* necessarily determine the sentence which an offender would receive. Regardless of the charge to which an offender pleads guilty, the judge is free to depart from the guideline sentence for that offense, if he has good reason for doing so. In addition, as we shall state later in this report, one task of the Sentencing Commission should be to explore the possibility of developing charging and plea-bargaining guidelines for prosecutors to operate in tandem with sentencing guidelines.

and against incarceration. The advent of sentencing guidelines would, therefore, in reality *expand* legislative participation in sentencing, while insulating the day-to-day activities of the Commission from political pressures.<sup>26</sup>

CHART 1\*

SENTENCING GUIDELINES: Point System Model - Burglary

Crime Score	Time in Months			
	4-5	48-72	60-84	72-96
3	36-48	48-60	60-78	78-102
2	24-36	36-48	48-60	60-84
1	probation	probation	24-36	36-60
0	probation	probation	probation	24-36
Offender Score	0-1	2-4	5-7	8-10

CRIME SCORE

OFFENDER SCORE

- |  |   |   |
|--|---|---|
| <p>A. Injury<br/>0 = None<br/>1 = Injury<br/>2 = Death</p>           | <p>A. Current Legal Status<br/>0 = Not on probation/<br/>parole<br/>1 = On probation/<br/>parole</p>                              | <p>C. Prior Adult Felony<br/>Convictions<br/>0 = None<br/>1 = One<br/>2 = Two or more</p> |
| <p>B. Weapon<br/>0 = None<br/>1 = Weapon<br/>2 = Weapon<br/>Used</p> | <p>B. Prior Adult Misdemeanor Convictions<br/>0 = None<br/>1 = One<br/>2 = Two or more</p>  | <p>D. Prior Adult Probation<br/>Parole Revocations<br/>0 = None<br/>1 = One or more</p>   |
| <p>C. Drugs<br/>0 = No Sale<br/>1 = Sale</p>                         | <p>E. Prior Adult Incarceration (over 60 days)<br/>0 = None                      1 = One                      2 = Two or more</p> |   |

\* This hypothetical example of a sentencing guideline is derived from a model created for the courts in Denver, Colorado.<sup>24</sup> It represents one approach to the guide-

While the parole board might theoretically continue to exercise its discretionary release function under a guidelines system, most guidelines schemes\* eliminate or severely restrict parole release, since re-sentencing by the Parole Board, with use of its *own* guidelines, is seen as duplicative and unnecessary.\*\* Thus, under such a system, the sentence imposed on an offender is the sentence that an offender will actually serve, except as it is reduced by good-time. Typically, therefore, *guideline sentences are based not on the statutory maximum, but on the average or median sentences offenders really serve under the prior indeterminate system.* Implementation of a sentencing guidelines system should therefore *not* result in an increase in the total time to be served by inmates behind prison walls — but it *will* apportion sentences in a more rational, equitable and effective manner.

In sum, we believe that a system of sentencing guidelines would achieve the goals of determinate sentencing — limiting sentence disparity and increasing the certainty of punishment — while avoiding the rigidity (and hence the unfairness) that mar other schemes. Thus, the ability of a judge to take into account the unusual nature of a case is retained; at the same time, the opportunity to abuse that discretion is substantially limited. Both justice and certainty would thus be promoted by sentencing guidelines.

We now proceed to sketch the outline of a determinate sentencing system, utilizing sentencing guidelines, as it might operate in New York.

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line system. While other approaches are possible, it is important that guidelines be easy to use, flexible, capable of accommodating actual sentencing practices, and cognizant of the differences between the time an offender will actually serve and a symbolic maximum sentence.

The Denver guideline uses a point system, and relies on existing felony categories to initially rank the seriousness of the crime. Only information relating to the criminal history of the offender is counted as part of the offender score; other models use certain socio-economic information (such as employment status) as well. The time ranges in the Denver guideline increase in direct proportion of offense seriousness, but are more influenced by prior criminal history. Other models reverse this result, and some provide narrower time ranges.

\* Pennsylvania,<sup>27</sup> however, retains parole release.<sup>28</sup>

\*\* It is also felt that an administrative agency such as the Parole Board, whose proceedings are conducted behind closed doors, with only minimal due process protections accorded to inmates, and whose policies are not subject to review by any other governmental agency or by the electorate, should not be in a position to overrule by flat judicial sentencing decisions.

## *Chapter IX*

### *A New Sentencing System for New York*

The sentencing guidelines system which we propose is fully detailed in legislation drafted to accompany this report. These would be its central features:

#### *Who Would Formulate Sentencing Guidelines?*

A New York State Sentencing Commission (the "Commission") would promulgate guidelines to aid the sentencing court in determining the sentence to be imposed in a criminal case, including the type of sanction to be imposed (probation, fine, restitution, community service, or incarceration) and the length of time for which the sanction should be imposed (or the dollar amount if a fine or restitution is the appropriate disposition). The Commission would consist of nine members, including:

- three active trial court judges to be appointed by the Administrative Board of the Judicial Conference;
- one District Attorney, one public defender, and one individual with substantial experience and expertise in the field of criminal justice, to be appointed by the Governor, no more than two of whom shall be members of the same political party; and
- three individuals with substantial experience and expertise in the field of criminal justice, to be appointed by the Legislature, no more than two of whom shall be members of the same political party.

Since all three branches of government have a vital interest in matters pertaining to sentencing, we believe that each should participate in nominating members of the Commission. The presence of trial court judges on the Commission is essential, since they have practical experience in the daily work of sentencing; moreover, judges are the ones who will actually be employing sentencing guidelines, and it is vital that they play a role in their formulation. Both a District Attorney and a public defender should sit on the Commission to

help ensure that the distinct perspectives of both prosecutor and defendant will receive adequate recognition in the Commission's work. Finally, the general public will have its own representatives on the Commission to insist that deference be given to the larger public interest.

The Governor would designate one member of the Commission as Chairman, and the Chairman would appoint an Executive Director and staff. Members of the Commission would serve terms of no more than five years.

In addition to establishing sentencing guidelines, the Commission would serve an on-going research and monitoring function. In particular, the Commission would:

- collect, analyze and disseminate information concerning sentencing practices within the State, and conduct studies concerning the sentencing process;
- periodically modify sentencing guidelines on the basis of empirical evaluation of the operation of existing guidelines, and growth in scientific knowledge regarding criminal behavior;
- make recommendations to the Legislature regarding the reclassification of offenses, or alteration of the maximum or minimum statutory penalties for offenses, if such changes are, in its view, required to enhance the justice or effectiveness of sentencing;
- conduct training programs for judges and other persons connected with the sentencing process in the use of sentencing guidelines; and
- explore the feasibility of developing charging and plea-bargaining guidelines to operate in tandem with a sentencing guidelines system.

### *What Principles Would Govern Sentencing Guidelines?*

The Commission should formulate sentencing guidelines on the basis of these fundamental principles, to be enunciated by the legislature in its mandate to the Commission:

Sentencing guidelines should be designed to do justice by imposing penal sanctions in proportion to the severity of the crime and prior criminal record of the offender. In order to protect the public by preventing crime, sentencing guidelines should also reflect, to the limited extent possible, reliable scientific knowledge concerning the effects of sentencing on criminal conduct.

The guideline sentence should be the *least severe sanction* necessary to achieve legitimate sentencing objectives. Sentences not involving confinement should be preferred, *unless*:

- confinement is necessary to protect society by restraining a defendant who has a history of serious criminal conduct;
- confinement is necessary to avoid depreciating the seriousness of the offense or justly to punish a defendant;
- confinement is necessary to provide an effective deterrent to others likely to commit similar offenses; or
- measures less restrictive than confinement have been applied frequently or recently to a defendant and have been unsuccessful.

In establishing its initial sentencing guidelines, the Commission should give substantial weight to current sentencing and release practices. Sentencing guidelines should, as a starting-point, attempt to replicate average sentences *actually served* by offenders for various crimes. The reason for this is simple: the length of sentences cannot be drastically altered, at a single stroke, without severely disrupting the criminal justice system. As sentencing guidelines develop over the years, they can be gradually redrawn and refined according to the dictates of justice and crime control, but this cannot be an overnight process. In particular, we strongly oppose the formulation of guidelines in such a manner as to increase suddenly and substantially the average sentence lengths served by inmates.

#### *How the Type and Length of Sentence Would be Determined*

Within the confines of presently existing felony and misdemeanor classes, the Commission may rank all criminal offenses on the basis of their seriousness. For purposes of these guidelines, the Commission may create new sub-categories for each offense. In determining the seriousness of an offense (or sub-category of an offense)

the Commission shall consider, *inter alia*, the nature and degree of harm caused by the offense.

The Commission shall also establish categories of defendants for purposes of these guidelines, based on factors relating to a defendant's prior criminal history. Such factors may include, *inter alia*, the number and type of prior felony and misdemeanor convictions, the number of prior incarcerations, whether the offender was on probation or parole at the time the offense was committed, and whether the offender has ever had parole revoked or probation violated for commission of an offense. Employment history or educational background shall not be considered in establishing categories of defendants for purposes of sentencing guidelines, since we regard them as essentially class-based distinctions for which an individual should not be punished.

For each offense involving each category of defendant, the Commission would establish a sentence range within present statutory limits. The range of sentence would be relatively narrow: for the initial guidelines, the top of the range should exceed the bottom by no more than 15% (i.e., 37 - 42 months).

The Commission would specify aggravating or mitigating circumstances which warrant enhancement or reduction of the guideline sentence, and would specify a narrowly circumscribed range of enhancement or reduction for each such circumstance or combinations thereof. Gratuitous harm to a victim is an example of one aggravating circumstance; voluntarily cooperating with the police to apprehend the other perpetrators of the crime might constitute a mitigating circumstance. It is not contemplated that the Commission would attempt to anticipate *all* possible aggravating or mitigating circumstances; it would instead state only the most common ones. The presence of *other* circumstances in a particular case might, in the discretion of the court, be held to justify a sentence outside the guideline range.

### *How Judges Would Use Sentencing Guidelines*

The judge would impose a sentence within the range prescribed by the sentencing guidelines, unless the court finds that specific aggravating or mitigating circumstances exist which are not reflected in the guidelines or which justify a different sentence. The court would be required to state on the record, at the time of sentencing, its reasons for imposing a particular sentence, and if the sentence is of a different type or duration from the guideline sentence, its

specific reasons for deviating from the guidelines, and the facts relied upon in reaching its decision.

A revamped presentence (or preplea) report would assist the judge in determining the appropriate sentence. The report would describe the sentencing guideline applicable to the offense and the offender, the presence or absence of aggravating or mitigating circumstances as defined by the Commission, and any factors which would justify a sentence outside the guidelines range. If a non-incarcerative sanction is provided under the guidelines, the report would provide information regarding appropriate programs suitable for and available to the defendant, and other information which might assist the court in imposing a fine, restitution, community service order, or other alternative disposition.

The presence of aggravating or mitigating circumstances, if in controversy, will be established at a presentence conference. Any party alleging such circumstances shall have the burden of proving them by the clear weight of the evidence. Facts relevant to the defendant's prior criminal history, if disputed, would also be determined at this hearing, and the existence of prior convictions must be proved beyond a reasonable doubt.

#### *How Appellate Review Would Limit Disparity*

In order to limit inequalities in sentencing — whether they be those of excessive leniency or excessive severity — both prosecutor *and* defendant would be entitled to appeal a sentence on the ground that it is outside the guidelines.<sup>1</sup> In addition, a sentence could be appealed by either party on the grounds that the sentence is illegal; that the sentencing guidelines were incorrectly applied to the defendant; or, by motion for leave to appeal, that the guidelines, as applied to the defendant, are clearly unreasonable.

On appeal, the party seeking affirmance of a sentence outside the guidelines will have the burden of demonstrating that such a sentence is supported by the clear weight of the evidence. With regard to any other sentence challenged on appeal, the appellant must demonstrate that the sentence was not supported by substantial evidence. The various Appellate Divisions of the Supreme Court will continue to decide sentence appeals.

#### *How the Role of the Parole Board Would be Altered*

Under a system of sentencing guidelines, defendants sentenced to a

term of incarceration would actually serve that term in prison (except as it is reduced by good-time). The Parole Board would perform a discretionary release function *only* for inmates who had been sentenced under the prior indeterminate system.

Parole release would be abolished because it would serve no legitimate function under a sentencing guidelines system. The New York State Parole Board today has abandoned its traditional practice of basing its release decisions on an inmate's purported progress towards rehabilitation; it has substituted instead a set of guidelines, which essentially reflect the severity of the offense and the offender's prior criminal record. These facts are known to the sentencing judge at the time the original sentence is imposed, and would be incorporated into a system of sentencing guidelines. We see no reason for permitting the Parole Board to resentence offenders on substantially the same criteria employed by the sentencing judge. Such a procedure is not only duplicative; it also violates our belief that sentencing is a judicial function, which should be performed in a public forum and open to public scrutiny. Only an appellate court, and not the Parole Board, should have the power to overrule the sentencing judge and modify his sentencing decision.

The power of the Governor to grant clemency would, of course, remain unchanged. Since abolition of parole release may result in a larger number of prisoners seeking clemency, we recommend that the Governor establish and appoint a Clemency Board to assist him in evaluating clemency applications. The traditional criteria for granting clemency would, however, remain unchanged;\* clemency would continue to be reserved for the extraordinary case, and the Clemency Board would *not* function as a re-christened Parole Board.

With regard to offenders who have already been sentenced under prior indeterminate sentencing laws, the Parole Board would continue to discharge its traditional discretionary release function. Since initial sentencing guidelines will be formulated in a manner designed to replicate the average time currently served by offenders, there should be no significant disparity, on the whole, between "old" and "new" law sentences. If, for any category of offenses or offenders, sentencing guidelines will nonetheless significantly *decrease* sentence

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\* According to guidelines employed by the Governor's office, applicants for clemency must demonstrate that their release would be in the interests of justice and consistent with public safety, and that (1) they have made extraordinary strides towards rehabilitation; or (2) they suffer from a terminal illness, or severe disability which would be mitigated by release, or (3) further incarceration would constitute gross unfairness because of the basic equities involved.<sup>2</sup>

length, the Sentencing Commission should recommend to the Legislature appropriate measures to make such provisions retroactive to similar offenders sentenced under the indeterminate system. In any event, the Parole Board should take into account guidelines promulgated by the Sentencing Commission in making its parole decisions for "old law" cases.

#### *How Good-Time Could Reduce a Sentence*

We have been told, by correctional officials and inmates alike, that good-time is a necessity in order to maintain prison discipline. While heeding this advice, we believe that in the interests of uniformity and certainty of sentencing, provisions for good-time should be no more expansive than is required to achieve that limited purpose. We therefore recommend that each inmate be allowed to obtain a reduction of up to 20% of his sentence as good-time, for conforming his conduct to prison rules. One such rule may be that the inmate participate in prison programs, provided that such programs exist in the institution where he resides, and that the inmate is capable of taking part in them. If a serious disciplinary violation is committed, the inmate may be deprived of up to 90 days good-time which he has previously earned.

#### *How Inmates Would be Supervised Upon Release*

The Division of Parole would continue to supervise all offenders following their release from prison. Evidence suggests that post-release supervision may play a role in lowering recidivism — at least for the first twenty-four months following an offender's return to the community. We therefore suggest that offenders who have served sentences of up to two years should undergo a one-year period of community supervision, and those serving terms of more than two years should remain under supervision for a two-year period. This period of supervision would form part of an inmate's sentence; i.e., an inmate sentenced to a two year prison term would have, as a component of his sentence, an additional one year period of community supervision. For violation of substantive conditions of supervision, an inmate would be subject to reincarceration for a period not to exceed six months, with credit given for time "on the street" without violations.

In addition to its surveillance function, post-release supervision has a second equally important role to perform: it should aim to re-

integrate the former inmate into society by providing meaningful employment and counselling services. The Division of Parole must place increased emphasis on this service function, and should be given sufficient resources to provide this vital assistance to offenders.

### *How Sentencing Guidelines Would be Implemented*

The formulation of sentencing guidelines will require extensive study and research. The Commission would, within two years of its creation, promulgate its proposed guidelines as regulations, to become effective 180 days after their publication. The activities of the Commission would be subject to the State Administrative Procedure Act, Open Meetings Law, and Public Access to Records Law.

\* \* \*

The comprehensive proposal for sentencing reform which we have enunciated here would enhance the fairness, effectiveness, and credibility of our criminal sanctions. In addition, our recommendations, if enacted, would bring new order and rationality to our system of sentencing. The need for sentencing reform is urgent. Consistent with New York's long tradition of leadership in the field of criminal justice, we believe that this report points the way.

**Supplemental Recommendations for New York's  
Criminal Justice System**

*Supplemental Recommendations for New York's  
Criminal Justice System*

As we have stressed, the impact of sentencing reform will inevitably be affected by what happens before and after sentencing. We therefore conclude this report with additional recommendations designed to enhance the justice, efficiency and accountability of the criminal justice process as a whole.\*

I. *Presentencing Stages*

A. *Increased Efficiency*

If the courts and prosecutors are to be able to devote themselves to the serious criminal cases which should have the greatest claim to their attention, improved screening of cases at the outset of the criminal justice process is a necessity.

One indication that present screening practices are inadequate is that many cases appear on criminal court dockets which will not lead to a conviction; other cases are charged at a level higher than the evidence will support, and charges will subsequently be reduced. Better screening decisions would reduce dismissals and later charge reductions; in addition, diversion of appropriate cases outside the confines of the criminal justice system would allow these cases to be dealt with more effectively and less expensively.

*Recommendations*

1. *Better police investigation and screening:*

Improved investigation by the police, both *before* and *after* the arrest, would do much to improve the likelihood of conviction. In particular, it is vital that the activities of police and prosecutors be better coordinated toward the common goal of obtaining a conviction. More careful screening decisions by the police before presenting a case for prosecution would also serve to lower dismissal rates later in the criminal justice process.

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\* Some of these recommendations, which appear here largely in outline form, are more fully set forth in legislation drafted to accompany this report.

## 2. *Better screening by prosecutors:*

Early Case Assessment Bureaus, where they have been instituted, have proved to be effective mechanisms for screening out cases which are unsuited for criminal adjudication. Early screening and case preparation by experienced prosecutors can also improve the quality of charging decisions and thus enable resources to be focused on the most serious offenders. We therefore believe that existing programs should be further strengthened, and Early Case Assessment Bureaus established in district attorneys' offices across the state. Moreover, we recommend that state and local funds be available to supplement federal funding of these programs.

## 3. *Diversion programs:*

In an effort to make more efficient use of court and prosecutorial resources, a variety of pre-trial services programs and dispute resolution forums have been developed to remove cases from the court system when criminal adjudication is unnecessary or undesirable. Pre-trial services programs attempt to deal with the problems of less serious offenders; mediation and arbitration programs, in appropriate cases and with the consent of the parties, resolve disputes with the aid of a mediator/arbitrator. Such programs have, on the whole, a demonstrated record of success and cost-efficiency.

The use of pre-trial diversion programs and community based mediation and arbitration centers should be further encouraged by increased state funding. In addition, a single state agency should be established to develop, monitor and set standards for such programs in New York. As we shall describe later in this chapter, such an agency should also be responsible for supervising community-based programs providing for non-incarcerative dispositions, other than probation, across the state.<sup>1</sup>

## B. *Increased Scrutiny of Prosecutorial Decision-Making*

As we earlier described, witness and evidence-related problems are a major determinant of plea-bargaining decisions. We therefore believe that heavy-handed attempts to abolish or severely restrict plea-bargaining will be both ineffectual and counter-productive. We strongly recommend, however, that steps be taken to increase the accountability of prosecutors for their plea-bargaining decisions, and to insure the uniformity of plea-bargaining practices.<sup>2</sup>

## *Recommendations*

### *1. Increased accountability:*

District attorneys' offices should be required to publish policy statements and meaningful statistical information relating to their charging and plea-bargaining practices — information which will allow the public to understand how often charges are dismissed or reduced, what percentage of charges were dismissed or reduced for what specific reasons, and how the practices of each prosecutor's office compares to the others. Moreover, whenever a voluntary dismissal or plea to a lesser charge is accepted, the prosecutor should be required to file a written statement setting forth the *specific* reasons for accepting such a disposition.

In order to provide for the most efficient use of court resources we also recommend that a procedure for omnibus pre-trial motions be established. All motions would be heard and plea negotiations conducted at a consolidated pre-trial proceeding.

### *2. Increased uniformity:*

It shall be an important task of the Sentencing Commission to explore the feasibility of developing plea-bargaining guidelines to operate in tandem with a sentencing guidelines system. In the interim, all prosecutors' offices should develop internal review procedures, such as plea review boards or other methods of supervisory review, to enhance consistency in plea decisions and sentence recommendations.

## *II. Sentencing*

In the preceding chapter of this report, we outlined our recommendations for a sentencing guidelines system in New York. Here, we will summarize additional recommendations relating to the sentencing process.

### *A. Presentence and Preplea Reports*

The presentence report is ostensibly designed to enable judges to make uniform sentencing decisions — yet, as we discussed earlier in this report, presentence reports are often replete with misleading, irrelevant or inaccurate information, and lack necessary sentencing recommendations.

## *Recommendations*

### 1. *Who should prepare the reports:*

In our view, an initial problem is that presentence reports are presently prepared by the wrong agency — the local probation department. We believe that preparation of these reports should be the responsibility of an arm of the court,\* and that probation departments should cease to perform this function.

We make this recommendation for essentially two reasons. First, we believe that those who prepare these reports should be directly accountable to the courts, and hence responsive to their needs; we also are convinced that probation departments should not be afforded the opportunity to determine the size of their own caseloads through their recommendations regarding who should and should not be placed on probation. Second, such a change would allow probation departments to concentrate on doing the *real* work of probation: providing social services to probationers.<sup>3</sup>

### 2. *What the reports should say:*

The substance of presentence reports should also change under a sentencing guidelines system. A presentence report for a felony case should primarily present information relating to the offender's criminal history and facts relating to the offense. It would include an indication of the applicable guideline sentence, and elucidate any factors which might suggest that a sentence *outside* the guidelines would be appropriate. To assure most efficient use of resources, we recommend experimentation with voluntary waiver of the presentence report in misdemeanor cases.

### 3. *Increased reliance on preplea reports:*

We also believe that more extensive use of preplea reports is desirable, since the utility of the presentence reports is often undermined by the fact that a plea or sentence bargain has already been struck

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\* The draft legislation accompanying this report directs that the presentence reports be prepared by court investigators responsible to the chief administrative judge. There are, however, additional provisions which would enable local courts to acquire reports by any one of a variety of mechanisms (including subcontracting with a private agency or the local probation department).

before it is completed. We therefore recommend that individual counties be encouraged to expand their use of preplea investigations, on an experimental basis, in order to determine the feasibility of implementing such a practice statewide.

### B. *Alternatives to Incarceration*

Imprisonment is an extraordinarily expensive strategy for crime control — according to recent estimates, the cost of incarcerating an inmate in state prison for one year is at least \$15,000. Nor is it notably effective: offenders on probation or given community sanctions are no more likely to commit new crimes than are similar offenders who have been incarcerated. To the extent that imprisonment of an offender is not required to do justice or protect the public, it is vital that alternative — and less costly — dispositions be available and utilized.

#### *Recommendations*

Sentencing must cease to be an all-or-nothing proposition, with probation as the sole alternative to incarceration. Probation should be reserved for offenders with ascertainable needs which can best be met through a program of supervision. For other offenders, a wide range of intermediate dispositions — including restitution, day fines, and community service orders — would be more appropriate, and less expensive. Such sentencing alternatives must be developed and incorporated into a sentencing guidelines system. A single state agency should be responsible for encouraging and developing these community-based programs on a statewide basis. It should also provide technical assistance to communities in establishing such programs, evaluate and monitor their effectiveness, and if necessary, provide funds to help support their operation.

### C. *The 1973 Drug Laws*

The mandate of this Committee is to evaluate the effectiveness of our present system of sentencing, rather than to comment upon specific sections of the penal law. Nevertheless, we believe it is our duty to express our conviction that provisions of the 1973 Drug Laws, especially as they relate to first offenders and minor drug offenses, are incompatible with a system of fair and consistent criminal sanctions, such as we propose to achieve through sentencing guidelines.

In too many cases, the 1973 Drug Laws, because of their mandatory and inflexible nature, require penalties which are out of all proportion to the seriousness of the offense or the criminal history of the offender. The sale of an eye-dropper of cocaine by a first offender does not merit more punishment than forcible rape by a recidivist — yet such a tragic absurdity is precisely what the present law demands. Nor have such harsh provisions reduced the use of drugs or drug-related crimes. A sentencing guidelines system, based on the seriousness of the offense and the offender's prior criminal history, will insure that serious drug crimes will receive adequate punishment. There is no need, however, to continue harsh mandatory sentences for minor drug offenses. We call upon the legislature to conduct a swift but thorough review of the drug laws to eliminate these provisions.<sup>4</sup>

### III. *What Happens After Sentence Is Imposed*

#### A. *Probation Supervision*

Probation supervision, as it now exists, is a largely meaningless, mechanical reporting-in process which fails to meet the needs of probationers. Little attempt is made to ascertain the particular problems which contributed to the probationer's criminal conduct, or to locate or make use of community resources — such as drug treatment centers or vocational programs — which can most effectively solve them. The State Department of Probation has provided inadequate supervision and monitoring of the work of local probation departments, and has not enunciated meaningful standards to govern probation supervision in New York.

#### *Recommendations*

The delivery of social services to probationers must become the overriding priority of probation supervision. A probationer's concrete problems must be identified early in the probation process, and the probation officer should assist the probationer in obtaining help through job training, psychological counselling, or educational tutoring, making use of programs in the community, including volunteers and paraprofessionals.

The State Department of Probation must act to discharge its responsibility for over-all supervision of probation activities in New York State. It must enact standards which emphasize assistance to

probationers, rather than mere paper-shuffling, and energetically monitor the operations of local probation departments to enforce compliance with these standards. Moreover, the State Department of Probation must develop a research capability sufficient to identify the characteristics of probationers, their rehabilitative needs, and which programs fail and which succeed in reducing recidivism.

Probation has also been dreadfully under-funded in New York. Quality probation supervision will require an additional investment—but one far cheaper, and at least as effective, as prison.

### *B. Imprisonment*

Security, not rehabilitation, is the overriding priority of prison managers. While there may be reason to doubt whether prisons can ever provide an environment conducive to rehabilitation, we are convinced that a central goal of the correctional system should be to provide inmates with the tools to improve their own lives, through opportunities to participate in effective educational, vocational, counselling, and substance abuse programs. Today, our prisons abjectly fail to achieve this relatively modest goal.

### *Recommendations*

#### *1. Classification and transfers:*

The rehabilitative needs of inmates must be given greater consideration in formulating classification and transfer policies. Classification should take into account an inmate's program needs, as well as the security risk he presents; moreover, objective criteria which realistically assess risk must be developed to reduce expensive and harmful over-classification of inmates. It is also vital that the constant transfer of prisoners, which disrupts efforts at program participation, be drastically reduced, if not eliminated.<sup>5</sup>

#### *2. Programs:*

Vocational, education, and industrial programs are, in the main, poorly managed and ill-coordinated. In particular, vocational programs often teach the wrong skills and do nothing to help an inmate find employment following release; industrial programs provide little useful on-the-job training; and educational programs fail to tie their teaching activities to a prisoner's vocational needs.

Better management is urgently required to begin to cure these defects. Programs should be oriented towards providing inmates with skills which have a demonstrable relationship to a prisoner's ability to obtain employment in the outside world. Educational, vocational and industrial programs should work together to provide the inmate with the proficiency he requires. The prison industries program should explore the "free venture model" which provides for prison industries to be run like a modern business concern — including a full work day, wage incentives, modern equipment, and adequate supervision. Product lines which will provide inmates with marketable skills when they are released should be emphasized.<sup>6</sup>

Work-release, educational release, and furloughs, with appropriate security safeguards in terms of selection and supervision of inmates, should be encouraged. It is also vital that psychiatric and drug and alcohol abuse services available to inmates be greatly expanded.

Finally, programs which reduce the isolation of inmates should receive continued support. The Family Reunion Program, the Correspondence and Telephone Programs, and the Inmate Grievance Program are all substantial steps in the right direction. The work done by Prisoners Legal Services, an independent state-funded organization which insures inmates access to the court system by providing them with free legal services in civil matters, is also deserving of praise.

### 3. *Facilities:*

The continued reliance of the state prison system on ancient, isolated fortress-prisons has been roundly condemned by a variety of groups, including the McKay Commission on Attica. We agree that New York must cease building or expanding such bastilles. It is counter-productive to build mammoth, dehumanizing institutions far from population centers, which serve only to further isolate offenders from their families and friends. Prisons should aim to preserve, not sever, the offender's ties in the community to which he will return upon release, and use of facilities in or near urban areas should be encouraged.<sup>7</sup>

### C. *Post-Release Supervision*

Inmates released from prison face difficult problems with finances, housing and employment. Post-release supervision should be organized around helping the inmate cope with these difficulties, rather than merely surveilling his activities, as is now too often the case.

### *Recommendations*

All inmates, upon release from prison, should undergo a period of post-release supervision. For inmates serving sentences of two years or more, the supervisory period should be two years; for sentences less than two years, a one year period of supervision should be required.<sup>8</sup>

Programs designed to meet the transitional needs of inmates must be developed by the Division of Parole and should provide the focus for post-release supervision. Emergency and short-term housing needs should be met through a comprehensive statewide system of parole resource centers; short-term financial assistance to inmates should be provided through increased gate money or loans. It is vital that increased emphasis be given to obtaining employment for inmates through stepped-up job placement activities. The Division of Parole should also make more vigorous efforts at job development for releasees, through the creation or utilization of subsidized work programs.

The conditions of post-release supervision, presently contained in the parole agreement, must be narrowed and simplified. Only meaningful conditions, directly related to an inmate's likelihood of remaining crime-free during the post-release period, should be retained. The maximum period of reincarceration for violating a condition of post-release supervision should be limited to six months.

#### *IV. Criminal Justice Data*

Our final recommendation centers around the way in which state agencies collect and maintain criminal justice data.

Nearly a half-century ago, the Wickersham Commission stated:

"Most of those who write and speak on American criminal justice assume certain things to be well known or incontrovertible. But as one looks for the facts underlying such assumption he soon finds they are not at hand."<sup>9</sup>

Today, little has changed. Despite millions of dollars invested in data systems, statistics are kept in such a fashion that they are insufficient to answer even the most primitive questions about the criminal justice process.

Thus, for example, it is impossible to know how many people were arrested during the past year for Robbery<sup>10</sup>; what percentage of these were recidivists, and what prior crimes they were convicted of; how many individual arrests led to an indictment, and what became of the other arrests; what is the recidivism rate for persons placed on probation, as opposed to those given jail or prison terms — the list can go on and on. Incredibly, it is impossible to track a single felony arrest through the entire process of prosecution, conviction, and sentencing, which deprives us of the ability to assess what happens after arrest, or why. In sum, the aggregate statistics which are published are substantially meaningless for evaluating how well, or how poorly, the criminal justice system really works.

The root of this problem is that each criminal justice agency keeps information which is primarily designed to meet its own internal management needs, rather than the larger requirements of the criminal justice system as a whole. The State Division of Criminal Justice Services ("DCJS"), which has been charged with the complex task of coordinating criminal justice information systems, has not yet been able to remedy this situation.\*

In its report to the nation, the President's Advisory Commission on Criminal Justice Standards and Goals<sup>11</sup> established an agenda for state and local criminal justice planning agencies. It recommended the rapid development of a Comprehensive Data System consisting of four elements — Computerized Criminal Histories (CCH), Offender-Based Tracking Statistics System (OBTS), State Judicial Information System (SJIS) and Prosecutor's Management Information System (PROMIS). Although New York has agreed to implement this plan, five years later only scattered parts of such a system are in place in the state, and there appears to be no central plan for the coordination of data collection or policy research.<sup>12</sup>

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\* Other problems severely limit — if not destroy — the utility of criminal justice data. Different agencies use different definitions of crimes; different units of measurement (e.g., prison officials count individual inmates, while DCJS counts indictments — leading to the absurdity that 100 indictments may relate to one individual indicted 100 times for essentially the same transaction, or to 100 different individuals each indicted once); and different units of time. The result is that data compiled by one agency cannot be reconciled with data compiled by another. Even conclusions derived from examining the data of a single agency can be misleading; for example, DCJS recently reported that one suburban county had more felony convictions than felony indictments.<sup>10</sup>

*Recommendations*

DCJS must create a realistic and sensible master plan for an integrated network of criminal justice information systems. This master plan should be developed by state and local agencies together with the Sentencing Commission. The management needs of individual state agencies should *not* be the sole criterion for the statistics they keep, or the manner in which they keep them. Rather, the overriding consideration should be providing information about what the various components of the criminal justice system do and how well they do it. The focus of state data systems must shift, therefore, from mere record-keeping to providing the grist for a meaningful policy research and evaluation. As Roscoe Pound succinctly put it, "We must learn to use statistics to control the quality of... the operations by which the legal order is maintained and carried on".<sup>13</sup>

**Footnotes**

## Footnotes

*CHAPTER I: An Historical Look at Sentencing in New York*

1. For background on the history of sentencing policy in New York and the United States, see L. Friedman, *A History of American Law* (1973); D. Rothman, *The Discovery of the Asylum* (1971); S. Rubin, *The Law of Criminal Correction* (2d ed. 1973); Department of Justice, *The Attorney General's Survey of Release Procedures* (vols. 1-5) (W. L. Morse ed. 1939) [hereinafter cited as *Release Procedures*]; A. Dershowitz, *Background Paper*, in Twentieth Century Fund Task Force on Criminal Sentencing, *Fair and Certain Punishment*, at 67-124 (1976).

2. For general background on sentencing policy in colonial New York, see J. Goebel, Jr. & T. R. Naughton, *Law Enforcement in Colonial New York* (1944); D. Rothman, *supra* note 1.

3. Goebel & Naughton, *supra* note 2, at 709 describe the fine as "the sanction par excellence of provincial justice. It was imposed in the greatest variety of non-capital cases." They calculate that, of 446 penalties in the New York City Supreme Court between 1691 and 1776, 136 were fines, 62 were whippings and 17 involved some type of public shaming, either the pillory, carting or wearing a label naming the offender. In 20 cases imprisonment (from 11 days to one year) was used as punishment and in 13 the defendant was released on payment of a bond guaranteeing good behavior. *Id.* at 702-03 n. 139. The whip was used more frequently in the Special Sessions Court where most of the defendants were propertyless. *Id.* at 708.

4. D. Rothman, *supra* note 1, at 50 & 322 n. 30.

5. See Commission to Investigate Prison Administration and Construction (Lewisohn Commission), *Prisoners: Their Crimes and Sentences*, at 7 (1933) (Special Report to the New York State Legislature) [hereinafter cited as *Lewisohn Commission Report*]; Goebel & Naughton, *supra* note 2, at 702 n. 139. Goebel and Naughton report that of 446 penalties imposed in the New York Supreme Court between 1691 and 1776 87 were sentences to the gallows. The offenses for which these defendants were convicted included murder, counterfeiting, burglary, horse stealing, grand larceny and pickpocketing. *Id.*

6. For a general discussion of the clergy rule and its application by the New York Courts, see Goebel & Naughton, *supra* note 2, at 751-54. Goebel & Naughton report that clergy was most frequently granted in cases of grand larceny and manslaughter. *Id.*

7. See Goebel & Naughton, *supra* note 2, at 751.

8. D. Rothman recounts the history of one such vagabond criminal named Isaac Frazier:

"Frazier recounted his life in crime to a group of Connecticut ministers eager to publicize his story as a warning to others. He told them how infrequently he was apprehended for his many thefts, how when convicted he would be

only lightly punished. He would have to return the stolen goods and frequently leave town, but since his past record did not follow him from place to place, he never approached the gallows. Suddenly, one day, his reputation caught up with him, and a Connecticut court, fully informed of his history, passed the death sentence."

D. Rothman, *supra* note 1, at 52.

9. S. Rubin, *supra* note 1, at 40.

10. C. Beccaria, *On Crimes and Punishments* (H. Paolucci trans. 1963), *quoted in* D. Rothman, *supra* note 1, at 60.

11. 1801 N.Y. Laws ch. 58.

12. For a background discussion of the penitentiary concept and its development, see B. McKelvey, *American Prisons: A Study in American Social History Prior to 1915* (1936). See also D. Rothman, *supra* note 1.

13. An 1822 report to the New York State Senate, for example, recites the following:

"Then it appears that every profligate who chooses to commit a crime, can subject this community to a taxation of more than 100 dollars for his support each per annum, will still, after every practicable diminution of expense, cost as much money as would prepare 800 of the youth of our country for lives of public usefulness, by an education at the colleges."

New York State Senate, *Report* (1822), *quoted in Correction*, at 2 (Sept., 1938).

14. By 1808 the Newgate Penitentiary in New York was granting so many pardons as to make discharges equal to commitments. The professional criminal often was successful in obtaining a pardon through bribery, leaving for long prison incarceration only those who were poor or without political influence. Under such a haphazard system many criminals dangerous to society were released. See The Council of State Governments, *Definite Sentencing: An Examination of Proposals in Four States*, at 4 (1976) and sources cited therein.

15. In 1817 New York did enact a "good-time" statute which permitted prison inspectors to reduce by one-fourth the sentence of any prisoner serving not less than 5 years upon certification by the "principal keeper" that the prisoner "has acquired at least the net sum of \$15 per annum," from his prison labor. 1817 N.Y. Laws ch. 95. In practice, however, the statute was very rarely used for many years. See *Release Procedures*, *supra* note 1.

16. F. H. Wines, *Prison Reform*, at 17 (1910), *quoted in* Lindsey, "Historical Sketch of the Indeterminate Sentence and Parole System," 16 J. Crim. L. & Crim. & Police Sci. 9, 16 (1925-26).

17. *Id.*
18. Lindsey, *supra* note 16, at 12.
19. For a discussion of the Irish and British systems, see L. Carney, *Corrections and the Community* (1977); Lindsey, *supra* note 16, at 10-18; *Release Procedures*, *supra* note 1, at vol. 4, 1-19.
20. For background on the indeterminate sentencing movement, see Lindsey, *supra* note 16; *Release Procedures*, *supra* note 1, at vol. 4; Zalman, "The Rise and Fall of the Indeterminate Sentence," 24 *Wayne L. Rev.* 45 (1977).
21. National Congress on Penitentiary and Reformatory Discipline, *Proceeding* (1870), *quoted in* Lindsey, *supra* note 16, at 20.
22. 1870 N.Y. Laws ch. 427, §9.
23. 1901 N.Y. Laws ch. 425.
24. *Lewisohn Commission Report*, *supra* note 5, at 36.
25. Warner, "Some Aspects of the Indeterminate Sentence," 8 *Yale L. J.* 221 (1899).
26. National Commission on Law Observance and Enforcement (Wickersham Commission), *Report on Penal Institutions, Probation and Parole*, at 142-43 (1931). *See also* B. Lewis, *The Offender*, at 115 (1917).
27. Z. R. Brockway, *Fifty Years of Prison Service* (1912), *quoted in* American Friends Service Committee, *Struggle for Justice*, at 38 (1971).
28. New York State Crime Commission (Baumes Commission), *Report*, at 10-11, Leg. Doc. No. 99 (1929).
29. A summary of the Commission's recommendations can be found at Joint Legislative Committee of the Coordination of Civil and Criminal Practice Acts (Baumes Commission), *Report*, at 29-31, Leg. Doc. No. 84 (1926). The enacted legislation can be found at 1926 N.Y. Laws ch. 457.
30. Although habitual offender provisions in New York go back to at least 1796, the evidence suggests that they were rarely used. One commentator has stated that in 1916 the records of the State of New York showed that there had been but two convictions under the existing provisions. Statement by Hon. Lewis Valentine, Police Commissioner of the City of New York, in Governor's Conference on Crime, the Criminal and Society, *Proceedings*, at 399 (1935). For a general history of New York's habitual offender legislation, see *Lewisohn Commission Report*, *supra* note 5, at 39-40; Note, "Court Treatment of General Recidivist Statutes," 48 *Colum. L. Rev.* 238 (1948) [hereinafter cited as *Columbia Note*].  
Senator Baumes explained the purpose of the habitual offender statute as "not punishment at all, but...protection to the public. The man who has been convicted... three times, sentenced and...comes out and resumed operations again has proved...that

he cannot learn his lesson. He is incurable." C. H. Baumes, *The Baumes Laws and The Legislative Program in New York*, A. B. A. Rep. 511, 521 (1927), quoted in *Columbia Note*, *supra*, at 238.

31. New York State Crime Commission, *Report*, at 11, Leg. Doc. No. 94 (1927).

32. *Id.*

33. *Lewisohn Commission Report*, *supra* note 5, at 13.

34. Some judges went to extreme lengths to avoid the mandatory life imprisonment section of the law. For example, in *People ex. rel. Fernandez v. Kaiser*, 230 A. D. 646, *aff'd*, 256 N.Y. 581 (1931), *cert. denied*, 284 U. S. 63 (1931), a defendant brought to trial for an offense in 1926 was shown to have been sentenced for former crimes once in 1926 and twice theretofore. The court dismissed the charge then before it, reopened the third conviction for which sentence had already been served and, proceeding under §1943 of the Penal Law, vacated the sentence therein and resentedenced the prisoner *nunc pro tunc* as a third offender. *Columbia Note*, *supra* note 30, at 249-51 & n.n. 108-11.

35. *Lewisohn Commission Report*, *supra* note 5, at 24-30.

36. *Id.* at 54.

37. See, e.g., M. Frankel, *Criminal Sentences* (1972); A. VonHirsch, *Doing Justice* (1976); J. Mitford, *Kind and Usual Punishment* (1972); Twentieth Century Fund Task Force on Criminal Sentencing, *Fair and Certain Punishment* (1976); American Friends Service Committee, *supra* note 27.

38. See generally "Symposium on Sentencing," 7 Hofstra L. Rev. (1978).

CHAPTER II: *What Happens Before Sentencing*

1. See Appendix A, pp. 15-39 *infra* and sources cited therein.
2. Hindelang & Gottfredson, "The Victim's Decision Not to Invoke the Criminal Justice Process," *Criminal Justice and the Victim*, at 58 (W. McDonald ed. 1976) [hereinafter cited as *Criminal Justice and the Victim*].
3. See U. S. Department of Justice Law Enforcement Assistance Administration, *Criminal Victimization Surveys in Chicago, Detroit, Los Angeles, New York, and Philadelphia: A Comparison of 1972 and 1974 Findings* (National Crime Survey Rep. No. SD-NCS-C-6) (1976) [hereinafter cited as *1972-1974 Victimization Findings*]. See also Wolfgang & Singer, "Victim Categories of Crime," 69 *J. Crim. L. & Criminology* 379 (1978).
4. *1972-1974 Victimization Findings*, *supra* note 3, at 61; New York City Police Department, *Statistical Report: Complaints and Arrests*, at 2 (1974).
5. *Id.* See Also Wolfgang & Singer, *supra* note 3, at 381.
6. Motor vehicle theft is the most frequently reported personal crime. 95% of these incidents were reported in 1974. *1972-1974 Victimization Findings*, *supra* note 3, at 72. For a discussion of the reasons for the decision to report, see Hindelang & Gottfredson, *supra* note 2; Wolfgang & Singer, *supra* note 3; Schneider, "The Role of Attitudes in the Decision to Report Crimes to the Police," in *Criminal Justice and the Victim*, *supra* note 2.
7. *1972-1974 Victimization Findings*, *supra* note 3, at 72; Wolfgang & Singer, *supra* note 3, at 381.
8. See Hindelang & Gottfredson, *supra* note 2, at 71-74.
9. H. Ennis, *Criminal Victimization in the United States: Field Survey II* (Report to the President's Commission on Law Enforcement) (1967).
10. Hindelang & Gottfredson, *supra* note 2, at 66-67.
11. See Appendix A, p. 17 *infra*.
12. Donald Santarelli, former director of the Law Enforcement Assistance Administration, reacted to the National Crime Panel victimization surveys by observing that "the statistics have uncovered in minute detail the sobering fact that a great many people do not report crime because they are turned off by the criminal justice system and its clanking process." Law Enforcement Assistance Administration, *Newsletter* 3 (11), *quoted in* Schneider, *supra* note 6, at 90. Schneider reports that the percentage of victims who report incidents to the police tended to be higher if the victims had higher scores on a "trust scale" used to measure an overall trust in the police. *Id.* at 98-99.

13. For a discussion of the problems and responses of rape victims in coping with the criminal justice system, see L. L. Holmstrom & A. W. Burgess, *The Victim of Rape: Institutional Reactions* (1978).

14. The victims of personal crimes are somewhat more likely to report the incident if they think the court would punish the offender than if they do not believe the court would take action. Schneider, *supra* note 6, at 102. See also Ziegenhagen, "Victim-Criminal Justice System Interactions," in *Criminal Justice and the Victim*, *supra* note 2.

15. President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Science and Technology*, at 12 (1967).

16. Hindelang & Gottfredson, *supra* note 2, at 76. The cited survey is that of the National Crime Panel in eight American cities.

17. C. Silberman, *Criminal Violence*, *Criminal Justice*, at 217-18 (1978).

18. For a more detailed discussion of police clearance rates, see Appendix A, pp. 16-17 *infra* and sources cited therein.

19. Federal Bureau of Investigation, *Uniform Crime Report* (1976), cited in C. Silberman, *supra* note 17, at 218.

20. According to the National Crime Survey, in 1975 41% of assault victims were attacked by someone with whom they were acquainted. See C. Silberman, *supra* note 17, at 218.

21. According to one estimate, no more than two crimes in five occur in locations where they can be observed by someone other than the victim. T. Schell, *Traditional Preventive Patrol*, at 7 (1976) (N.I.L.C.J. monograph).

22. P. Greenwood, *An Analysis of the Apprehension Activities of the New York City Police Department*, Rand Institute R-5-29-NYC (1970). See also Greenwood, *The Criminal Investigation Process*, at 135 (1977) [hereinafter cited as *The Criminal Investigation Process*] (which indicates that "the great majority of cleared crimes are solved because the identity of the perpetrator is already known when the crime report reaches the investigator").

23. Smith, "How Cops Catch Robbers," in F. Feeney, *The Prevention and Control of Robbery*, at Vol. 4, 47-63 (1973).

24. A study of victim behavior and police response time in Kansas City found that, on the average, assault victims did not report the crime to the police until an hour after it had occurred. Robbery victims did not call the police for 23 minutes, on average, and burglaries were not reported for more than an hour after they were discovered. Caplan, *Studying the Police*, unpublished remarks to the Executive Forum on Upgrading the Police (April 13, 1976), cited in C. Silberman, *supra* note 17, at 245.

25. "[O]f the total working hours of an investigation, only a small proportion (7% in Kansas City) is devoted to activities that lead to clearing crime." *The Criminal Investigation Process*, *supra* note 22, at 121.

26. Bittner, "Florence Nightingale in Pursuit of Willie Sutton: A Theory of the Police," in *The Potential for Reform of Criminal Justice*, at 30 (H. Jacob ed. 1974), *cited in* C. Silberman, *supra* note 17, at 245.

27. National Advisory Commission on Criminal Justice Standards and Goals, *Task Force Report: Police*, at 192 (1973).

28. See Appendix A, pp. 20-28 *infra* and sources cited therein.

29. New York State Crime Commission, *Report*, at 52-54, Leg. Doc. No. 23 (1928) [hereinafter cited as *1928 Crime Commission Report*]. See also J. Goebel, Jr. and T. R. Naughton, *Law Enforcement in Colonial New York* (1944). Goebel and Naughton report that, between 1691 and 1776, only 35% of the cases in the New York City Court of General Sessions (which handles cases which would generally be misdemeanors today) were tried. In the two rural counties in which records were analyzed the proportion of dispositions by trial was even lower; in Ulster County only 3 of 69 (5%) of dispositions were by jury verdict; in Tryon County only 5 of 41 (12%) were tried. *Id.* at 597. Goebel and Naughton also report that "[i]n the case of petit larcenies there is some reason to believe that the defendants were 'taking a plea' for sometimes the stolen items enumerated in the indictment were obviously of much greater value than the classic 12d. which marked the borderline between grand and petit larceny. There are also a few cases which point rather more definitely to negotiations with the prosecuting officials. In them, the defendant having pleaded not guilty would relinquish his plea and pray mercy or 'submit' and was usually only lightly fined." *Id.* at 598.

*Cf.* Heumann, "A Note on Plea-Bargaining and Case Pressure," 9 *Law & Soc. Rev.* 515 (1975). Heumann compared trial rates in the Connecticut Superior Courts (which handle felony cases) from 1800 through 1954. The percentage rate of trials (as compared with total dispositions) varied minimally throughout this period and averaged 8.7%. During the years 1966-1973, the average percentage trial rate was 4.1%. The research team went on to compare trial rates in high and low volume courts and found that, particularly from 1910 on, there was minimal variation, with the lower volume courts often having lower trial rates than the high volume courts. *Id.* at 518-520. See generally Miller, "The Compromise of Criminal Cases," 1 *S. Cal. L. Rev.* 1 (1927); Moley, "The Vanishing Jury," 2 *S. Cal. L. Rev.* 97 (1927); Wishingrad, "The Plea Bargain in Historical Perspective," 23 *Buffalo L. Rev.* 499 (1974).

30. *1928 Crime Commission Report*, *supra* note 29, at 53.

31. See Appendix A, p. 27 *infra*. During the 1920's trial rates were also lowest in up-state counties, highest in New York City. See *1928 Crime Commission Report*, *supra* note 29, at 84-85.

32. New York State Commission to Investigate Prison Administration and Construction, *Prisoners: Their Crimes and Sentences*, at 11 (1933). See also *1928 Crime Commission Report*, *supra* note 29, at 83-90; New York State Crime Commission, *Report*, at 129-39, Leg. Doc. No. 94 (1927) [hereinafter cited as *1927 Crime Com-*

*mission Report*]. In New York City, the Commission reports that four-fifths of all pleas entered in 1926 were to a lesser offense than the original charge. *Id.* at 131.

33. See Appendix A, pp. 28-30 *infra*.

34. *1928 Crime Commission Report*, *supra* note 29, at 58.

35. During the year 1974, for example, the rate of trials which accounted for dispositions in New York County was approximately 7%. New York County had 37 felony parts to handle 5,525 total dispositions. In Cayuga County (which is typical of rural counties) the trial rate was approximately 2% and the "caseload" 63 dispositions, less than half that of New York County's. See State of New York, The Administrative Board of the Judicial Conference, *Report*, at 58-59, Table 19, Leg. Doc. No. 90 (1977); New York State Prosecutors' Council Statistics and Management Committee, *1974 Survey* (June, 1975) (unpublished survey). See also Heumann, *supra* note 29; Georgetown University Law Center Institute of Criminal Law and Procedure, *Plea Bargaining in the United States: Phase I Report* (April 16, 1977) (unpublished manuscript) [hereinafter cited as *Georgetown Report*]. The Georgetown research team compared the populations of the 10% of all jurisdictions in each state that had the lowest plea rates with the 10% that had the highest plea rates. Data collected in New York was typical: the mean plea rate of the top 10% was 99.1%; mean population of these jurisdictions was 45,192. The mean plea rate of the bottom 10% was 79.4%; mean population of these jurisdictions was 51,644. *Id.* at 21. The researchers concluded that: "The data...does not support the assertion...[of] many practitioners that without more resources they could not try more cases." *Id.* at 23.

36. See Appendix A, p. 27 *infra* and sources cited therein.

37. B. Forst, *What Happens After Arrest: A Court Perspective of Police Operations in the District of Columbia*, at 23 (PROMIS Research Project Publication No. 4) (1977) [hereinafter cited as *What Happens After Arrest*]. See also K. Brosi, *A Cross City Comparison of Felony Case Processing* (July, 1978) (unpublished report by the Institute to Law and Social Research); The Vera Institute of Justice, *Felony Arrests: Their Prosecution and Disposition in New York City's Courts* (1977) [hereinafter cited as *Felony Arrests*]; Institute for Law and Social Research, *Highlights of Interim Findings and Implications* (PROMIS Research Project Publication No. 1) (1977) [hereinafter cited as *PROMIS Interim Findings*]; H. Zeisel, *A Criminal Justice System Under Stress: A Study of the Disposition of Felony Arrests in New York City* (1975) (unpublished manuscript).

38. *The Criminal Investigation Process*, *supra* note 22, at 171-75.

39. *Id.* at 187-88.

40. *What Happens After Arrest*, *supra* note 37, at 48.

41. *Id.* at 23-32, 42. See also K. Brosi, *supra* note 37, at III-18. In a cross city comparison of case dispositions, evidence problems were the source of from 15% (Detroit) to 85% (Cobb County, Georgia) of post-filing dismissals. *Id.*

42. C. Silberman, *supra* note 17, at 267.

43. *Felony Arrests*, *supra* note 37, at 19. Overall, 77% of surveyed victims were in some manner acquainted with their assailant. The proportions ranged from 21% in auto theft cases to 83% in rape cases. *Id.*

44. *What Happens After Arrest*, *supra* note 37, at 24. The arrest figure includes arrests in which the relationship was not recorded. Cf. K. M. Williams, *The Role of the Victim in the Prosecution of Violent Crimes*. (PROMIS Research Publication No. 12) (May 12, 1978) (unpublished draft). Williams reports that in 1973 21% of robbery arrests involved acquaintances. This figure excludes cases in which the relationship between victim and arrestee was unknown. Of arrests for all violent crimes, 57% involved acquaintances. *Id.* at IV-5

45. See, e.g., Brosi *supra* note 37, at III-4; (Indianapolis and Washington, D.C. assault arrests); M. Levin, *Urban Politics and the Criminal Courts*, at 63-64 (1977), (Pittsburgh, Minneapolis, and Chicago); Banfield and Anderson, "Continuances in The Cook County Criminal Courts," 35 U. Chi. L. Rev. 259, 291-2 (1968) (Chicago).

46. See *Felony Arrests*, *supra* note 37, at 20; *What Happens After Arrest*, *supra* note 37, at 21-43. In the New York City study 87% of dismissals in cases in which the victim had a prior relationship with the defendant were due to complainant non-cooperation, as compared with only 29% of dismissals in stranger cases. *Felony Arrests*, *supra* note 37, at 20. In the Washington, D.C. study it is reported that "the rate of rejection due specifically to witness problems, such as failure to appear in court...[was] substantially higher for offenses that were not recorded as stranger to stranger episodes." *What Happens After Arrest*, *supra* note 37, at 43.

See also McIntyre, "A Study of Judicial Dominance of The Charging Decision," 59 J. Crim. L. C. & P. S. 469 (1968) and K. Williams, *supra* note 44, at 10, IV 1-IV 9 & VI-V5. Williams reports that in Washington, D.C. in 1973, 61% of rejections at screening and 54% of dismissals in nonstranger cases were attributed to complaining witness problems.

47. For a general discussion of Victim-Witness Assistance Programs, see McDonald, "Criminal Justice and the Victim: An Introduction," in *Criminal Justice and The Victim*, *supra* note 2.

48. One recent study found that victims who abused alcohol were more than twice as likely as other victims to have their cases rejected at screening, and a third more likely to have their cases dismissed before trial. A victim with a prior record was found to increase the likelihood of dismissal in sexual assault cases. K. M. Williams, *supra* note 44, at III-9 and III-11.

49. *Felony Arrests*, *supra* note 37, at 75-76. For a general discussion of the effects of victim characteristics on disposition, see Denno & Cramer, "The Effects of Victim Characteristics on Judicial Decision Making," in *Criminal Justice and the Victim*, *supra* note 2; Landy & Aronson, "The Influence of the Character of the Criminal and His Victim on the Decision of Simulated Jurors," in *Victimology* (I. Drapkin & E. Viano eds. 1974); K. M. Williams, *supra* note 44.

50. *Felony Arrests*, *supra* note 37, at 71. See also H. Kalven & H. Zeisel, *The American Jury* (1971); K. M. Williams, *supra* note 44, at III-5; note, "Prosecutorial Discretion in the Initiation of Criminal Complaints," 42 S. Cal. L. Rev. 519 (1969). Williams reports that perceived victim provocation or participation substantially increased the likelihood that the prosecutor would refuse to accept a case. K. M. Williams, *supra* note 44, at III-5.

51. For a discussion of the Manhattan program, see Institute For Mediation and Conflict Resolution, *Two-Year Operational Report* (1977) (unpublished manuscript). For a general description of mediation/arbitration programs, see note 72 *infra* and sources cited therein.

52. Statement submitted by George Nicolau, Vice President of the Institute for Mediation and Conflict Resolution, to the New York State Executive Advisory Committee on Sentencing, at 5 (Nov. 6, 1978).

53. For a general discussion of the plea bargaining process and how it works, see D. Newman, *Conviction: The Determination of Guilt or Innocence Without Trial* (1966); A. Rossett & D. Cressey, *Justice by Consent* (1976); M. Heumann, *Plea Bargaining: The Experiences of Prosecutors, Judges, and Defense Attorneys* (1977); *Georgetown Report*, *supra* note 35; Mather, "Some Determinants of the Method of Case Disposition: Decision Making by Public Defenders in Los Angeles," 8 Law & Soc. Rev. 187 (1973); Alschuler, "The Prosecutor's Role in Plea Bargaining," 36 U. Chi. L. Rev. 50 (1968); Alschuler, "The Defense Attorney's Role in Plea Bargaining," 84 Yale L. J. 1179 (1975); Alschuler, "The Supreme Court, The Defense Attorney and the Guilty Plea," 77 U. Colo. Rev. 1 (1975); Alschuler, "The Trial Judge's Role in Plea Bargaining," 76 Colum. L. Rev. 1059 (1973); Feeley, "Two Models of the Criminal Justice System: An Organizational Perspective," 7 Law & Soc. Rev. 407 (1973); Cox, "Prosecutorial Discretion: An Overview," 13 Am. Crim. L. Rev. 383 (1976). For a discussion of the plea bargaining process in New York City, see *Felony Arrests*, *supra* note 37, Zeisel, *supra* note 37; S. Casales, *Plea Compromise in New York and London* (1978) (unpublished dissertation, Yale University). For a discussion of plea bargaining in Buffalo, N. Y., see Rebrovich, "Factors Affecting the Plea Bargaining Process in Erie County: Some Tentative Findings," 26 Buffalo L. Rev. 693 (1977).

54. An example of the impact of physical evidence on charge reduction patterns is provided by S. Casales in her review of plea bargaining practices in New York City:

"One victim alleged that she saw something gleaming in the streetlight and realized that the defendant had a gun in his hand. There were no witnesses and although the victim identified the defendant readily, the evidence as to the weapon was not considered very promising by the prosecution. The defense attorney approached by the A.D.A. in the courtroom before the case was called and pointed out this standard weakness in the prosecution's case; the A.D.A. agreed to one grade reduction, i.e., to robbery in the second degree, although the definition of that offense was not appropriate to the facts." S. Casales, *supra* note 53, at VII-31.

Of the 53 sample robbery cases in the New York City felony disposition study, 35% involved a victim and defendant who knew each other. Almost 3/4 of those cases were dismissed. Of the 1/4 who pleaded guilty, all but one pleaded to a misdemeanor. By contrast, of the 34 stranger robberies, only 12% were dismissed and 65% were convicted on felony charges. *Felony Arrests, supra* note 37, at 75-78. *See also*, Lagoy, "An Empirical Study on Information Usage for Prosecutorial Decision Making in Plea Negotiations," 13 Am. Crim. L. Rev. 435 (1976).

55. *See Felony Arrests, supra* note 37; *Georgetown Report, supra* note 35, especially Ch. 2. The prosecutor's concern for a certain outcome derives in part from the fact that seemingly guilty defendants are sometimes acquitted against all the odds. For examples, see H. Zeisel, *supra* note 37, at 141-58.

56. *See* Louis Harris and Associates, *Survey of Actors in the New York State Criminal Justice System*, at 8-11 (November 21, 1978) (unpublished survey prepared for the New York State Executive Advisory Committee on Sentencing) [hereinafter cited as *Harris Survey*]. Only 6% of surveyed judges indicated that they never participate in plea bargaining discussions. *Id. See also Georgetown Report, supra* note 35, at 39; Alschuler, "The Trial Judge's Role in Plea Bargaining," 76 Colum. L. Rev. 1059 (1976), especially 1689-92.

57. *See* Mather, *supra* note 53, note 35, especially 708-11; *Felony Arrests, supra* note 37. Offense seriousness is perceived by prosecutors in relation to the type and level of crime which makes up their workload. In the early 1970's, for example, night time commercial burglaries in New York City were generally treated as misdemeanors. One New York City prosecutor described such a case: "There are too many crimes in this city to regard this as a major offense." The judge in the case concurred: "I just don't think that breaking into a grocery store is worth a felony. I would have given him no more than one year even if this case were tried..." *Id.* at 90. In general, the more serious the offense, the larger the proportion of cases that are settled by trial. H. Kalven & H. Zeisel, *supra* note 50, especially Ch. 2; Mather, *supra* note 53, at 208-11.

58. *See* Mather, *supra* note 53; Zeisel, *supra* note 37; LaGoy, *supra* note 54. The impact of prior record on plea negotiations is apparent from the New York City felony disposition study data: 77% of convicted defendants with no prior record avoided prison or jail, as compared to only 16% of convicted defendants who had previously been sentenced to prison. *Felony Arrests, supra* note 37, at 20-21.

59. K. Brosi, *supra* note 37, at V9-V16.

60. Association of the Bar of the City of New York, *The Nation's Toughest Drug Law: Evaluating the New York Experience*, at 96-97 (1977) [hereinafter cited as *Bar Association Drug Study*].

61. *Id.* at 155; N. Y. Crim. Proc. Law §220.10 (McKinney, 1976) and *Supplementary Practice Commentary* (1976).

62. Church, "Plea Bargaining, Concessions and the Courts: Analysis of a Quasi Experiment," 10 Law & Soc. Rev. 337, 389-90 (1976).

63. *Id.* at 400.

64. See *Georgetown Report*, *supra* note 35, at 8 and 126. See also Alaska Judicial Council, *Interim Report on the Elimination of Plea Bargaining* (1977). The Judicial Council reports that during the initial phase of the plea bargaining ban, which applied only to misdemeanors, the number of cases declined by the prosecution increased. *Id.* at 49-52.

65. *Georgetown Report*, *supra* note 35, at 126.

66. *Id.* at 128. 42% of New Orleans felony arrests were rejected at screening in the first half of 1977. Brosi, *supra* note 37, III-3.

67. *Id.* at VIII-3. PROMIS data from the first half of 1977 indicates a felony incarceration rate in New Orleans of 57%. The incarceration rate and average felony sentence in the four other surveyed jurisdictions were:

	<u>Incarceration Rate</u>	<u>Average Sentence</u>
Washington, D.C.	61%	n.a.
Los Angeles	73%	n.a.
Indianapolis	81%	1 to 3-6 yrs.
Detroit	39%	2 to 6 yrs.
New Orleans	57%	3 to 9 yrs.

68. *Georgetown Report*, *supra* note 35, at 129.

69. Cf. S. Wildhorn, M. Lavin & A. Pascal, *Indicators of Justice*, at 73-130 (1977) (Multnomah County, Ore.); Note, "The Elimination of Plea Bargaining in Blackhawk County: A Case Study," 60 Iowa L. Rev. 1053 (1975) (Blackhawk County, Iowa); *Georgetown Report*, *supra* note 35, at 28-29 (New Orleans, La.); Church, *supra* note 62 (anonymous midwestern county); *Bar Association Drug Study*, *supra* note 60 (New York State).

In Blackhawk County, Iowa and Multnomah County, Oregon a no-plea policy was combined with both an improved system of police investigation and screening and improved prosecutorial screening. As a result, although fewer cases were filed, dismissal rates did not increase. In the New York, New Orleans and the anonymous midwestern county that imposed a ban on plea bargaining *without* improved police investigation and screening, fewer cases were filed and more were dismissed.

70. See, e.g., Note, "The Elimination of Plea Bargaining in Blackhawk County: A Case Study," 60 Iowa L. Rev. 1053 (1975); *Georgetown Report*, *supra* note 35, at 8-15; Church, *supra* note 62; S. Wildhorn, *supra* note 69, at 90.

71. See, e.g., *Felony Arrests*, *supra* note 37, at 79. Among the sampled robbery cases in the New York City felony disposition study, only four which involved a relationship between the defendant and victim ended with jail sentences. Pretrial custody was found to figure prominently in all of these cases. For example: "One defendant, arrested for robbery despite the police officer's uncertainty about what, if anything he had done, pled guilty to attempted petit larceny (a B misdemeanor) and got a 30 day jail sentence because it was not worth waiting even longer in jail for the dismissal that was sure to follow from the complainant's noncooperation." *Id.*

72. For a general discussion of the need for confining and structuring prosecutorial discretion, see K. C. Davis, *Discretionary Justice*, at 188-233 (1969).

73. 51 prosecutors' offices responded to the survey. 34 (66.7%) of the reporting counties indicated that, "pleas are regularly reviewed by a supervisor."

74. 30 (58.8%) of the 51 reporting prosecutors' offices responded affirmatively to the question "Does your office have official guidelines concerning plea bargaining?" Only 3 offices, however, reported that they employed *written* guidelines.

75. M. J. Farrell & J. P. Moran, *Criminal Justice Operations in the City of Detroit*, at 1-2 & 17-18 (1978) (unpublished memorandum to members of the Special Committee on Criminal Justice of the Association of the Bar of the City of New York).

76. *Id.* at 30. For a comparison of the New York City and California screening process, see Feeny & Woods, "A Comparative Description of the New York and California Criminal Justice Systems: Arrest Through Arraignment," 26 Vand. L. Rev. 973 (1973). Feeny & Woods conclude that "[m]uch of the screening that takes place at first appearance in New York is done in California felony cases at an earlier stage by the police or prior to charge by the district attorney. Consequently, although very few California felony cases are disposed of *at* first appearance, between 20 and 30 percent are disposed of *before* the first appearance. Defendants in these cases are released without charge or eventually are charged with misdemeanors. The procedure has obvious advantages in terms of judicial economy." *Id.* at 1021.

The importance of screening decisions on subsequent disposition patterns is also evident in data from Washington, D. C. Between 1972 and 1974 post-filing dismissals increased from 16% to 29% of total dispositions. The Institute for Law and Social Research found that the reason for the increase was that the arrest rejection rate had also declined from 26% to 21% during this time period. B. Forst, *supra* note 37, at 68 & 78. This "hydraulic phenomenon" is also visible in cross city case processing comparisons using PROMIS data. In New Orleans, for example, where the largest number (42%) of cases presented for prosecution were rejected, the smallest number (only 7%) were dismissed post-filing. By contrast, the District of Columbia, which rejected only 22% of cases at screening, has a post-filing dismissal rate of 27%. The end result in each city is the rejection of half (49%) of all arrests, but with varying degrees of efficiency and expedition. (The New Orleans rejection rate excludes cases referred to other agencies for prosecution.) See K. Brosi, *supra* note 37, at III-7.

77. Vera Institute of Justice, *Early Case Assessment: An Evaluation* (1977) (unpublished manuscript). For a general discussion of early case assessment and the screening decision, see New York State Division of Criminal Justice Services, *Screening Manual for Prosecutors* (1977); J. Jacoby, *The Prosecutor's Charging Decision: A Policy Perspective* (1977) (N.I.L.E.C.J. monograph). For a general discussion of the diversion concept, see National Association of Pretrial Services Agencies, *Performance Standards and Goals for Pretrial Release and Diversion: Pretrial Diversion* (1978) R. Nimmer, *Diversion: The Search for Alternative Forms of Prosecution* (1974); American Bar Association Pretrial Intervention Services Center, *Pretrial Intervention Legal Issues: A Guide to Policy Development* (1977); Note, "Pretrial Diversion from the Criminal Process," 83 Yale L. J. 827 (1974) United States Senate Committee on the Judiciary Subcommittee on Improvements in Judicial Machinery, *Hearings on S. 1819 (The Federal Criminal Diversion Act of 1977)*.

78. Diversion programs fall into two basic categories. Arbitration/Mediation diversion programs provide an alternative forum to the criminal court which emphasizes dispute resolution, rather than the adjudication of guilt. The most frequent use of these programs is for cases in which the victim and the defendant have a prior relationship. For a discussion of mediation programs, see J. McGillis & J. Mullen, *Neighborhood Justice Centers: An Analysis of Potential Models* (1977); D. E. Aaronson, *Alternatives to Conventional Criminal Adjudication: Guidebook for Planners and Practitioners* (1977); (N.I.L.E.C.J. monograph); American Bar Association, *Report on the National Conference on Minor Disputes Resolution* (1977). In New York, Arbitration/Mediation programs are currently in operation in Rochester, Brooklyn, and New York County. For a description of the New York County mediation program, see Institute for Mediation and Conflict Resolution, *Two-Year Operational Report* (1977) (unpublished manuscript).

Other diversion programs provide, in essence, pretrial probation and focus on the delivery of services and supervision of the divertee in order to prevent future criminal activity. Most diversion programs of this type are modeled after pilot programs funded by the Manpower Administration of the U. S. Dept. of Labor in the late nineteen sixties. They have focused primarily on vocational and academic upgrading, counseling and other services are additionally provided in some such programs. For a general discussion of offender-oriented diversion programs, see Departmental Committee for Court Administration of the Appellate Divisions, First and Second Departments Subcommittee on Elimination of Inappropriate and Unnecessary Jurisdiction, *Diversion from the Judicial Process: An Alternative to Trial and Incarceration* (1974) (unpublished report); M. Kirby, *Recent Research Findings in Pretrial Diversion*, (Pretrial Services Resource Center monograph 1978); Zimring, "Measuring the Impact of Pretrial Division from the Criminal Justice System," 41 U. Chi. L. Rev. 224 (1974). Pretrial diversion programs of this type currently are operational in New York County (Manhattan Court Employment Project), Nassau County (Operation Midway), and Monroe County. For a description of the Monroe County Diversion program, see Kirby, *supra*, at 16-19; D. Pryor, *Pretrial Diversions Program in Monroe County, New York: An Evaluation* (1977) (unpublished report to the Center for Governmental Research, Inc.). For a description of the Manhattan Court Employment Project, see Kirby, *supra*, at 19-21; Zimring, *supra*; Vera Institute of Justice Court Employment Project Evaluation, *Pretrial Diversion From Prosecution: Descriptive Profiles of Seven Selected Programs*, at 1-33 (April, 1978) (unpublished manuscript) [hereinafter cited as *Vera Profiles*]. For a description of the Nassau County program, see *Vera Profiles*, *supra*, at 131-41; Nassau County Dept. of Probation, *Operation Midway Ann. Rep.* (1977).

CHAPTER III: The Sentencing Process and its Results: How Judges and the Parole Board Sentence Offenders

Part 1A — The Framework of Sentencing

1. N. Y. Penal Law (McKinney).
2. Persons convicted of misdemeanors and certain lower level felonies, who receive a "definite" sentence of incarceration of one year or less, are put in the custody of a local jail or penitentiary. See N. Y. County Law §40 and N. Y. Correc. Law §500 (McKinney).
3. While we recognize that many felony offenders are housed in local jails awaiting trial or after sentence, it was beyond the mandate of the Committee to study these facilities in detail.

Later in this report we review the programs available to convicted felons in the state prison system. As inadequate as the state programs are, they offer far greater promise than the idleness, boredom and despair which pervade local jails. Few jails in New York State maintain any significant rehabilitative programs (in education, vocational training or counseling) for the over three thousand sentenced inmates who reside there. See R. Goldfarb, *JAIL: The Ultimate Ghetto* (1975). Mattick, "The Contemporary Jails of the United States: An Unknown Neglected Area of Justice," in *Handbook of Criminology*, at 77 (D. Glaser ed. 1974); *Rhem v. McGrath*, 326 F. Supp. 681, *supp. by sub nom. Rhem v. Malcolm*, 371 F. Supp. 594 (S.D. N. Y. 1974) *aff'd in part*, 507 F. 2d 333 (2d Cir. 1975), *supp. op.* 432 F. Supp. 769 (S.D. N. Y. 1977) (Manhattan's Mens House of Detention). *Detainees of Brooklyn House of Detention v. Malcolm*, 520 F. Supp. 392 (2d Cir. 1974), *on remand*, 421 F. Supp. 832 (E.D. N. Y. 1976) (Brooklyn jail); *Lucas v. Wasser*, 425 F. Supp. 955 & 73 F.R.D. 361 (S.D. N. Y. 1976) (Sullivan County jail); *Ambrose v. Malcolm*, 76 Civ. 190 (S.D. N. Y. 1978) (New York City jail); *Benjamin v. Malcolm*, 75 Civ. 3073 (S.D. N. Y. 1978) (New York City jail); *Detainees of Queens House of Detention v. Malcolm*, 73 Civ. 101 (S.D. N. Y.) (Queens jail). *Forts v. Malcolm*, 76 Civ. 101 (S.D. N. Y. 1978) (New York City jail); *Giampetuzzi v. Malcolm*, 406 F. Supp. 836 (S.D. N. Y. 1975) (New York City jail); *Merriweather v. Sherwood*, Civ. 77-3421 (S.D. N. Y. 1978) (consent order) (Orange Co. jail); *Lasky v. Quinlan*, unreported order, *vacated as moot*, 558 F. 2d 133 (2d Cir. 1977) (Dutchess Co. jail); *Cooper v. Morin*, 50 A. D. 2d 32 (4th Dept. 1975), *on remand*, 398 N.Y.S. 2d 36 (Sup. Ct. 1977), *aff'd in part, rev'd in part*, 64 A.D. 2d 130 (4th Dept. 1978), *appeal pending*, (Monroe Co. jail); *Mancione v. Cleary*, Civ. No. 74-575 (E.D. N. Y. 1975) (Suffolk Co. jail); *Powlowski v. Wullich*, 81 Misc. 2d 895 (Sup. Ct. 1975) (Genesee Co. jail).

4. The crime categories which are excluded include conspiracy, manslaughter, kidnapping, criminal mischief, arson, forgery, bribery, gambling and drug offenses, and several other minor categories.

The only available information about all felonies merely lists dispositions after indictment. Therefore, it is impossible to ascertain whether the sanction (jail, probation, prison) came after a felony or misdemeanor conviction.

*Post Indictment Dispositions*

Probation (including probation and drug treatment)	31.8%
Unconditional and Conditional Discharge	6.2%
Local Jail Terms (a year or less)	21.3%
State Prison	38.7%

New York State Division of Criminal Justice Services, *Ann. Rep. - 1977*, at 178-179 & 152-153 (1977).

5. *Id.*

6. *See* pp. 44, 174, 180 *infra* and sources cited therein.

7. *See* note 4 *supra*.

8. *See* note 4 *supra*.

9. N. Y. Penal Law §70.40 (1) (b) (McKinney); N. Y. Correc. Law §§212(5) & 803(1); 7 N.Y.C.R.R. §§262.1-262.3; Department of Correctional Services, Directive 4932 (1978).

10. Louis Harris and Associates, Inc. *Survey of Actors in the New York State Criminal Justice System*, at 50-52 (Nov. 21, 1978) (unpublished survey prepared for the New York State Executive Advisory Committee on Sentencing). [hereinafter cited as *Harris Survey*].

11. N. Y. Penal Law §1.05 (McKinney).

12. N. Y. Crim. Proc. Law §390.20 (McKinney).

13. Although the prepleading investigation report is not specifically authorized by statute in New York, its propriety has been accepted by the New York courts. *See, e.g., People v. Crosby*, 87 Misc. 2d. 1079 (Sup. Ct. 1976).

14. N. Y. Crim. Proc. Law §390.30 (McKinney).

15. 9 N.Y.C.R.R. §350.4.

16. N. Y. Crim. Proc. Law §390.50 (McKinney).

17. 9 N.Y.C.R.R. §350.2.

18. *See, e.g., Mayor's Committee Report, supra* note 19; *Subcommittee Report, supra* note 19, at 1-34; *Judicial Process Report, supra* note 19; *EDC Report, supra* note 18, at 52-48; Office of the State Comptroller, *Audit Report on State Probation*, at

25, No. AL-ST-40-74 (1973) [hereinafter cited as *Comptroller's Report*]; New York State Division of Probation, *An Analysis and Report of the Monroe County Department*, at 6-8 (1978) (unpublished manuscript) [hereinafter cited as *Monroe County Report*].

19. Economic Development Council Probation Task Force, *Report on New York City Department of Probation*, at 43 (1977) [hereinafter cited as *EDC Report*].

20. See, e.g., Subcommittee on the Functioning of Probation for the Subcommittee on Liaison with Public and Private Agencies, *The Role and Quality of Probation Services in New York City*, at 12-13 & 25 (1973) (unpublished manuscript) [hereinafter cited as *Subcommittee Report*]; Mayor's Committee on Auxiliary Services to the Courts of New York City, *Report* (1961) (unpublished report) [hereinafter cited as *Mayor's Committee Report*]; Judicial Process Commission, *A Study of Probation* (1976) (unpublished manuscript) [hereinafter cited as *Judicial Process Report*]. See *Harris Survey*, *supra* note 10, at 62-65 (Only 3% of downstate defense attorneys and 10% of upstate defense attorneys whom we surveyed believe that the PSR is "almost always accurate." 94% of defense attorneys surveyed had challenged information contained in the PSR during the past year. Prosecutors surveyed were somewhat less likely to question the PSR's accuracy; 22% believed that the reports were "almost always accurate." This result may be due to the fact that the prosecutor's file was generally cited as the main source of information (offense description which surveyed defense attorneys reported that they frequently challenge).

21. See, e.g., Carter, "The Presentence Report and the Decisionmaking Process," 13 J. Crime & Delinquency 203 (1967); Note, "The Presentence Report: An Empirical Study of Its Use in the Federal Criminal Process," 58 Geo. L. J. 451 (1970).

22. *Mayor's Committee Report*, *supra* note 19, at 59.

23. *Subcommittee Report*, *supra* note 19, at 34.

24. *Id.* at 25.

25. *EDC Report*, *supra* note 18, at 43.

26. See e.g., *Judicial Process Report*, *supra* note 19; *Comptroller's Report*, *supra* note 20; *Monroe County Report*, *supra* note 20.

27. *Harris Survey*, *supra* note 10, at 75-76. (82% of surveyed prosecutors, and 70% of surveyed defense attorneys reported that they did not generally receive the report until the day of sentencing. 68% of surveyed judges indicated that they generally received the report on the day of sentencing, or 1-2 days before. Downstate practitioners more frequently reported delays; 87% of downstate judges reported receiving the reports on, or 1-2 days before sentencing, as opposed to 37% of upstate judges. 100% of downstate defense attorneys reported receiving the reports on or 1-2 days before sentencing, as opposed to 65% of upstate defense attorneys).

28. Witztum, *The Utilization of Presentence Reports in Kings County: An Analysis of the Value of Mandatory Presentence Reports for Plea Bargained Dispositions* (1972) (unpublished manuscript), quoted in Note, "Presentence Reports," 2 Fordham Urban

L. J. 27, 40 (1973). *See also* New York State Joint Legislative Committee on Crime, Its Causes, Control and Effects on Society (Hughes Committee), *Report*, Leg. Doc. No. 26, at 15 (1971); *EDC Report*, *supra* note 18, at 42-44.

29. *EDC Report*, *supra* note 18, at 43.

30. *Harris Survey*, *supra* note 10, at 72-74 (Only 22% of surveyed judges, 8% of prosecutors and 2% of defense attorneys indicated that probation officers are "never influenced by considerations other than the individual case" in making a sentence recommendation. Probation department caseloads and the judge's usual sentencing practices were the most frequently listed influencing factors (23% each) mentioned by judges. The prosecutor's recommendation (30%) and probation caseload (17%) were the factors most frequently cited by prosecutors; defense attorneys cited the same factors (prosecutor's recommendation 26%; probation caseload 19% and community pressures 23%).

#### Part 1B — Sentencing Practices in New York

1. W. Gaylin, M.D., *Partial Justice: A Study of Bias in Sentencing*, at 3 (1974).
2. Twentieth Century Fund Task Force on Criminal Sentencing, *Fair and Certain Punishment*, at 6 (1976).
3. As a result, disparity has been seen to cause prison unrest and further embitter inmates. President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Courts*, at 14-26 (1967).
4. M. Frankel, *Criminal Sentences: Law Without Order*, at 21 (1972).
5. G. Everson, "The Human Element in Justice," 10 J. Crim. L. & Criminology 90, 91 (1919).
6. *Id.* at 93.
7. *Id.* at 97.
8. *Id.* at 99.
9. Somit, Tanenhaus & Wilke, "Aspects of Judicial Sentencing Behavior," 21 U. of Pitts. L. Rev. 613, 614 (1960).
10. Cargan & Coates, "The Indeterminate Sentence and Judicial Bias," 19 Crime & Delinquency 144, 149-50 (1974).
11. L. J. Toliver, *Sentencing and the Law and Order Syndrome in South Carolina*, at 83 (1974).
12. Johnson, Miller, Schoenberg & Weatherly, "Discretion in Felony Sentencing - A Study of Influencing Factors," 48 Wash. L. Rev. 857, 878. *See also* Kilpatric & Brummel, "Sentencing Study," 52 Wash. L. Rev. 103 (1976).

13. Baab & Furgeson, "Texas Sentencing Patterns: A Statistical Study," 45 Tex. L. Rev. 471, 490 & 501 (1967).
14. L. Wilkins, J. Kress, D. Gottfredson, J. Calpin & A. Gelman, *Sentencing Guidelines: Structuring Judicial Discretion* (1976).
15. Seymour, "1970 Sentencing Study for the Southern District of New York," 45 N. Y. S. Bar J. 163 (April, 1973). See also Glueck, "The Sentencing Problem," 20 Fed. Prob. 15, 16 (1956); President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Courts* (1967); National Advisory Commission on Criminal Justice Standards and Goals, *Corrections*, at 142 (1973).
16. Federal Judicial Council, *The Second Circuit Sentencing Study: A Report to the Judges of the Second Circuit* (A. Partridge & W. Eldridge eds. 1974).
17. *Id.* at 14.
18. *Id.* at 9.
19. *Id.* at 23 & 32.
20. Appendix D, pp. 182-183.
21. Federal Judicial Council, *supra* note 16, at 16. See also Wilkens, Preface to the *Sentencing Simulation Study* which is annexed to this report as Appendix C.
22. Appendix C, Table 2.
23. Appendix C, Table 3.
24. Appendix C, Table 4.
25. Appendix C, Table 5.
26. Appendix C, Table 6.
27. Appendix C, Table 9.
28. C. Silberman, *Criminal Violence, Criminal Justice*, at 285-90 (1978); T. Dungworth, *An Empirical Assessment of Sentencing Practices in the Superior Court of the District of Columbia* (1978) (unpublished study done for the Law Enforcement Assistance Administration, U. S. Dept. of Justice). See also L. Sutton, *Variations in Federal Criminal Sentences: A Statistical Assessment at the National Level* (1978) (A study of over 9,000 sentences imposed in federal district courts in 1971 which concludes that "... nearly half of the [sentencing variations]" cannot be explained by analysis of objective information, such as prior criminal record).

#### Part 1C — Appellate Review

1. N. Y. Crim. Proc. Law §§450.20 (4) & 450.30 (2) (McKinney).

2. *People v. Reep*, 54 A.D. 2d 594, 387 N.Y.S. 2d 29 (3rd Dept., 1976); *People v. Dittmar*, 41 A.D. 2d 788, 341 N.Y.S. 2d 50 (3rd Dept. 1973).
3. Code Crim. Proc. §543 (1) had conferred upon the Appellate Division the power to reduce the sentence imposed to a sentence not lower than the minimum penalty provided by law for the offense. While this language has not been carried over into the present Criminal Procedure Law, which took effect September 1, 1971, it has been said that the present law substantially restates that provision. R. G. Denzer, *Practice Commentary*, in N. Y. Crim. Proc. Law §470.15 (McKinney).
4. *People v. Rytel*, 284 N.Y. 242, 30 N.E. 2d 578 (1940).
5. *People v. Ellis*, 60 A.D. 2d 736, 737, 400 N.Y.S. 2d 899, 900 (3rd Dept. 1977).
6. *People v. Washington*, 56 A.D. 2d 738, 392 N.Y.S. 2d 743 (4th Dept. 1977); *People v. Walsh*, 50 A.D. 2d 940, 377 N.Y.S. 2d 192 (2d Dept. 1975).
7. *People v. Stewart*, 57 A.D. 2d 796, 394 N.Y.S. 2d 690 (1st Dept. 1977); *People v. Silver*, 10 A.D. 2d 274, 199 N.Y.S. 2d 254 (1st Dept. 1960).
8. *People v. Del Popolo*, 50 A.D. 2d 710, 374 N.Y.S. 2d 888 (4th Dept. 1975).
9. *People v. Gomez*, 57 A.D. 2d 904, 394 N.Y.S. 2d 287 (2d Dept. 1977); *People v. Garson*, 53 A.D. 2d 618, 384 N.Y.S. 2d 26 (2d Dept. 1976).
10. *People v. Lockwood*, 50 A.D. 2d 1074, 374 N.Y.S. 2d 60 (4th Dept. 1975).
11. *People v. Ryan*, 38 A.D. 2d 50, 327 N.Y.S. 2d 207 (1st Dept. 1971).
12. *People v. Belknap*, 57 A.D. 2d 970, 394 N.Y.S. 2d 94 (3rd Dept. 1977).
13. *People v. Wilson*, 56 A.D. 2d 572, 391 N.Y.S. 2d 524 (2d Dept. 1977).
14. *People v. VanAmeron*, 60 A.D. 2d 785, 400 N.Y.S. 2d 651 (4th Dept. 1977).
15. For a review of the literature on the efficacy of appellate review, see Coburn, "Disparity in Sentences and Appellate Review of Sentencing," 25 Rutgers L. Rev. 207 (1971); Hopkins, "Reviewing Sentencing Discretion: A Method of Swift Appellate Action," 23 U.C.L.A. L. Rev. 491 (1976); Labbe, "Appellate Review of Sentences: Penology on the Judicial Doorstep," 68 J. Crim. L. & Criminology 122 (1977); Palmer, "A Model of Criminal Dispositions: An Alternative to Official Discretion in Sentencing," 62 Geo. L. J. 1 (1973); Samuelson, "Sentence Review and Sentence Disparity: A Case Study of the Connecticut Sentence Review Decision," 10 Conn. L. Rev. 5 (1977); "Appellate Review of Sentences and the Need for a Reviewable Record," 1973 Duke L. J. 1357; "Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study," 69 Yale L. J. 1453 (1960). A.B.A. Advisory Committee on Sentencing and Review, *Standards Relating to the Administration of Criminal Justice: Appellate Review of Sentences* (2d Tent. Draft 1978); *Appellate Review of Sentences: A Symposium at the Judicial Conference on the U. S. Court of Appeals for the Second Circuit*, 32 F.R.D. 249 (1962).

## Part 2: The Parole Board

1. Lindsey, "Historical Sketch of the Indeterminate Sentence and Parole System," 16 J. Crim. L. & Criminology 9, 13 (1925).

See 4 U. S. Attorney General's Survey of Release Procedures, at 4 (W. Morse ed. 1939) for the following "classic" definition of parole:

"...[R]elease of an offender from a penal or correctional institution, after he has served a portion of his sentence under the continued custody of the State and under conditions that permit his reincarceration in the event of misbehavior."

2. See Governor's Special Committee on Offenders, *Preliminary Report of the Governor's Special Committee on Offenders*, at 230-33 (1968); New York State Special Committee on the Parole Problem, *Report of Special Committee on the Parole Problem* (1930); U. S. Attorney General's Survey of Release Procedures, *supra* note 1, at 785-808.

3. K. C. Davis, *Discretionary Justice*, at 126 (1969).

4. J. Mitford, *Kind and Usual Punishment* (1974); Dawson, "The Decision to Grant or Deny Parole: A Study of Parole Criteria and Practice," 1966 Wash. U. L. Q. 243; Harris, "Disquisition on the Need for a New Model for Criminal Sanctioning Systems," 77 W. Vir L. Rev. 263, 297 (1975). See also American Friends Service Committee, *Struggle for Justice* (1971); Grossenbacker, "Rights Versus Results: Quo Vadis Due Process for Parolees," 1 Pac. L. Rev. 321 (1970); Hier, "Curbing Abuse in the Decision to Grant or Deny Parole," 8 Harv. C. R. - C. L. L. Rev. 419 (1973); vonHirsch, "Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons," 21 Buffalo L. Rev. 717 (1971); Parsons - Lewis, "Due Process in Parole Release Decisions," 60 Cal. L. Rev. 1518 (1972); Comment, "Does Due Process Require Clear and Convincing Proof Before Life's Liberties May Be Lost," 24 Emory L. J. 104 (1975); Comment, "The Right to Counsel in Parole Release Hearings," 54 Iowa L. Rev. 497 (1968); Comment, "The Parole System," 120 U. Pa. L. Rev. 284 (1971).

5. See, e.g., *Morrissey v. Brewer*, 408 U. S. 471 (1972); *Haymes v. Regan*, 525 F. 2d 540 (2d Cir. 1975); *United States ex. rel. Johnson v. Chairman New York State Parole Board*, 500 F. 2d 925, 934 (2d Cir. 1974), vacated as moot *sub nom. Regan v. Johnson*, 419 U. S. 1015 (1974); *Cicero v. Oligiati*, 426 F. Supp. 1210 (S.D.N.Y. 1976).

6. New York State Special Commission on Attica, *Attica: The Official Report of the New York State Special Commission on Attica*, at 93 (1972).

7. *Id.* at 98.

8. Citizens' Inquiry on Parole and Criminal Justice, *Report on New York Parole*, at 176 (1974).

9. *Id.* at 176-77.

10. *Id.* at 178.
11. Staff of the Codes Committee of the New York State Assembly, *But I Was Free Born*, at 63 (1976).
12. *Id.* at 63-64. See also Community Service Society, *Statement Regarding Reform of the Parole System* (presented to N. Y. Assembly Codes Committee, April 29, 1977).
13. The origin of publically articulated doubt concerning the efficacy of rehabilitation programs can, in part, be traced to D. Lipton, R. Martinson & J. Wilks, *The Effectiveness of Correctional Treatment* (1975), begun under the auspices of Governor Rockefeller's Special Committee on Criminal Offenders in 1968. Before the book became available Martinson published his now famous article, R. Martinson, "What Works? Questions and Answers About Prison Reform," 35 *Public Interest*, at 22-54 (1974). Co-author Lipton has questioned Martinson's conclusions. See 2 *Corrections Quarterly* 32, 35 (1977).  
 For a rebuttal to the Martinson thesis, see Palmer, "Martinson Revisited," 12 *Crime & Delinquency* 133, 150 (1975). See also S. Adams, *Evaluative Research in Corrections* (1975); Halleck & Witte, "Is Rehabilitation Dead?" 10 *Crime & Delinquency*, 372, 373 (1977); Warren, "Correctional Treatment and Coercion: The Differential Effectiveness Perspective," 4 *Criminal Justice Behavior* 355 (1977).  
 For an update on D. Lipton, R. Martinson & J. Wilks, *supra*, see Greenberg, "The Correctional Effects of Corrections," *Corrections & Punishment*, at 111-149 (1977).
14. Citizens' Inquiry on Parole and Criminal Justice, *supra* note 8, at 173.
15. Harris, *supra* note 4, at 301; Kastenmeier & Elgit, "Parole Release Decision-Making: Rehabilitation, Expertise, and the Demise of Mythology," 22 *Am. U. L. Rev.* 477 (1973). See generally Citizens' Inquiry on Parole and Criminal Justice, *supra* note 8; J. Mitford, *supra* note 4, at 294; D. J. Stanley, *Prisoners Among Us* (1976); McGee, "A New Look at Sentencing," 38 *Fed. Prob.*, at 3-8 (1974) & 39 *Fed. Prob.*, at 3-11 (1974).
16. See *Speed v. Regan*, 42 N.Y. 2d 1087 (1977).
17. N.Y. Exec. Law §259 (McKinney).
18. 28 C. F. R. §2.1-2.57 (1978).

One major difference between the federal and New York guidelines is that the federal guidelines incorporate certain socio-economic facts about the offender (such as employment and marital status) to enhance their predictive ability concerning the offender's likelihood of success on parole, while New York's parole guidelines do not. See D. Gottfredson, L. Wilkins & P. Hoffman, *Guidelines for Parole and Sentencing* (1978); D. Gottfredson, C. Cosgrove, L. Wilkins, J. Wallerstein & C. Rauh, *Classification for Parole Decision Policy* (1978) (LEAA Monograph); Gottfredson, Hoffman, Sigler & Wilkins, "Making Parole Policy Explicit," 21 *Crime & Delinquency*, at 34-44 (1975); Hoffman & DeGostin, "Parole Decision-Making: Structuring Discretion," 38 *Fed. Prob.* 7 (1974); Maffucci, "The New York State Board of Parole: Scapegoats of the Criminal Justice System," 1978 N.Y.S. Bar J. 640, at 643 (Dec. 1978).

19. E. R. Hammock, *Interim Guidelines for Parole Board Decision Making* (Jan. 13, 1978) (unpublished memorandum from the Chairman of the New York Board of Parole).

20. The constitutionality of this practice has been upheld by the courts, particularly when a Parole Board has relied upon facts recited in a presentence report. See, e.g., *Billiteri v. U. S. Board of Parole*, 541 F. 2d 687 (2d Cir. 1976). These decisions appear to rely upon the holding in *Williams v. New York*, 337 U.S. 241, 246 (1949) that a court may consider hearsay evidence in determining sentence; by analogy, it has been held that a Parole Board may also rely upon hearsay in making its release decisions. It should be noted, however, that a defendant in court, through his counsel, has an opportunity to learn the contents of the presentence report and contest hearsay. An inmate appearing before the Parole Board has only severely limited access to the hearsay information which may be used against him, and has no right to counsel. See notes 28-29 *infra*.

21. A memorandum, prepared by the New York State Division of Parole, at 2, states: "It must be noted that the MPI's reflect what the Board refers to as 'realistic' minimum terms. In this context 'realistic' means that the inmate has a high probability of being granted parole at the expiration of his minimum term."

22. Memorandum by E. R. Hammock, Chairman of the New York State Board of Parole (Oct. 2, 1978).

23. *Id.*

24. *Parole Board MPI Decision Notice*, at Form 9025.

25. *Id.* at Form 9026.

26. Citizens' Inquiry on Parole and Criminal Justice, *supra* note 8, at 32-40. Information provided to the Committee staff by representatives of the Board of Parole (Sept. 18, 1978).

27. 9 N.Y.C.R.R. §8002.3.

28. The provision for inmates obtaining access to information in their parole file is contained in 9 N.Y.C.R.R. §8000.5(c)-(i). These regulations deny access to information which is confidential in nature, including psychiatric records and material which would reveal confidential sources. The practical effect is to ban access to much of the data in the presentence report. The Division also cannot release prison records because they are kept by a different agency. The Committee learned that obtaining prison records was a cumbersome process and therefore infrequently utilized.

Several Federal Circuit courts have ruled that at least limited access to parole files is constitutionally required. *Williams v. Missouri Board of Probation and Parole*, 585 F. 2d 922 (8th Cir. 1978), *petition for cert. filed*, 47 U.S.L.W. 3532. In *Williams, supra*, the court went beyond the New York regulations and required inmates to be informed of a summary of the contents of any information properly withheld as confidential. The rule on access to parole files in the Second Circuit is less than clear. In *Billiteri v. U.S. Bd. of Parole*, 541 F. 2d 938, 945 (2d Cir. 1976), the court held that

there was no constitutional right of access to the presentence report contained in the parole file. Subsequently, A Connecticut inmate claimed that the question of whether an inmate had a right to examine his file had to be examined in the context of actual practice. In *Holup v. Gates*, 544 F.2d 82 (2d Cir. 1976), *cert. denied*, 430 U.S. 941 (1977) the court agreed and remanded the case to the trial court for an assessment of the negative consequences of requiring the Parole Board to produce data from the files of inmates denied parole and the extent of past inaccuracies in the Parole Board files. Two subsequent cases involved challenges to the denial of access to information in a parole board file in New York. The Second Circuit, in *Williams v. Ward*, 556 F.2d 1143 (1976), *cert. dismissed*, 434 U.S. 994 (1977), found no basis for granting access (perhaps because of the court's view of the merits of the case). In *Coraluzzo v. New York State Board of Parole*, 566 F.2d 375 (1977), the court ordered access. The circumstances surrounding the case involved an inmate's bona fide claim that information, previously redacted by a State Court, was improperly used by the Parole Board. See also "Prisoner Access to Parole Files: A Due Process Analysis," 47 *Fordham L. Rev.* 260 (1978).

Compare N.Y.C.R.R. §8000.5(c)-(i) with 18 U.S.C. §4208 and A.B.A. Commission on Correctional Facilities and Services, *State Parole Release Procedures*, at 5 (1976).

29. Inmates do not have the right to counsel. N.Y. Exec. Law §259-i.

In 1970, the Second Circuit ruled that inmates had no constitutional right to counsel at parole hearings. *Menechino v. Oswald*, 430 F.2d 403 (2d Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971). The *Menechino* court reasoned that parole boards were interested in rehabilitating the inmate and parole hearings were not adversarial or fact finding in nature. The court rejected a claim that parole hearings were a form of deferred sentencing which, under *Mempha v. Rhay*, 389 U.S. 128 (1967), required counsel.

Today, Menechino's claim might have greater strength because, as we indicate elsewhere in this report, the Parole Board does perform a resentencing function and thus should logically be subject to the constitutional requirements set forth by the Supreme Court in *Mempha v. Rhay*, *supra*. Twenty-one (21) jurisdictions permit attorneys to appear at parole release hearings. V. O'Leary & K. Hanrahan, *Parole Systems in the United States*, at 39 (1976).

30. See note 28 *supra*.

31. New York State Special Commission on Attica, *supra* note 6, at 96 (Committee observations at parole hearings confirmed this view).

32. Division of Parole, *Parole Statistics*, at Table H-1 (1976); Citizens' Inquiry on Parole and Criminal Justice, *supra* note 8, at 42.

33. New York State Special Commission on Attica, *supra* note 6, at 96; Citizens' Inquiry on Parole and Criminal Justice, *supra* note 8, at 194-99.

34. The Committee attended Parole Board hearings at the Elmira Correctional Facility on three different days in the Fall of 1978.

35. Citizens' Inquiry on Parole and Criminal Justice, *supra* note 8, at 56.

36. See *Matter of Hyntz*, 411 N.Y.S. 2d 389, 392 (2d Dept. 1978) (Suozzi, J.; dissenting opinion).

37. 9 N.Y.C.R.R. §8030; *See also* E. R. Hammock, *Appeal Procedures* (March 16, 1978) (unpublished memorandum from the Chairman of the New York State Board of Parole).

38. 9 N.Y.C.R.R. §8006.1-8006.4.

39. These figures were given to the Committee by representatives of the Division of Parole.

40. N.Y. Exec. Law §259-i(4) (McKinney).

41. *Brigulio v. N. Y. Bd. of Parole*, 24 N.Y. 2d 21, 29 (1969).

42. Department of Correctional Services, *Monthly Analysis of Admissions and Releases and Graphs* (memorandum of Dec. 20, 1978).

43. Conversation between Committee staff and a representative of the Department of Correctional Services.

44. Appendix A, pp. 65-68.

45. P. Hoffman and M. Stover, *Reform in the Determination of Prison Terms: Equity Determinacy and the Parole Release Function*, at 28 (1978) (unpublished manuscript) (furnished as appendage to testimony given at Sentencing Committee public hearings in Albany).

46. *Id.* at 32.

47. Conversation with E. R. Hammock, Chairman of the New York State Board of Parole (Oct. 23, 1978).

48. As Congressman Robert Kastenmeier wrote:

"Parole is the dominant concern and... source of frustration in virtually every prison. Prison riots capture headlines, but parole is in control of the mind and heart of virtually every prisoner."

Kastenmeier & Elgit, *supra* note 15, at 487.

49. As the Third Circuit reasoned in *Geraghty v. U.S. Parole Commission*, 579 F. 2d 238 (3rd Cir. 1978), *petition for cert. filed*, 47 U.S.L.W. 3551:

"When...the Parole authority focuses consideration entirely on factors of deterrence, incapacitation and retribution, it takes into account the very factors that are available to the sentencing judges...serious questions are raised whether the constitutional protections provided by an independent judiciary are being undermined."

*Id.* at 261.

CHAPTER IV: Imprisonment

1. For more information on the history of prisons, see American Friends Service Committee, *Struggle for Justice: A Report on Crime and Punishment in America* (1971); M. Foucault, *Discipline and Punishment* (1977); L. Friedman, *A History of American Law* (1973); R. Goldfarb & L. Singer, *After Conviction* (1973); G. Hawkins, *The Prison* (1976); B. McKelvey, *American Prison: A Study in American Social History Prior to 1915* (1972); J. Mitford, *Kind and Usual Punishment* (1973); W. Nagel, *The New Red Barn: A Critical Look at the Modern American Prison* (1973); D. Rothman, *The Discovery of the Asylum* (1973) [hereinafter cited as *The Discovery of the Asylum*]; Twentieth Century Fund Task Force on Criminal Sentencing, *Fair and Certain Punishment* (1976); Rothman, "Decarcerating Prisoners and Patients," 1 Civ. Lib. Rev. 8 (1973); Rothman, "The Invention of the Penitentiary," 8 Crim. L. Bull. 555 (1972).
2. C. Dickens, *American Notes*, at 118, 127 (1842).
3. J.B. Finley, *Memorials of a Prison Life*, at 41-42 (1851), quoted in *The Discovery of the Asylum*, *supra* note 1, at 84.
4. New York Society for the Prevention of Pauperism, *Report on the Penitentiary System*, at 96, quoted in *The Discovery of the Asylum*, *supra* note 1, at 94.
5. Lindsey, "Historical Sketch of the Indeterminate Sentence and Parole System," 16 J. Crim. L. C. & P. S. 9 (1925-26).
6. *Id.* at 20.
7. See B. G. Lewis, *The Offender and His Relations to Law and Society*, at 135-35 (1917); Lewis, "The Indeterminate Sentence," 8 Yale L. J. 21 (1899).
8. N.Y. State Board of Charities, *Report and Proceedings of the State Board of Charities Relative to the Management of the State Reformatory at Elmira*, vol I, at vi (1894). See also N.Y. State Board of Charities, *supra*, vol. II.
9. New York State Commission to Investigate Prison Administration and Construction, *Prisoners: Their Crimes and Sentences*, at 23 (1930) (Special Commission Report).
10. National Commission on Law Observance and Enforcement, *Report on Penal Institutions, Probation and Parole No. 9*, at 142-232 (1931); Warner, "Some Aspects of the Indeterminate Sentence," 8 Yale L. J. 221 (1899).
11. See *supra* note 10.
12. D. Lipton, R. Martinson & J. Wilks, *The Effectiveness of Correctional Treatment*, at 540-42 (1975).
13. N. Morris, *The Future of Imprisonment*, at 5 (1974).
14. "Decarcerating Prisoners and Patients," *supra* note 1, at 8-9.

15. Rothman, "Doing Time: Days, Months and Years in the Criminal Justice System," XIX Int'l J. Contp. Soc., at 130 & 135-36 (1977).

16. New York State Department of Correctional Services, Bureau of Records and Statistical Analysis, *Distribution of Inmate Population as of January 15, 1979*, (preliminary figures).

17. New York State Department of Correctional Services, *Ethnic Distribution of Inmates Under Custody in New York State Correctional Facilities as of September 29, 1978*. The admissions data comes from unpublished information made available to the Committee by DOCS.

18. *N. Y. DOCS Ann. Rep.*, at 16 (1977).

19. New York State Division of Parole, *1976 Parole Statistics*, at Table R-6 (1976).

20. This information was provided to the Committee staff by the New York State Department of Correctional Services.

21. Among the plausible explanations for increases in the prison population are: (1) Shifts in the unemployment rate [see U. S. Bureau of Prisons, *Correlation of Unemployment and Federal Prison Population*, (March 1975); R. W. Gillespie, *Economic Factors in Crime and Delinquency: A Critical Review of the Empirical Evidence*, (1975)]; and, (2) Fluctuations in the use of civil commitment alternatives for drug addicts [information obtained by the Committee from the New York State Office of Substance Abuse Services indicates that the average number of admissions of narcotic addicts committed for treatment in lieu of incarceration, grew from less than 200 in the years 1967-69, to an average figure exceeding nine-hundred for the years 1970-73. Also, during 1970-73 the prison population increased by approximately the same figures].

Another explanation is that more serious offenders are now being sent to prison more frequently than in past years. Characteristics of inmates under custody in 1962 indicate that 28.7% of the state inmates had been convicted of misdemeanors and that the percentage of inmates serving time for violent offenses was just over 36% (murder-manslaughter, 9.2%; assault, 6.6%; rape, 2%; robbery, 19%). In contrast, in 1977 the figure for violent crimes was 51%.

22. New York State Department of Correctional Services, *City-State Plan for Riker's Island*, at 11 (July 25, 1978).

Such figures are gross estimates at best. The methods used for making prison population projections are very crude indeed. See A. Rutherford, *Prison Population and Policy Choices, Volume I: Preliminary Report to Congress*, (1977); Robinson, Smith & Wolf, *Prison Population Costs - Illustrative Projections to 1980*, (1977) (Congressional Research Service, Library of Congress); A. Blumstein, *Demographically Disaggregated Projections of Prison Populations 1, 3-5* (Carnegie-Mellon University Urban Systems Institute, (1978); D. Nagin, *The Impact of Flat Time Sentencing Legislation on Prison Population and Sentence Length: A California Case Study* (1977).

23. 7 N.Y.C.R.R. §250-270.6, and information provided to the Committee staff by the Department of Correctional Services.

24. This quotation is reproduced in the preface to National Advisory Commission on Criminal Justice Standards and Goals, *Task Force Report: Corrections*, (1973) [hereinafter cited as *Corrections*].

25. In *The Effectiveness of Correctional Treatment*, *supra* note 12, the authors concluded that:

“Minimum security institutions are more effective than maximum security institutions relative to recidivism for youthful, good risk offenders.”  
[*Id.* at 84].

See also L. Wilkins, “Directions for Corrections,” 118 Proceedings of the American Philosophic Society 235 (June 1974) reprinted in Carter, Glaser & Wilkins, *Correctional Institutions*, (1977); *Corrections*, *supra* note 24, at 197-209.

26. As David Rothman, social historian, told the Committee at a public hearing:

“[N]o matter how much investment you make in a therapeutic enterprise as a system — ultimately someone inside... is going to test the boundaries. Somebody will try to walk away... At that point the whole therapeutic model begins to collapse because you finally must police... and coercion will come into play.”

Hearing of the New York State Executive Advisory Committee on Sentencing, *Transcript*, at 168-69 (New York, N.Y.: Nov. 16, 1978) (testimony of David Rothman, Co-Director of the Project on Community Alternatives).

27. One researcher found that there was a correlation between parole success (reduction of recidivism) and the contact inmates had with the community measured by the number of visitors. Holt & Miller, “Exploration in Inmate-Family Relationships,” reported in California Department of Corrections, *Research Division Report #45*, (1972).

28. Select Committee on Crime, *Reform of Our Correctional System*, at 41 (1973) (report to the United States House of Representatives).

29. C. Silberman, *Criminal Violence, Criminal Justice*, at 397-98 (1978).

30. Prison officials have attempted to limit the negative impact of transfers by developing “learning modules.” These modules are designed to standardize the skills taught to inmates at each prison in a specific program. Each module is designed to be of short duration and provide for an objective test to assure other teachers that the inmate has developed the requisite skills to go on to the next module. See generally *Corrections*, *supra* note 24.

31. Moseley, “Prison Programs as State of Mind,” *Fortune News*, at 7 (Sept., 1978).

32. Temporary State Commission on Management and Productivity in the Public Sector, *Working Papers*, at 114 (Oct. 1977) (report on the N.Y.S. Dept. of Correctional Services).

33. D. McDonald, *Cost of Criminal Justice in New York*, (1979) (unpublished manuscript).

34. N. Morris, *The Future of Imprisonment*, at 38 (1974); See also S. Sheehan, *A Prison and A Prisoner* (1978) for a description of New York's Green Haven Prison.

35. Those vocational programs which have been most successful are those which match the offender and skills developed in prison with jobs. Gearhart, "An Analysis of the Vocational Training Programs in the Washington State Adult Correctional Institutions," 23 *Research Review*, (1967); D. Greenberg, *Correction and Punishment*, at 121 (1977).

36. S. Sheehan, *supra* note 34, at 27. C. Silberman, *supra* note 29, at 281 reports that nearly ten percent of the average population of Green Haven was in protective segregation at some point during 1976. Our interviews at other prisons produced an even bleaker picture.

37. Corrections, *supra* note 24, at 370. See also, ABA, *Cost Analysis of Correctional Standards: Institutional Based Programs and Parole*, at 71-81 (1976).

38. See S. Sheehan, *supra* note 34, at 122.

39. D. Lipton, *supra* note 12, at 615.

40. N. Y. State Senate Committee on Crime and Correction, *Report on Felony Offenders in Prison in New York State*, at 81 (not dated).

41. D. Greenberg, *Corrections and Punishment*, at 121-22 (1977).

42. See generally A. D. Little, *Correctional Industrial Training: A Survey*, Vol. I & II (1974) (Report for the New York State Department of Correctional Services); D. McDonald, *Cost of Criminal Justice in New York* (1979) (unpublished manuscript) [hereinafter cited as *Cost of Criminal Justice*]; Study of the Economic and Rehabilitative Aspects of Prison Industry, *Technical Tasks and Results*, (1978).

43. Office of the New York State Comptroller, *Audit Rep. AL-ST-39-74*, (1974) (for inmates released in 1973, 75% had no jobs when they were released).

44. Absenteeism ranged from 18% in facility maintenance to 35% in correctional industries. The prison system has attempted to minimize these schedule conflicts, by installing the Comprehensive Program Day. The goal of this program is to schedule fifteen uninterrupted hours of training per week. Despite good intentions, however, the early results of this approach have been disappointing. See DOCS - Budget Task Force Report, *Comprehensive Program Day*, at 4 (1978) (Interruption rates ranged from 19% to 38% depending on the program assignment before implementation, but were only reduced to 19% at one facility after the concept was put in place). *Id.* at 11.

45. The current "state use" provisions are found in NY. Correction Law §170-97 (McKinney). N.Y. Correction Law §45 (McKinney) gives a watchdog role to the Commission of Correction.

46. Joint New York State Department of Correctional Services and Division of the Budget Task Force, *Industry Program* (Jan. 1978) (internal memorandum).

47. *Id.* at 3.

48. Office of the New York State Comptroller, *Audit Rep. AL-ST-56-76* at 2-3 (1977) and *Audit Rep. AL-ST-30-77* at 1-2 (1976); A. D. Little, *supra* note 42; *Cost of Criminal Justice, supra* note 42.

49. See generally Note, "Temporary Release in New York State Correctional Facilities," 38 Albany L. Rev. 691 (1974); Meltzner, Caplan & Lane, "An Act to Promote the Rehabilitation of Criminal Offenders in the State of New York," 24 Syracuse L. Rev. 885, 895-96 (1973). See also Hearings on S. 1602, S. 4034, S. 4408, and S. 5216 before the New York State Committee on Penal Institutions on proposed work release legislation (April 5, 1968).

For a review of successful work-release programs see A. D. Little, *Work Release in North Carolina: An Evaluation of Its Post Release Effects* (1975); Holt, "Temporary Prison Release," 17 Crime & Delinquency 414, 423 (1971); Rudoff & Esselstyne, "Evaluating Work Furlough: A Follow-up," 37 Fed. Prob. 48 (June, 1973).

50. N. Y. Correction Law §§851-861 (McKinney); Department of Correctional Services, *Temporary Release Program Rules and Regulations* (1978) (DOCS directive).

51. Until 1976 prison officials permitted Temporary Release Committees at the various prisons to decide who would be released. Beginning in 1976, prison officials began to centralize the selection process and, with the help of the VERA Institute, to objectify the selection criteria. Dunkel, *The Development of a Point System For Temporary Release Selection* (1978).

52. Hearing of the New York State Senate Committee on Crime and Correction, *Transcript*, at 171-74 (June 1, 1977) [hereinafter cited as *Hearings - Temporary Release*]. Cf. N. Y. Correction Law §29 (1) (McKinney).

53. *Id.* at 102.

54. Laws of 1977 ch. 691. See also M. Hannah, *A Review of Temporary Release Programs in New York State* (1978) (Report of the New York State Commission of Correction); New York Department of Correctional Services, *White Paper on Temporary Release* (Feb., 1978); Community Service Society of New York, *Community Oriented Correctional Programs* (1975).

55. The modern prison has developed a new set of management problems. The opportunity for positive relationships to develop between guards and inmates is limited. First, some senior guards have sought job assignments away from regular contact with inmates. Second, development of job titles such as "corrections counsellors" — and the accompanying civilian attire — has further exacerbated the division between security and rehabilitation staff. Some guards provide no services other than security. See

S. Sheehan, *supra* note 34, at 142-47 (1978); J. Jacobs, *Stateville* (1977); National Institute for Law Enforcement and Criminal Justice, *Prison Employee Unionism: The Impact on Correctional Administration and Programs* (1978); Alexander, "The New Prison Administrators and The Court: New Directions in Prison Law," 56 *Tex. L. Rev.* 963, n. 39 (1978).

For a description of the relationship between guards and inmates, see Gould, "The Officer-Inmate Relationship: His Role in the Attica Rebellion," 2 *Bull. of the Am. Acad. Psych. & L.* 34 (March, 1974).

56. Information provided by William Birnbaum in conversation with the Committee staff (January 17, 1979).

57. New York State Division of Criminal Justice Services, *1979 Comprehensive Crime Control Plan* at VI-8.

58. *Id.* at VI-12.

59. *Id.* at VI-11.

60. New York State Select Committee on Correctional Institutions and Programs, *Report No. 1*, at 8-9 (1972).

61. As Hans Toch, the leading researcher on prison violence, concludes:

"Jails and prison ... have a climate of violence which has no free-world counterpart. Inmates, are terrorized by other inmates and spend years in fear of harm. Some inmates request segregation, others lock themselves in, many inmates injure themselves."

H. Toch, *Police, Prisons and the Problems of Violence*, at 53 (1977). See also C. Silberman, *supra* note 29, at 397-98 (1978); J. Conrad & S. Dinitz, *In Fear of Each Other* (1977); A. Cohen, G. Cole & N. Bailey, *Prison Violence* at 123 (1976).

62. D. Greenberg, *supra* note 41, at 122-24; Martinson, "What Works?, Questions and Answers About Prison Reform," 10 *Public Interest* 22, 36-37 (1974); Chiricos, "Work Release and Recidivism," *Evaluation* at 87-107 (1977); D. Lipton, *supra* note 12, at 82; Robinson & Smith, "The Effectiveness of Correctional Programs," 17 *Crime & Delinquency* 67, 71 (1971).

CHAPTER V: Post-Release Supervision

1. New York State Department of Correctional Services, Division of Program Planning, Evaluation and Research, *Parole Statistics*, at Table S-1 (1976).

According to information given to the Attica Commission, a parolee is most likely to be placed in delinquent status and brought before the Parole Board during his first year on parole supervision. Note, "After Release - The Parolee in Society," 48 St. John's L. Rev. 1, 15 (1973).

Burkhart suggests that two years is the optimal period of supervision. W. Burkhart, *The Great Parole Experiment*, reprinted in E. Miller & M. R. Montilla, *Corrections in the Community*, at 245 (1977). See also Commission on Accreditation for Corrections, *Manual of Standards for Adult Parole Authorities*, at 25 (1976) ("A policy should exist stating that continued active supervision of an individual after two years under supervision requires a specific affirmative justification."); D. Stanley, *Prisoners Among Us*, at 181 (1976) (Citing a California study which found that "...parolees who remain free from criminal involvement for a year (or more) are not likely to subsequently become criminally involved..."). We also must be cognizant of past practices. A two year limit on supervision would mean that about sixty percent of parolees would be supervised for less time than they are now.

2. Specialized caseloads are described in New York State Division of Parole, *Policy and Procedures Manual*, at S-9221 to 9222 (Oct. 1, 1978). In late 1978 there were fewer than twenty such caseloads and all were operated out of the New York City Parole Office. See generally R. M. Carter & L. T. Wilkins, *Probation, Parole and Community Corrections* (2d ed. 1976); D. Lipton, R. Martinson & J. Wilks, *The Effectiveness of Correctional Treatment*, at 522 (1975).

The average caseload size was derived from conversations of Committee staff with both representatives of the Division of Parole and individual parole officers.

3. In a report by the New York State National Probation and Parole Association, the Association concluded: "Surveillance is that activity of the parole officer which utilizes watchfulness, checking, and verification of certain behavior of a parolee without contributing to a helpful relationship with him." New York State National Probation & Parole Association, *Parole in Principle and Practice*, at 70 (1957).

4. The budget for field parole services offered by the Division of Parole for 1978-79 is \$17,299,328. State of New York, *N. Y. Executive Budget 1978-79*, at 526 (1979). This figure divided by the average number of parolees and conditional releases, gives a very rough cost estimate of over a thousand dollars per year for supervision.

5. George Bernard Shaw as quoted in B. Webb, *English Prisons Under Local Government*, at xvii (1922).

6. E. Studt, *Reintegration from the Parolees Perspective*, at 43 (1973) (LEAA monograph).

7. D. Stanley, *supra* note 1, at 138.

8. Parolees also have their savings from prison, but it is not likely that this amount will be sufficient. R. Horowitz, *Back on the Street - From Prison to Poverty*, the

*Financial Resources of Released Offenders*, at iii (1976) (Estimates that the average savings for a New York inmate upon release is forty dollars).

9. Information concerning the Division of Parole loan program was provided to the Committee staff by representatives of the Division of Parole.

10. Only eighteen states have loan programs. D. Stanley, *supra* note 1, at 146. However, those programs report some promising results. *Id.* at 147.

Recent experiments have included the Living Insurance Program for Ex-Prisoners (LIFE) and have been shown to reduce certain theft-related crimes by parolees. K. Lenihan, *Theft Among Ex-Prisoners* (1974) (unpublished paper); P. Rossi, R. Berk & K. Lenihan, *Money, Work and Crime* (1978) (preliminary draft); C. D. Mollar & V. D. Craig, *A Comparative Evaluation of the Benefits and Costs From the Life Program* (Feb. 1978) (Report by the A.B.A. Commission on Correctional Facilities & Services). See also K. Lenihan, *When Money Counts* (1976) (Asserting that job placement assistance had no appreciable impact on recidivism but that financial assistance did).

11. By a vote of the A.B.A. House of Delegates in 1976, based upon a report of the Commission on Correctional Facilities & Services, the A.B.A. recommended that offenders be given sufficient resources to obtain one month's worth of food, clothing and lodging.

12. National Advisory Commission on Criminal Justice Standards & Goals, *Task Force Report: Corrections*, at 431 (1973). See also California Department of Corrections, *Direct Financial Assistance to Parolees* (1975).

13. D. Stanley, *supra* note 1, at 149.

14. New York State Department of Correctional Services, *Characteristics of Inmates Discharged in 1973*, Table 2B, at 5 (1974).

15. *Id.* at 5-6. More than half (56%) were unemployed at the time the offense was committed. Thirty-one percent had temporary employment and only thirteen percent had permanent jobs. Among the total, sixty-eight percent were unskilled at any marketable task, and eighteen percent semi-skilled. The implication is that eighty-six percent of those surveyed would qualify solely for low grade jobs at low pay. New York State Senate Standing Committee on Crime & Correction, and the Select Committee on Crime, *Report on Felony Offenders in Prison in New York State*, at 81 (not dated).

16. *Parole Statistics*, *supra* note 1, at Table R-9.

17. D. Stanley, *supra* note 1, at 157-58; Citizens' Inquiry on Parole & Criminal Justice, Inc., *Prison Without Walls*, at 85 (1975).

18. *Parole Statistics*, *supra* note 1, at Table M-9.

19. According to parole statistics only 484 solicitations to employers were made on behalf of inmates, and only fifty-three placements were made by parole officers. The

Employment Bureau of Parole claimed only 261 placements for the year 1976. *Parole Statistics*, *supra* note 1, at Tables M-7 & M-8.

In New York, great strides were made in 1976 by banning employment discrimination on the basis of arrest records, and severely limiting discrimination based on conviction record. Under current law employers and state licensing agencies cannot discriminate against ex-offenders unless the conviction is reasonably related to the job or license sought. Despite these statutory changes, employment barriers persist, largely because of non-compliance with and inadequate enforcement of these laws.

20. Communications from the Division of Parole to the Committee staff. Provisions for the placement of ex-offenders in CETA jobs are contained in 29 U.S.C. §§801-902 (1978). *See also* 29 C.F.R. 94-99, especially 94.4 (ii) which defines offenders as eligible for CETA participation.

21. Vera Institute of Justice, *Further Work in Criminal Justice Reform*, at 61-79 (1977); L. Friedman, *Correlates of Crime* (1978) (unpublished paper).

22. A.B.A., *Employing the Ex-Offender* (1976); A.B.A., *Removing Offender Employment Restrictions* (1970); R. S. Erickson, *Paroled But Not Free*, at 97 (1973); Citizens' Inquiry on Parole & Criminal Justice, Inc., *supra* note 17 at 84-95; H. S. Miller, *The Closed Door* (1972); G. Pownall, *Employment Problems of Released Offenders* (1969) (report to the U. S. Dept. of Labor), *quoted in* D. Stanley, *supra* note 1, at 159; D. Stanley, *supra* note 1, at 156 ("The price of this prejudice is nothing but an incalculable economic loss and human wastage."); A.B.A. "Tentative Draft of Standards Relating to the Legal Status of Prisoners," 14 Am. Crim. L.Rev. 1, 615 (1977); Mitchell, "Barriers to Rehabilitation of Ex-Offenders," 22 Crime & Delinquency 322, 325-31 (1967); Oswald, "Community Discrimination Against the Parolee: A Second Look," 33 Focus 68 (1954). *See also* N. Y. Correction Law §§701-705 & §§751-755 (McKinney); N. Y. Executive Law §296 (14) & (15) (McKinney); "Citizens' Inquiry on Parole," Parole Bull. (Spr. 1977, Winter 1976); *Smith v. Fussenich*, 440 F. Supp. 1077 (D. Conn. 1977).

23. Except in unusual circumstances single persons are not eligible for rapid processing or emergency assistance from the state welfare system. *See* N. Y. Social Services Law §131 (McKinney).

24. Parole Resource Centers are meant to provide temporary housing, to be used as an alternative to reincarceration, and to provide a structured environment and programs to parolees. According to a study by the Division of Parole, ninety-six percent of the participants performed satisfactorily while in the program. Division of Parole, *Resource Center Programs*, at ii (May 1975).

25. Commission on Accreditation for Corrections, *Manual of Standards for Adult Probation and Parole Field Services*, §3162 at 32 (1977). *See also* National Advisory Commission on Criminal Justice Standards & Goals, *supra* note 12, at 221-36; O. Keller & B. Alper, *Halfway Houses* (1970); LEAA, *Guidelines and Standards for Halfway Houses and Community Treatment Centers* (1973) (particularly J. M. McCart & T. J. Mangogna, *History of Halfway Houses in the United States* and J. M. McCart & T. J. Mangogna, *Overview Issues Relating to Halfway Houses and Community Treatment Centers*); D. Thalheimer, *Cost Analysis of Correctional Standards: Halfway Houses*, Vol. II, (1978).

26. "Intensive Supervision" involves greater contact. This status can be ordered by the Board of Parole, a Commissioner, the Area Director, Assistant-Area Director, Area Supervisor, or a senior parole officer. Under intensive supervision the level of contact with the parole officer involves a weekly or semi-monthly reporting schedule until otherwise approved by the person who placed the case under intensive supervision. A minimum of one home visit a month, one "positive" home visit every three months, one employment check a month, and one "positive" employment visit every three months, are required for cases in this category. According to the Parole Officers Manual, a newly released parolee needs three months of intensive supervision. "Active supervision" is necessary for two years before a parolee can be placed on reduced supervision. Active supervision involves monthly office reporting, home visits of once a month, and an employment check every two months. "Reduced supervision" for at least six months is a condition precedent to consideration of discharge from parole. Reduced supervision involves contacts "quarterly or less frequently up to and including annually." New York State Division of Parole, *supra* note 1, at §9203.00; Citizens' Inquiry on Parole & Criminal Justice, Inc., *supra* note 17, at 105-06. The differentiation in levels of supervision is not new in New York State. A similar approach was in place in the 1930's. See U. S. Attorney General, *Survey of Release Procedures*, at 148 (1939).

27. Interview by Committee staff with a parole officer.

28. New York State Division of Parole, *supra* note 1, at §9204.00.

29. E. Studt, *supra* note 6; E. Studt, *Surveillance and Service in Parole* (1972) (unpublished manuscript).

30. *Parole Statistics*, *supra* note 1, at Table M-6.

31. Federal Judicial Center, *Probation Time Study* (1973). Time studies in other jurisdictions report similar findings. See, e.g., A. P. Miles, *A Time Study of Wisconsin Probation and Parole Agents* (March, 1964) (report to State Department of Public Welfare Division of Corrections); W. Jacks, *A Time Study of Parole Agents* (March, 1961) (report to Pennsylvania Board of Parole); S. Megathalen, *Probation Parole Caseload Review* (1973) (report to Atlanta, Ga. Dept. of Offender Rehabilitation), reported in N. Singer & V. Wright, *Cost Analysis of Correctional Standards*, Vol. II, at 69 (1975). See generally D. Stanley, *supra* note 1, at 125-27.

32. For such a definition of "delinquency area", see New York State Division of Parole, *supra* note 2, at §9204.00.

33. In 1976 there were 116,440 home visits or about ten per parolee. *Parole Statistics*, *supra* note 1, at Table M-6; Citizens' Inquiry on Parole & Criminal Justice, Inc., *supra* note 17, at 76; E. Studt, *supra* note 29, at 109.

34. In 1976 there were 19,950 parolees under supervision for all or part of the year, but only 14,099 employment visits were made. There has been a reduction of nearly 20% in the number of employment contacts from 1971. *Parole Statistics*, *supra* note 1, at Table M-6.

35. The Fourth Amendment to the United States Constitution states that people have a right to be "... secure in their persons, houses, papers, and effects, against

unreasonable searches and seizures..." This constitutional protection has been held by courts to have only limited applicability to parolees. *United States ex. rel. Santo v. N. Y. State Board of Parole*, 441 F.2d 1216 (2d Cir. 1971); *United States ex. rel. Randazzo v. Jollette*, 418 F.2d 1319 (2d Cir. 1969); *People v. Huntley*, 43 N.Y.2d 175 (1977). The recent decision of the New York Court of Appeals in *Huntley* was based, in part, upon the existence of the dual role of a parole officer; that of a social worker as well as a police officer. Citing this distinction, the court upheld a warrantless search on the ground that the parole officer's conduct "was rationally and reasonably related to the performance of his duties as a parole officer." *Id.* at 181-182.

For an illuminating discussion of the tensions that arise from the interaction of Fourth Amendment principles and the status of parolees see *Diaz v. Ward*, 437 F. Supp. 678 (S.D.N.Y. 1977); *United States ex. rel. Coleman v. Smith*, 395 F. Supp. 1155 (W.D.N.Y. 1975); Note, "Warrantless Searches of Parolees," 69 J. Crim. L. & Criminology; Note, "Fourth Amendment Limitations on Probation and Parole Supervision," 1976 Duke L. J. 71; Note, "Striking the Balance Between Privacy and Supervision: The Fourth Amendment and Parole and Probation Officer Searches of Parolees and Probationers," 51 N. Y. U. L. Rev. 800 (1976); Comment, "Constitutional Law: Warrantless Parole Officer Searches - A New Rationale," 60 Minn. L. Rev. 805 (1976). Compare *Latta v. Fitzharris*, 521 F.2d 246 (9th Cir. 1975), *cert. den.*, 423 U.S. 897 (1975) with *United States v. Consuela-Gonzalez*, 521 F.2d 259 (9th Cir. 1975).

36. E. Studt, *supra* note 29, at 88-89. See also D. Stanley, *supra* note 1, at 101, 169, 189-90; National Advisory Commission on Criminal Justice Standards & Goals, *supra* note 11, at 409.

37. N. Y. Division of Parole "Conditions of Release." See also 9 N.Y.C.R.R. §8003.2; Citizens' Inquiry on Parole & Criminal Justice, Inc., *supra* note 17, at 98-120.

38. Lee & Zuckerman, "Representing Parole Violators," 11 Crim. L. Bull. 327 (1975).

39. New York State Special Commission on Attica, *Attica: The Official Report of the New York State Special Commission on Attica*, at 93 (1972).

40. National Advisory Commission on Criminal Justice Standards & Goals, *supra* note 11, at 433. See also President's Commission on Law Enforcement & the Administration of Justice, *Task Force Report: Corrections*, at 69 (1967); Arluke, "Summary of Parole Rules: 13 Years Later," 15 Crime & Delinquency 267 (1969).

41. Staff of the Codes Committee of the New York State Assembly, *But I Was Free Born*, at 95 (1976) (A Report on Parole Reform).

42. National Advisory Commission on Criminal Justice Standards & Goals, *supra* note 11, at 409; W. Parker, *Parole*, at 32, 37-39, 196-98 (1972).

43. California Department of Corrections, *Some Recommended Changes*, at 1 & 47 (1977). See also N. Morris, *The Future of Imprisonment*, at 42-43 (1974) (Morris argues that conditional limitations on freedom may be justified if they are directly related to the crime of conviction).

44. *Parole Statistics*, *supra* note 1, at Table DR-4 (35% of the 1971 releasees were revoked or returned by 1976).

45. *Id.* at Table D-10.

46. For a description of the parole revocation process in New York State, see N. Y. Exec. Law §259-i (McKinney).

47. P. Takagi, *Evaluation Systems and Adaptations in a Formal Organization: A Case Study of a Parole Agency*, at 181-85 (1967) (unpublished P.H.D. dissertation, Stanford University). Revocation of parole may also be influenced by the nature of the parolee's original offense. Neithercutt, "Parole Violations Patterns and Commitment Offense," *J. of Research in Crime & Delinquency*, at 87 & 89 (1972) (Neithercutt asserts that parolees originally imprisoned for crimes against the person are more likely to be revoked for technical violations than property offenders). Other considerations may be the time remaining on parole, the burden of processing a revocation, or a prediction concerning the likelihood of a parolee benefiting from a return to prison. Interview by Committee staff with a parole officer.

For an interesting California study of revocation practices, which finds that the decision to revoke parole varies significantly not only between individual parole officers and between officers of different status, but also between different parole offices, see P. Takagi, *supra*.

For a phenomenological description of how parole officers exercise their discretion see McCleary, "How Parole Officers Use Records," 24 *Social Problems* 56 (April, 1977) (McCleary finds severe underreporting of criminal behavior by parole officers and concludes that unless the officer can expect to receive some bureaucratic benefit it is in the officer's best interest to control his work environment by minimizing the use of revocations. McCleary also finds that negative or "bad" reports may be used against a parolee not so much to protect society as to increase control over troublesome clients).

48. D. Stanley, *supra* note 1, at 87; P. Takagi, *supra* note 47, at 109-10. (Takagi found that 2.9% of revocations were based upon information collected by the parole officer and 71.2% were based upon information compiled from law enforcement agencies). For a discussion of similar findings in three other jurisdictions, see R. O. Dawson, *Sentencing*, at 343 (1969) ("... police are the parole officers major source of information concerning parole violations and virtually his exclusive source concerning serious new offenses committed by parolees.

49. Wolin, "After Release: The Parolee in Society," 48 *St. John's L. Rev.* 17 (1973). As suggested by one author, "The task of turning the formal authority relationship into a psychologically useful influence relationship is difficult but is of primary importance." E. Studt, "An Outline for Study of Social Authority Factors in Casework," 35 *Social Casework*, at 231-38 (June, 1954), *reprinted in Authority and Social Work: Concept and Use*, at 116 (A. Shankan ed. 1974). See also G. Buchan, "Authority: A Viable Concept in the Helping Process," 14 *Can. J. C. & Corr.* 247 (1972); Ohlin, Piven & Papsenfort, "Major Dilemmas of the Social Worker in Probation and Parole," 1956 *Nat'l Prob. & Parole J.* 211, *reprinted in Authority and Social Work, supra* at 206.

50. A von Hirsch, *Abolish Parole* (1978).

51. Martinson, "Save Parole Supervision," Fed. Prob., at 23, 27 (Sept. 1977); Kitchener, Schmidt & Glaser, "How Persistent is Post-Prison Success?" Fed. Prob., at 9 (March 1977); Lerner, "The Effectiveness of a Definite Sentence Parole Program," 15 Criminology 211 (1977); M. Gottfredson, *Some Positive Changes in the Parole Process*, at 10-14 (Nov. 1, 1975) (paper presented to American Society of Criminology Meeting). See also Report by Professor Sachs & Professor Logan to the Connecticut Department of Corrections, *News Release* (Aug. 8, 1978) (Sachs & Logan report that parole supervision has modest success in reducing recidivism). But see I. Waller, *Men Released From Prison* (1974) (After studying parole in Canada and looking at the evidence in the United States, Waller concludes that more extensive supervision does not produce major reduction in reconviction rates, although it may increase the number of technical violations).

52. A von Hirsch, *supra* note 50, at 94. See, e.g., I. Waller, *supra* note 51, at 190; California Youth Authority, *The Bay Area Parole Study*, at 23 (May 1978); LEAA, *An Experimental Study of the Differential Effects of Parole Supervision for a Group of Adolescent Boys and Girls* (1973).

New York studies concerning the effectiveness of parole do not inquire into the impact of supervision alone; rather they combine the possible effects of the predictive judgements of the Parole Board with supervision. These studies also use an inadequate definition of recidivism, which is based upon returns to prison in New York. See, e.g., N. Y. Division of Parole, *Parole and Recidivism in New York* (1975) (A study of parolees released in 1968).

53. A von Hirsch, *supra* note 50, at 181.

54. The requirement of a rational relationship between a parole condition and criminality has been suggested by criminologists and embodied in provisions of legal guideposts. See, e.g., A. von Hirsch, *supra* note 50, at 92-93; Model Penal Code §305.17 (Commentary to Drafts 5, 6 & 7: 1955); Commission on Accreditation for Correction, *Manual of Standards for Adult Parole Authorities*, at Standard 10.8 (1976).

55. N. Y. Crim. Proc. Law §1.20 (33) (i) & §140.25 (McKinney). These provisions are relatively rare in the United States; only two other jurisdictions, Colorado and Pennsylvania, encourage such a law enforcement orientation. H. Abadinsky, *Probation and Parole*, at 288-89 (1977). See also D. Stanley, *supra* note 1, at 111-12; Citizens' Inquiry on Parole & Criminal Justice, Inc., *supra* note 17, at 28-29; National Advisory Commission on Criminal Justice Standards and Goals, *supra* note 11, at 413.

56. D. Stanley, *supra* note 1, at 1330 New York State Special Commission on Attica, *supra* note 39, at 133. See also Testimony of Committee for the Study of Incarceration, reported in J. Mitford, *Kind and Usual Punishment*, at 238 (1974).

57. It has been suggested that personality compatibility is of unproven value and difficult to administer. D. Stanley, *supra* note 1, at 86. There is some evidence however, to suggest that specialized case loads can be effective. *Id.* at 163-67.

## CHAPTER VI: Probation

1. According to New York State's Division of Criminal Justice Services (DCJS), of 25,344 persons convicted after indictment on felony charges in 1977, 8,066 (31.8%) received probation, 1,363 (5.4%) received conditional discharges, 199 (0.8%) received unconditional discharges and 504 (2.0%) received "other" dispositions. See New York State Division of Criminal Justice Services, *Crime and Justice in New York: [1977] Ann. Rep.*, at 152-53 [hereinafter cited as *1977 Annual Report*]. DCJS statistics do not describe the disposition of felony convictions. The New York State Division of Probation, however, reports 9,255 new probationers convicted of felony charges in 1977. See New York State Division of Probation, *Statistical Supplement to the Ann. Rep.*, at 74 (1977) [hereinafter cited as *1977 Probation Statistical Supplement*]. The discrepancy between the Probation and DCJS figures is apparently attributable, in part, to the exclusion by DCJS of offenders sentenced to "shock probation" (probation plus up to 60 days in jail).

2. *1977 Annual Report*, *supra* note 1, at 152-53.

3. 21,123 convicted misdemeanants were placed on probation in 1977, as compared with 9,255 convicted felons. *1977 Probation Statistical Supplement*, *supra* note 1, at 74.

4. *Id.* 19,369 persons were in New York's prisons during 1977. See New York State Department of Correctional Services, *Humanizing the System: [1977] Ann. Rep.*, at 17.

5. National Advisory Commission on Criminal Justice Standards and Goals, *Task Force Report: Corrections*, at 311 (1973) [hereinafter cited as *NAC Corrections*].

6. The court must require that the probationer:

- (a) report to a probation officer as directed by the court or the probation officer and permit the probation officer to visit him at his place of abode or elsewhere;
- (b) remain within the jurisdiction of the court unless granted permission to leave by court or the probation officer; and
- (c) answer all reasonable inquiries by the probation officer and promptly notify the probation officer of any change in address or employment.

N. Y. Penal Law §65.00 (3) (McKinney).

7. The New York Penal Law specified some of the more commonly imposed conditions of probation. They include requirements that the probationer:

- (a) avoid injurious or vicious habits;
- (b) refrain from frequenting unlawful or disreputable places or consorting with disreputable persons;
- (c) work faithfully at a suitable employment or faithfully pursue a course of study or of vocational training;

- (d) undergo available medical or psychiatric treatment and remain in a specified institution, when required for that purpose;
- (e) support his dependents and meet other family responsibilities; and
- (f) make restitution of the fruits of his offense or make reparation, in an amount he can afford to pay, for the loss or damage caused thereby. When restitution or reparation is a condition of the sentence, the court shall fix the amount thereof and the manner of the performance.

N. Y. Penal Law §65.10 (2) (McKinney).

8. 9 N.Y.C.R.R. §351.4 (b); New York State Division of Probation, *Source Book of Comprehensive Community Programs*, at 92-103 (1976) [hereinafter cited as *Probation Sourcebook*].

9. 9 N.Y.C.R.R. §§351.1 (j) & 351.3-.4; *Probation Sourcebook*, *supra* note 8.

10. 9 N.Y.C.R.R. §351.3-.4; *Probation Sourcebook*, *supra* note 8.

11. New York State Division of Probation, *Statistical Supplement to the Ann. Rep.*, at 35 (1976); D. McDonald, *The Cost of Criminal Justice in New York* (1979) (unpublished manuscript).

12. See p. 4 *infra* and sources cited therein.

13. For a general background on the history of probation, see L. Carney, *Probation and Parole: Legal and Social Dimensions*, at 75-92 (1977); United Nations, "The Origins of Probation in the United States," *reprinted in Probation, Parole and Community Corrections*, at 89-92 (2d. ed. R. Carter & L. Wilkins 1976).

14. New York State Probation Commission, *Report*, at 43, Assembly No. 51 (1906).

15. *Id.*

16. *Id.* at 43-44.

17. *Id.* at 44-45.

18. *Id.*

19. For a turn-of-the-century discussion of the advantages of longer periods of probation and paid professionals, see *Id.* at 64-65 & 75-85.

20. New York State Crime Commission, *Report*, at 34, Leg. Doc. No. 94 (1927) [hereinafter cited as *1927 Crime Commission Report*].

21. *Id.*

22. *Id.* at 257.

23. The 1928 Crime Commission reports that the percentage of suspended sentences in New York during 1926 were 39% upstate and 15.9% in New York City. The Commission reports that "it is probable that the difference between New York City and the remainder of the state is due to the presence of the strict system of investigation employed by the [New York City] Court of General Sessions ... the county which, by general consent, maintains the most liberally paid and most efficient probation department ... means not a more liberal but a more restricted use of the suspended sentence." New York State Crime Commission, *Report*, at 55-56, Leg. Doc. No. 23 (1928) [hereinafter cited as *1928 Crime Commission Report*]. See also *1927 Crime Commission Report*, *supra* note 20, at 73, 102 & 262.

24. According to the 1927 Crime Commission, the Probation Bureau of the General Sessions Court in New York County was responsible for decreasing the proportion of cases in which probation was granted from about 40% to 18%. *1927 Crime Commission Report*, *supra* note 20, at 262. See also *Id.* at 36-37.

25. *Id.* See also *1928 Crime Commission Report*, *supra* note 23, at 55-56.

26. N. Y. Crim. Proc. Law §390.10-390.60 (McKinney); 9 N.Y.C.R.R. §350.1-350.4. 350.4.

27. See pp. 52-56 *infra* and sources cited therein.

28. See Economic Development Council Probation Task Force, *Organization Report on New York City Department of Probation*, at 40-41 (1977) [hereinafter cited as *EDC Report*]; Cf. Office of the State Comptroller, *Audit Report on State Probation*, at 42-43, No. AL-ST-40-74 (1973) [hereinafter cited as *Comptroller's Report*].

29. See, e.g., *1977 Probation Statistical Supplement*, *supra* note 1. When operational the Probation Management Information System (PROBAMIS), currently in the planning stage, will provide a broader range of information about individual probationers.

30. Of 30,378 new probationers received during 1977, 15,894 (52%) were age 21 or younger. *1977 Statistical Supplement*, *supra* note 1, at 75.

21,123 new probationers received during 1977 were convicted of misdemeanors, as opposed to 9,255 who were convicted of felonies. *Id.* at 74.

31. N. Y. Penal Law §60.05 (McKinney). An individual convicted as a Youthful Offender may, however, receive a sentence or probation unless convicted of an A-I or A-II felony. N. Y. Penal Law §60.02 (McKinney).

32. N. Y. Penal Law §60.05 (5) (McKinney).

33. 62% of those released from prison in 1976 were considered to have drug or alcohol problems. New York State Division of Parole, *1976 Parole Statistics*, at Table R-6 (1976).

Of those sentenced to prison in 1973, 80% had not completed high school, and most had not gone beyond the ninth grade. 56% were unemployed when arrested, 31% had temporary employment, and only 13% had steady jobs. The vast majority — 68%

— had no marketable skills. Another 18% were semi-skilled, while only 14% were skilled workers. New York State Department of Correctional Services, *supra* note 4, at 16.

*Cf.* Comptroller General of the United States, *State and County Probation Systems in Crisis* (1976). From an examination of probation case files in four sample jurisdictions (Maricopa County, Ariz., Multnomah County, Ore., Philadelphia County, Pa., and King County, Wash.) the research staff concluded that 47% of probationers had not graduated from high school, and 40% were unemployed at the time of sentencing. *Id.* at 27.

34. 9 N.Y.C.R.R. §351.2-351.4.

The current regulations were promulgated in March, 1975 in apparent response to the State Comptroller's Report, issued in December, 1973, which indicated that the previous, more specific supervision requirements were not being followed by local agencies. The State Division of Probation was particularly urged to determine whether home visits were an essential element of supervision and whether a "differential treatment caseload distribution procedure" should be substituted for the flat caseload standard of 60 clients per probation officer. *Comptroller's Report, supra* note 28, at 28-30 & 35-36.

The new regulations abandoned the home visit and caseload requirements and instituted the current scheme which emphasizes "differential supervision" on the basis of varying numbers of client contacts.

35. 9 N.Y.C.R.R. §351.4 (c).

36. See 9 N.Y.C.R.R. §351.4. The *Probation Sourcebook, supra* note 8, at XIV-10, does suggest that two of the four intensive supervision contacts be home visits.

37. See, e.g., Mayor's Committee on Auxiliary Services to the Courts of New York City, *Report* (1961) (unpublished report) [hereinafter cited as *Mayor's Committee Report*]; *Comptroller's Report, supra* note 28; *EDC Report, supra* note 28; New York State Division of Probation Metropolitan Area Office, *Field Supervision Practices of the New York City Department of Probation* (1977) (unpublished manuscript) [hereinafter cited as *N.Y.C. Field Supervision*]; New York State Division of Probation, *An Analysis and Report of the Monroe County Probation Department* (1978) (unpublished manuscript) [hereinafter cited as *Monroe County Report*]; New York State Commission of Investigation, *Report Concerning the Warrant Division of the New York City Police Department*, at 233-34 (1974) (unpublished manuscript) [hereinafter cited as *Commission of Investigation Report*]; New York State Division of Probation, *Survey: Supervision Practices in New York City Supreme Court Probation Departments* (1973) (unpublished manuscript) [hereinafter cited as *N.Y.C. Supreme Court Supervision*].

38. See, e.g., *Comptroller's Report, supra* note 28; *N.Y.C. Supreme Court Supervision, supra* note 37; *Mayor's Committee Report, supra* note 37. The Mayor's Committee Report indicates that in New York City during 1961 client contact and counseling were minimal, and that community resources were not properly utilized. The Mayor's Committee also found that, in well over half the cases examined, an appropriate supervision plan had not been developed. *Mayor's Committee Report, supra* note 37, at 61-66. In general the Committee found probation work to be characterized by "routinization and sterility of contact with the probationer and the general absence of design for rehabilitation." *Id.* at 63. The Comptroller's Report indicates, that, in

New York City, Onandaga, Fulton, and Montgomery Counties during 1973, state standards regarding caseload, client contacts and treatment plans were not being met. (Warren County practices were found to meet state standards.) *Comptroller's Report*, *supra* note 28, at 4. The Division of Probation also indicates that in New York City during 1973 few community resources were utilized, field visits made only in a crisis situation, and the majority of probationers reported monthly. *N.Y.C. Supreme Court Supervision*, *supra* note 37. See also *Commission of Investigation Report*, *supra* note 37.

39. *EDC Report*, *supra* note 28, at 40.

40. See, e.g., *Monroe County Report*, *supra* note 37; *Comptroller's Report*, *supra* note 28.

41. *Monroe County Report*, *supra* note 37, at 11. A Youth Resources Center worker reported to the evaluators that, despite the fact that a staff member spent one day a week at Probation, only two referrals had resulted and that of 160 intake cases, 9 had come from probation while 80 came from the police. *Id.*

42. *EDC Report*, *supra* note 28, at 40.

43. Comptroller General of the United States, *supra* note 33, at 28, 34, 39 & 43.

44. State of New York, *Executive Budget: 1978-79*, at 112 (1978).

45. D. McDonald, *supra* note 11.

46. Since 1976, the subsidy rate has been 42.5%. In 1971, the rate was 48.5%; it increased to 50% for 1972-74, and declined in 1975 to 42.5%. D. McDonald, *supra* note 11. As the state aid program does not cover local expenditures, the *actual* proportion of probation costs paid by the state, is much lower. In New York City during 1977, for example, the actual reimbursement rate was only 26.5%. *Id.* For a list of excluded cost items, see 9 N.Y.C.R.R. §360.3 (f).

47. Hearings of the New York State Executive Advisory Committee on Sentencing, *Transcript*, at 36 (Albany, N. Y. Nov. 17, 1978) (testimony of Edmond Windsor, Executive Director of Field Operations, New York State Division of Probation) [hereinafter cited as *Windsor Testimony*]. In New York City during fiscal year 1978, the average caseload was 129. D. McDonald, *supra* note 11.

48. J. Banks, *Summary: Phase I Evaluation of Intensive Special Probation Projects* (1977) (N.I.L.E.C.J. monograph). See also D. M. Gottfredson & M. G. Neithercutt, *Caseload Size Variation and Difference in Probation/Parole Performance* (1974) (National Council on Crime and Delinquency Research Center monograph); D. Lipton, R. Martinson & J. Wilks, *The Effectiveness of Correctional Treatment: A Survey of Treatment Evaluation Studies*, at 45-49 & 59 (1975); D. Greenberg, *Corrections and Punishment* (1977); Adams & Vetter, "Probation Caseload Size and Recidivism Rate," 16 *Brit. J. of Criminology* 390 (1971); Adams & Vetter, "Effectiveness of Probation Caseload Sizes: A Review of the Empirical Literature," 8 *Criminology* 333 (1971); Nath, "Parole and Probation Caseload Size Variation: The Florida Intensive Supervision Project," 1 *Crim. J. Rev.* 61 (1976).

A few studies have reported positive results from smaller caseloads with juvenile offenders. See D. Lipton, *supra* note 48, at 26-45.

49. *N. Y. C. Field Supervision, supra* note 37, at 7.

50. Information from meeting with adult supervision probation officers, in New York City (Oct. 6, 1978).

51. See note 38 *supra* and sources cited therein.

52. The State Division maintains a system of regional consultants to see that Division standards are maintained on a regular basis. The *Comptroller's Report, supra* note 28, at 10-12 indicates, however, that consultants for the examined jurisdictions (New York City and Onandaga County) had not been carrying out their role of "examiners or performance auditors."

The State Division also has the power to withhold reimbursement of state aid if it finds that local performance is substandard. Despite the notable deficiencies in service which exist in many counties, it has never done so. See D. Gordon, *Is New York State Takeover of Probation a Good Idea?*, at 4-9 (1978).

53. *Windsor Testimony, supra* note 47, at 36.

54. D. McDonald, *supra* note 11. The annual cost of criminal court supervision is \$292.

55. New York State Division of Criminal Justice Services, *Delphi Report: Standards and Goals Program* (July 25, 1977) (unpublished manuscript). Among 67 items of concern to interviewed prosecutors and defense attorneys, "there is a lack of alternative non-judicial programs such as restitution, mediation, arbitration, and victim/offender encounter" was ranked in second place. "Community resources are not utilized as alternatives to probation" was also highly ranked, appearing in 16th place.

56. See, e.g., Newton, "Alternatives to Imprisonment: Day Fines, Community Service Orders, and Restitution," 22 *Crime & Delinquency* 109 (March, 1976); Thornstedt, "The Day-Fine System in Sweden," 1975 *Crim. L. Rev.* 307 (1975).

57. See, e.g., M. K. Harris, *Community Services by Offenders* (Jan., 1979) (submission draft to A.B.A. BASIC's Program); J. Beha, *Sentencing to Community Service* (1977); Bergman, "Community Service in England," 39 *Fed. Prob.* 43 (1975); K. Pease, *Community Service Orders*, Great Britain Home Office Research Study No. 29 (1975); Newton, *supra* note 56.

58. See, e.g., Hudson & Chesney, "Research on Restitution: A Review and Assessment," reprinted in *Offender Restitution in Theory and Action*, at 131-48 (B. Galaway & J. Hudson ed. 1978); J. Weber, *Georgia's Residential Restitution Centers* (May, 1978) (report to the Council of State Governments); Read, "How Restitution Works in Georgia," 60 *Judicature* 323 (1972).

An evaluation of the Minnesota Restitution Center found that a significantly larger proportion of controls (24%) as compared with Restitution Center residents (6%) had been returned to prison on the basis of a new court commitment. Hudson & Chesney, *supra* note 58, at 139. However, a significantly larger proportion of Resti-

tution Center residents (40%) as compared to controls (10%) had been returned to prison for technical violations. *Id.* The difference apparently was the result of more intensive parole supervision provided to center residents. *Id.*

59. *Cf. NAC Corrections, supra* note 5, at 311-23 and Standard 10.2; American Correctional Association Commission on Accreditation for Corrections, *Manual of Standards for Adult Probation and Parole Field Services*, at Standard 3121 (1977).

60. *See pp.* 143-48, 153 *infra* and sources cited therein.

61. E. Studt, *Surveillance and Service in Parole* (1972) (unpublished manuscript); J. Conrad, "Who Needs a Door-Bell Pusher," (paper presented at the American Society of Criminology Annual Meeting, Nov. 1, 1975); Newman, "Concepts of Treatment in Probation and Parole," 25 *Fed. Prob.* 14 (1961).

62. Conrad, *supra* note 61.

63. *NAC Corrections, supra* note 5, at 223.

64. Babst & Mannering, "Probation versus Imprisonment for Similar Types of Offenders," 2 *J. Res. Crime and Delinquency* 60 (1965).

65. R. H. Beattie and C. K. Bridges, *Superior Court Probation and/or Jail Sample* (1970) (report by Bureau of Criminal Statistics of California Department of Justice). For a summary of the research findings, see *Corrections and Punishment*, at 115. (D. Greenberg ed. 1977).

66. Great Britain Home Office, *The Treatment of Offenders in Britain* (1964). For a summary of the research findings, see D. Lipton, *supra* note 48, at 55-56.

67. *See note 56 supra.*

68. *See, e.g.,* Wilkins, "A Small Comparative Study of the Results of Probation," 8 *Brit. J. Delinquency* 201 (1958); Martin, "The Saginaw Project," 6 *Crime & Delinquency* 357 (1960); Michigan Council of the National Probation and Parole Association, *The Saginaw Probation Demonstration Project* (1963). *See generally* D. Lipton, *supra* note 48, at 52-61; *NAC Corrections, supra* note 5, at 310-13.

69. D. McDonald, *supra* note 11.

70. American Law Institute, *Model Penal Code*, at §7.01 (Proposed Official Draft 1962).

71. American Bar Association Project on Standards for Criminal Justice, *Standards Relating to Probation*, at §1.1-3 (1970). The standards require that probation should be an available disposition in every type of offense, and should be the preferred sentence unless the court finds that:

- (i) "confinement is necessary to protect the public from further criminal activity by the offender; or,

- (ii) the offender is in need of correctional treatment which can most effectively be provided if he is confined; or
- (iii) it would unduly depreciate the seriousness of the offense if a sentence of probation were imposed." *Id.* at 10.

See also American Bar Association Project on Standards for Criminal Justice, *Standards Relating to Sentencing Alternatives and Procedures* (1968).

72. National Council on Crime Delinquency, *Guides for Sentencing* (2d ed. 1974). The Guides conclude that "probation is a preferred disposition and should be considered as a possibility in almost every case." Only the "dangerous offender" is deemed to be an unsuitable candidate for community release. *Id.* at 23-24.

73. National Advisory Commission on Criminal Justice Standards and Goals, at Standard 5.2, *reprinted in NAC Corrections, supra* note 5, at 150. The standard requires that in imposing a sentence the court should select "the least drastic alternative that is consistent with public safety."

"The court should impose the first of the following alternatives that will reasonably protect the public safety:

- (a) Unconditional release;
- (b) Conditional release;
- (c) A fine;
- (d) Release under supervision in the community;
- (e) Sentence to a halfway house or other residential facility located in the community;
- (f) Sentence to partial confinement with liberty to work or participate in training or education during all but leisure time;
- (g) Total confinement in a correctional facility."

Under the Standards, before the court imposes a sentence of confinement, it must show appropriate justification on the record. (Factors justifying confinement are substantially the same as those described in the A.B.A. Standards). *Id.*

74. New York State Division of Criminal Justice Services, *Standards and Goals for Criminal Justice: Corrections* (1977) (unpublished draft). Standard 3 (b) requires that "the [sentencing] option chosen should be the one which is the least restrictive of the defendant's liberty interests. Incarceration, as the most restrictive dispositional option, should be considered only after every other available option has been considered and rejected as inappropriate." *Id.* at 14.

75. National Conference of Commissioners on Uniform State Laws, *Uniform Sentencing and Corrections Act*, at §3-102 (1978) (unpublished draft). The Act requires that "[t]he sentence imposed should be the least severe measure necessary to achieve the purpose for which the sentence is imposed. Sentences not involving confinement should be preferred unless:

- (i) confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
- (ii) confinement is necessary to avoid depreciating the seriousness of the offense or justly to punish the defendant;
- (iii) confinement is particularly suited to provide an effective deterrent to others likely to commit similar offenses;
- (iv) measures less restrictive than confinement have been frequently or recently applied unsuccessfully to the defendant; and
- (v) the purposes of this article would be fulfilled only by a sentence involving confinement." *Id.*

76. The pioneer effort designed to encourage keeping offenders in the community was the California Probation Subsidy Program, instituted in 1965. The program provides a subsidy to county probation departments to improve probation services and develop special supervision programs. The amount of the subsidy is calculated largely on the extent to which the county has reduced its commitments to state institutions. (A sliding scale was developed to avoid penalizing counties whose base commitment rate was comparatively low). For a general discussion and history of the subsidy program, see E. M. Lemert & F. Dill, *Offenders in the Community* (1978); Project on Community Alternatives to Maximum Security Institutionalization for Selected Offenses, *Final Report*, at 273-302 (June 30, 1975) (unpublished report of the Institute for Public Policy Alternatives of the State University of New York at Albany).

By 1971-1972 the California Probation Subsidy Program had been credited with reducing the state commitment rate by an average of 43% and saving the state at least \$100 million dollars. *Id.* at 274 & 294. Some observers, however, have contended that the actual impact of the program was probably less than the figures suggest, as the state commitment rate was independently on the decline at the time the program was instituted, and continued to go down even in non-participating counties. They also note that the effect of the subsidy program may have been to increase the use of local jail along with probation. See Lemert, *supra* at 18, 30-31.

In recent years other states (Minnesota, Kansas, & Iowa) have instituted community correction programs, which similarly provide subsidies to localities to encourage development of a broad range of community sanctions to meet local needs, rather than funding only probation. For a general discussion of the community correction concept, see *NAC Corrections*, *supra* note 5, at 221-44. For a description of specific state programs, see D. Howard & M. D. Kannensohn, *A State-Supported Local Corrections System: The Minnesota Experience* (1977) (Council of State Governments monograph); D. Boorkman, *Community Based Corrections in Des Moines* (1976). (N.I.L.E.C.J. monograph); Blackmore, "Minnesota's Community Corrections Act Takes Effect," *Corrections*, at 46 (March, 1978). For a critical view of community corrections see Minnesota Department of Corrections Research and Information Systems, *The Effect of the Availability of Community Residential Alternatives to State Incarceration on Sentencing Practices: The Social Control Issue* (June, 1977); Greenberg "Problems in Community Corrections," 10 *Issues in Criminology* 1 (1975).

CHAPTER VII: *The Goals of Sentencing*

1. President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime on a Free Society*, at 6 (1967).
2. Toby, "Is Punishment Necessary?," 55 J. Crim. L. C. & P. S. 322, 334 (1964).
3. G. Hawkins & F. Zimring, *Deterrence: The Legal Threat in Crime Control*, at 72-74 (Phoenix ed. 1976).
4. *Id.* at 19-20.
5. G. Hawkins & F. Zimring, *supra* note 3, at 106-108; T. Honderich, *Punishment: The Supposed Justifications* (1969); E. A. Fattah, *Fear of Punishment*, at 22-23 (1976) (prepared for the Law Reform Commission of Canada).
6. Estimates of the proportion of all property crimes committed by drug addicts alone are as high as 67%. J. Q. Wilson, *Thinking About Crime*, at 137 (1975).
7. G. Hawkins & F. Zimring, *supra* note 3, at 98-101.
8. H. Packer, *The Limits of the Criminal Sanction*, at 45 (1968).
9. Wilkins, "Criminology: An Operational Research Program," in *Society, Problems and Methods of Study*, at 322 (Welford ed. 1962).
10. H. Bloch & G. Geis, *Man, Crime and Society*, at chap. 4 (1970); Chambliss, "Types of Deviance and the Effectiveness of Legal Sanctions," 1967 Wisc. L. Rev. 703, 706-07.
11. E. A. Fattah, *supra* note 5, at 43 (1976). *See also* T. Chiricos & G. Waldo, "Punishment and Crime: An Examination of Some Empirical Evidence," 18 Social Problems 200 (1970); Korbin, *The Deterrent Effect of Criminal Justice Sanctions Strategies* (1972); J. Tervan, "Deterrent Effects of Punishment: The Canadian Case," 14 Can. J. Criminology & Corrections 68 (1972).
12. G. E. Antunes & E. L. Hunt, "The Impact of Certainty and Severity of Punishment on Levels of Crime in American States: An Extended Analysis," (Sept., 1972) (unpublished study presented to the annual meeting of the American Political Science Association).
13. C. Beccaria, *On Crimes and Punishments* (1974). *Cf.* Andenaes, "General Preventative Effects of Punishment," 114 U. Pa. L. Rev. 949, 964 (1966).
14. Chaiken, "The Impact of Police Activity on Subway Crime," 3 Urban Analysis (1974). *See also* Press, *Some Effects of an Increase in Police Manpower in the 20th Precinct of New York City*, R-704-NYC (Rand Institute, 1971).
15. Police Foundation, *Kansas City Preventive Patrol Experiment* (1974), reviewed

in F. Zimring, "Policy Experiments in General Deterrence: 1970-75," in National Academy of Sciences, *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates* (A. Blumstein ed. 1978) [hereinafter cited as *NAS*].

16. Ross, "Law, Science and Accidents: The British Safety Act of 1967," 2 J. Legal Studies 1 (1973). See also Ross, "Deterrence Regained: The Cheshire Constabulary's Breathalyser Blitz," 6 J. Legal Studies 241 (1977). Ross claims that the deterrence effect was renewed with new tough enforcement policies. Ross also found that the deterrent impact of a tough enforcement policy diminished over time. See Ross, "Scandinavian Myth: The Effectiveness of Drinking-and-Driving Legislation in Sweden and Norway," 4 J. Legal Studies 285 (1975).

17. G. Antunes & A. L. Hunt, "The Deterrent Impact of Criminal Sanctions: Some Implications for Criminal Justice Policy," 51 J. of Urban Law 145, 151 (1973).

18. J. Andenaes, *supra* note 13, at 970.

19. *The Nations Toughest Drug Law: Evaluating the New York Experience* (final report of the Joint Committee on New York Drug Law Evaluation) (1977).

20. *Id.* at 7-11.

21. *Id.* at 13-24.

22. *Id.* at 13.

23. C. Silberman, *Criminal Violence, Criminal Justice*, at 195 (1978) quoting criminologist Jack Gibbs).

24. Andenaes, "Deterrence and Specific Offenses," 38 U. Chi. Rev. 537 (1971).

25. Chambliss, *supra* note 10, at 707; G. Hawkins & F. Zimring, *supra* note 3, at 128-41.

26. Andenaes, *supra* note 24, at 539.

27. J. Q. Wilson, *supra* note 6, at 173.

28. J. Petersilia, P. Greenwood & M. Lavin, *Criminal Careers of Habitual Felons*, R-2144-DOJ (Rand Institute, 1977).

29. D. Greenberg, "The Incapacitative Effect of Imprisonment: Some Estimates," 9 Law & Society Rev. 541, 572 (1975).

30. I. Ehrlich, "Participation in Illegitimate Activities: An Economic Analysis," in *Essays in the Economics of Crime and Punishment* (G. Becker & W. Landes eds. 1974).

31. S. Van Dine, S. Dinitz & J. Conrad, "The Incapacitation of the Dangerous Offender: A Statistical Experiment," in J. Conrad & S. Dinitz, *In Fear of Each Other*, at 112 (1977).

32. J. Marsh & M. Singer, "Soft Statistics on Hard Questions," MI-1712-DP (Hudson Institute, 1972) (discussion paper).
33. S. Shinnar & R. Shinnar, "The Effects of the Criminal Justice System on the Control of Crime: A Quantitative Approach," 9 *Law & Society Rev.* 581, 605 (1975).
34. *NAS*, *supra* note 15.
35. J. Cohen, "Incapacitative Effect of Imprisonment: A Critical Review of the Literature," in *NAS*, *supra* note 15, at 241.
36. *Id.* at 225.
37. Greenwood, Chaiken, Petersilia & Peterson, "The Rand Habitual Offender Project: A Summary of Research Findings to Date," Rand IP-5957, at 22 (Rand Institute, 1977).
38. T. Bynum, B. Forst, W. Rhodes, & J. Shirhall, *Sentencing and Social Research: A Review of the Literature on Deterrence, Incapacitation, and Rehabilitation*, at p. 265 (Institute for Law and Social Research, November 3, 1978) [hereinafter cited as *INSLAW*; annexed as Appendix E].
39. American Psychiatric Association, *Task Force Report #8: Clinical Aspects of the Violent Individual* (1974).
40. J. Monahan, "The Predication of Violent Criminal Behavior: A Methodological Critique and Prospectus," in *NAS*, *supra* note 15, at 246.
41. Wenk, Robison & Smith, "Can Violence be Predicted?" 18 *Crime & Delinquency* 393 (1972).
42. *INSLAW*, *supra* note 38, at III-6-7, citing K. M. Williams, *The Scope and Prediction of Recidivism*, PROMIS Research Publication no. 10 (INSLAW 1978, forthcoming).
43. *INSLAW*, *supra* note 38, at p. 261.
44. A. von Hirsch, *Doing Justice: The Choice of Punishments* (report of the Committee for the Study of Incarceration), at 22 (1976).
45. J. Ziskin, *Coping With Psychiatric Testimony*, at 127-28 (1975). See also B. Ennis & T. Litwack, "Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom," 62 *Cal. L. Rev.* 693 (1974).
46. J. Petersilia, *supra* note 28, at 120.
47. *Id.*
48. J. Petersilia & P. Greenwood, *Mandatory Prison Sentences: Their Projected Effects on Crime and Prison Populations*, (Criminal Justice Program and Rand Study), at IV (Rand Institute, 1977).

49. M. Wolfgang, R. Figlio & T. Sellin, *Delinquency in a Birth Cohort* (1972). See also J. Petersilia, *supra* note 28, at 34-38.

50. L. Wilkins, J. Kress, D. Gottfredson, J. Calpin & A. Gelman, *Sentencing Guidelines: Structuring Judicial Discretion* (National Institute of Law Enforcement and Criminal Justice, U. S. Dept. of Justice, 1978) establishes that judges sentence people with longer criminal records more severely. The utility of this practice was questioned in Wilson & Boland, "Age, Crime and Punishment," 1978 Public Interest 22.

51. D. Greenberg, "The Correctional Effects of Corrections," in *Corrections and Punishment*, at 115 (D. Greenberg ed. 1977).

52. D. Gottfredson, M. Gottfredson and J. Garofalo, "Time Served in Prison and Parole Outcomes Among Parolee Risk Categories," 5 J. Criminal Justice 1, 2 (1977).

53. *INSLAW*, *supra* note 38, at p. 273.

54. J. Robison & G. Smith, "The Effectiveness of Correctional Programs," 17 *Crime & Delinquency* 67, 71-72 (1971).

55. *INSLAW*, *supra* note 38, at p. 274.

56. *INSLAW*, *supra* note 38, at pp. 274-275.

57. *INSLAW*, *supra* note 38, at p. 277.

58. *INSLAW*, *supra* note 38, at p. 294.

59. N. Morris, *The Future of Imprisonment*, at 15 (1974).

60. *INSLAW*, *supra* note 38, at pp. 277-283.

61. N. Morris, *supra* note 59, at 16 (1974).

CHAPTER VIII: Alternative Sentencing Models

1. See generally Dershowitz, "Criminal Sentencing in the United States: An Historical and Conceptual Overview," 43 *Annals* 117 (1976); O'Leary, Gelman & Gottfredson, "Contemporary Sentencing Proposals," 11 *Crim. L. Bull.* 555 (1975); Council of State Government, *Definite Sentencing: An Examination of Proposals in Four States* (1976); N. Y. State Bar Association, *Report of Subcommittee of Criminal Justice Section Committee on the Correctional System* (1978).

2. Me. Rev. Stat. Ann. tit. 17-A, §§1251-1254 (West 1978). For a discussion of the Maine approach, see Lagoy, Hussey & Kramer, "A Comparative Assessment of Determinate Sentencing in the Four Pioneer States," 24 *Crime & Delinquency* 385, 387-88 (1978); Council of State Governments, *supra* note 1; State Bar Association, *supra* note 1, at 56-59.

3. Ill. Ann. Stat. ch. 38, §§1005-3-1 to -10-2 (Smith-Hurd Pamphlet Supp. 1978). For a discussion of the Illinois approach, see "Illinois Reconsiders 'Flat Time': An Analysis of the Impact of the Justice Model," 52 *Chi.-Kent L. Rev.* 621 (1976); "Illinois' New Flat Sentencing Law," *Corrections* (June, 1978); Council of State Governments, *supra* note 1; New York Bar Association, *supra* note 1, at 59-62.

4. Compare D. Fogel, "...*We are the Living Proof...*" (1975) with Singer, "In Favor of 'Presumptive Sentence's Set by a Sentencing Commission," 24 *Crime & Delinquency* 401, 404 (1978).

5. Me. Rev. Stat. Ann. tit. 17-A, §1252 (West 1978).

6. Ill. Ann. Stat. ch. 38, §1005-8-1 (Smith-Hurd Pamphlet Supp. 1978) requires that the sentence for commission of rape be not less than 6 years and not more than 30 years. Ill. Ann. Stat. ch. 38, §1005-8-2 (Smith-Hurd Pamphlet Supp. 1978), however, would allow the sentence to be enhanced to 60 years if the trial judge finds that the crime was accomplished by exceptionally brutal or heinous behavior indicative of wanton cruelty.

7. See, e.g., *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) "[F]or the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender"). For a discussion of the flaws of mandatory sentences, see Alper & Weiss, "The Mandatory Sentence: Recipe for Retribution," 41 *Fed. Prob.* 15 (1977); Flynn, "Turning Judges Into Robots," *Trial* (March, 1976); Petersilia & Greenwood, "Mandatory Prison Sentences: Their Projected Effects on Crime and Prison Populations," 69 *J. Crim. L. Criminology* 604 (1978).

8. Address by N. Morris, *Conceptual Overview and Commentary on the Movement Toward Determinacy*, presented at the Special Conference on Determinate Sentencing in Berkeley, California, June 1977, reprinted in LEAA, *Determinate Sentencing, Reform or Regression?* (1978).

9. See text accompanying note 19, Chapter VII *supra*; Remington, Book Review, 29 *Vand. L. Rev.* 1309, 1315 (1976).

10. See Alshuler, "Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for Fixed and Presumptive Sentencing," 126 U. Pa. L. Rev. 550 (1978).

11. For a general discussion of presumptive sentencing and an illustrative statute, see Twentieth Century Fund Task Force on Criminal Sentencing, *Fair and Certain Punishment*, at 19-61 (1976).

12. Ind. Code Ann. §35-50-1-1 to -6-6 (Burns Cum. Supp. 1978). For a discussion of the Indiana approach, see Clear, Hewitt & Regoli, "Discretion and the Determinate Sentence: Its Distribution, Control and Effect on Time Served," 24 *Crime & Delinquency* 428, 442 (1978) (Estimates that average time served under the new Indiana Law will increase by 47.4% from time served under the old Indiana Law); Paper by L. Orland, *The Future of Rehabilitation as a Rationale for Sentencing and Imprisonment*, prepared for the Criminal Justice Colloquium in Indianapolis, Indiana, Sept. 1978.

13. Cal. Penal Code §1170-1170.6 (West Cum. Supp. 1978). For a discussion of the California statute, see Cassou & Taugher, "Determinate Sentencing in California: The New Numbers Game," 9 *Pac. L. J.* 17 (1978); "California's New Determinate Sentencing Act," 42 *Fed. Prob.* 3 (1978); Comment, "Senate Bill 42 and the California Determinate Sentence Law," 14 *San Diego L. Rev.* 1176 (1977); Hesse & Kramer, *Issues in the Study of Criminal Code Revision - An Analysis of Reform in Maine and California*, reprinted in LEAA, *supra* note 8, at 111; Council of State Governments; *supra* note 1.

14. See, e.g., Cal. Penal Code §1203 (West Cum. Supp. 1978) and Cal. Rules of Court 414.

15. L. Wilkins, J. Kress, D. Gottfredson, J. Calpin & A. Gelman, *Sentencing Guidelines: Structuring Judicial Discretion*, at 4 (National Institute of Law Enforcement and Criminal Justice, U.S. Dept. of Justice, 1978).

16. Cal. Penal Code §1170 (a) & 1203 (West Cum. Supp. 1978).

17. For a discussion of the guideline model, see Coffee, "Repressed Issues of Sentencing: Accountability, Predictability and Equality in the Era of the Sentencing Commission," 66 *Geo. L. J.* 975 (1978); Gelman & Kress, "How Chaotic Is Sentencing In Your Jurisdiction," 17 *Judges J.* 35 (1978); Hon H. R. Tyler, Jr., "Sentencing Guidelines: Control of Discretion in Federal Sentencing, Symposium on Sentencing," 7 *Hofstra L. Rev.* (1978); Zalman, "A Commission Model of Sentencing," 53 *Notre Dame Lawyer* 266 (1977); L. Wilkins, *supra* note 15. For an illustrative statute of the guideline model, see National Conference of Commissioners of Uniform State Laws, *Uniform Sentencing & Corrections Act* (1978 draft).

18. Compare Diamond & Zeisel, "Sentencing Councils: A Study of Sentence Disparity and its Reduction," 43 *U. Chi. L. Rev.* 109 (1975) with Note, "The Collective Sentencing Decision in Judicial and Administrative Contexts," 11 *Am. Crim. L. Rev.* 695 (1977).

19. The U.S. Code lacks the type of felony classification system advocated by the Model Penal System Code and present in New York. Thus, the federal bill which suggests guidelines, S. 1437 (also known as the Kennedy-McClellan bill), does not bind the guidelines to existing felony classes. See S.1437, 95th Cong., 2d Sess. (1978).

20. Va. Sen. Bill No. 180 (1978).

21. 1978 Minn. Laws ch. 723

22. Pa. Act 319, Nov. 1978.

23. Strand, *Sentencing Disparity: How One Jurisdiction Reduced It*, 17 Judges J. 33, 53 (1978).

24. See L. Wilkins, *supra* note 15, at 63-75.

25. Hoffman & Stone-Meierhoefer, *Application of Guidelines to Sentencing*, 3 Law & Psych. Rev. 53 (1977); Kress, Wilkins & Gottfredson, "Is The End of Judicial Sentencing in Sight?," 60 Judicature 216 (1976); L. Wilkins, *supra* note 15. See, e.g., S. 1437, 95th Cong., 2d Sess. §994 (1978).

26. Other possible advantages to the use of sentencing guidelines include: (1) once in operation, the guideline system would not entail additional court personnel; (2) guidelines provide flexibility to allow for changing societal perceptions of offense seriousness; (3) guidelines build into their design an informational feedback loop so continuous monitoring of sentencing patterns is available and modifications feasible, (4) better presentence reports and the exclusion of irrelevant information from such reports. L. Wilkins, *supra* note 15, at xvii.

27. Pa. Act 319, Nov. 1978.

28. See A von Hirsch, *Abolish Parole?* (1978). See also A.B.A., *Standards Relating to the Legal Status of Prisoners*, 14 Am. Crim. L. Rev., at §9.2 (1977) (recommends the abolition of the Parole Board, but provides for a new independent releasing authority to replace it).

*CHAPTER IX: A New Sentencing System for New York*

1. There is no constitutional impediment to such prosecutorial appeals of sentences. The United States Supreme Court has held that the double jeopardy clause "was directed at the threat of multiple prosecutions, not government appeals, at least where the appeals would not result in a new trial." *U. S. v. Wilson*, 420 U.S. 332, 342 (1975). See also *U.S. v. Jenkins*, 420 U.S. 358 (1975); *Serfass v. U.S.*, 420 U.S. 377 (1975). In addition, as the Supreme Court indicates in *North Carolina v. Pearce*, 95 U.S. 711, 721 n. 18 (1969), a defendant's double jeopardy rights are subordinate to society's interest in promoting legitimate sentencing goals. Reducing unjustifiable sentencing disparity is one such goal, and prosecutorial appeals of sentences is a procedure which has been found necessary for its achievement. See Report of the Senate Committee to Accompany S.1, Criminal Justice Reform Act of 1975 (S. Rep. No. 94-100, 94th Cong. 1st Sess. note 35 at 1050). Thus, provisions for prosecutorial appeals of sentences are included in S.1437 as passed by the United States Senate, S.1437, 95th Cong., 2d Sess. §§3721-25 (1978). Furthermore, such a procedure is consistent with the recommendations of the American Bar Association. See A.B.A. Advisory Commission on Sentencing and Review, Standards Relating to Appellate Review of Sentences, at §1.1 (Approved Draft 1978). See also 1978 Minn. Laws Ch. 723. *Contra* Hon. C. R. Richey, "Appellate Review of Sentencing: Recommendation For A Hybrid Approach, Symposium on Sentencing," 7 Hofstra L. Rev. (1978); "Twice in Jeopardy: Prosecutorial Appeals of Sentences," 63 Va. L. Rev. 325 (1977).

*Supplemental Recommendations for New York's Criminal Justice System*

1. See, e.g., Kan. Stat. Ann. §§75-5290 to 52108 (1978); Iowa Code Ann. §§910.1-10 (West 1978). Minn. Stat. Ann. §§401.01-.16 (West 1978). See also D. Boorkman, E. J. Fazio, Jr., N. Day & D. Weinstein, *Community Based Corrections in Des Moines* (1976); P. Hahn, *Community Based Corrections and the Criminal Justice System* (1975); Blackmore, "Minnesota Community Corrections Act Takes Hold," *Corrections*, at 46-59 (March, 1978); Kansas Special Committee on Corrections, *Report on Kansas Legislative Interim Studies to the 1978 Legislature* (1978); Council of State Governments, *State Subsidies to Local Corrections: A Summary of Programs* (1977); Council of State Government, *A State Supported Local Corrections System: The Minnesota Experience* (1977).

2. For a discussion of the need for confining and structuring prosecutorial discretion, see K. C. Davis, *Discretionary Justice*, at 188-233 (1969). For a discussion of reforms to enhance the uniformity and accountability of prosecutorial decision making, see R. T. Nimmer, *The Nature of System Change: Reform Impact in the Criminal Court*, at 95-114 & 157-172 (1978); National Advisory Commission on Criminal Justice Standards and Goals, *Task Force Report: Courts*, at Standards 3.2-3.3 (1973).

3. See New York State Division of Criminal Justice Services, *State Standards and Goals for Criminal Justice Corrections*, at Standard 6.4 (1977). In order to achieve the appropriate utilization of probation supervision services in New York State. The Standard requires that "[p]resentence investigation and ROR investigation should be handled by an independent agency under the jurisdiction of the courts separate from the probation department."

4. The efficacy of the Rockefeller Drug Laws has been seriously challenged by both criminologists and practitioners. See pp. 38-39 & 193-94 *supra*.

The task of evaluating these laws lies with the legislature. Both federal and state courts have rejected defendants' claims that their sentences violated the constitutional prohibition against cruel and unusual punishment. *Carmona v. Ward*, 416 F. Supp. 272 (S.D.N.Y., 1977) (statute declared unconstitutional), *rev'd* 576 F. 2d 405 (2d Cir. 1978), *cert. denied* 24 Crim. L. Rep. 4145 (1978); *People v. Broadie*, 37 N. Y. 2d 100 (1975).

5. See generally American Correctional Association Commission on the Accreditation of Correctional Facilities, *Manual of Standards for Adult Correctional Institutions* at §§4193, 4302, 4372 & 4384 (1977); New York State Division of Criminal Justice Services, *supra* note 3 at Standard 5.7; National Advisory Commission on Criminal Justice Standards and Goals, *Task Force Report: Corrections*, at Standard 6.1 (1973); American Correctional Association, *Handbook on Correctional Classification* (1978).

6. ECON, Inc., *Study of the Economic and Rehabilitative Aspects of Prison Industry*, Vol I - VI (1976-77) (Report for LEAA); "Where Prison Shops Run Like Business," *Business Week* 56 (July 18, 1977); California Department of Corrections, *Report of the California Correctional Industries* (1978); United States Bureau of Prisons, Unicor Federal Prison Industries, *Ann. Rep.* (1977).

See generally National Advisory Commission on Criminal Justice Standards and Goals, *supra* note 5, at 387-88 (1973). American Bar Association, "Tentative Draft of Standards Relating to the Legal Status of Prisoners," *reprinted in* 14 Am. Crim. L. Rev. 387 (1977).

7. See American Correctional Association, Commission on the Accreditation of Correctional Facilities, *supra* note 5, at §§4140 & 9149 (which recommended that new prisons house 500 or fewer inmates); United States Department of Justice, *Draft: Federal Standards for Corrections*, at Physical Plant §§ 001 & 002 (1978) (which recommends that new prisons be built near urban areas).

This recommendation was also made by the Select Committee on Correctional Institutions and Programs (Jones Committee), *Report No. 4*, at 5-7 & *Report No. 5*, at 7.

8. Persons released from prison will be given credit against their sentence for time spent in the community without a parole violation. This practice is a fair reward for "playing by the rules." Also, the practice of denying credit for "street time" raises a number of constitutional issues. See, Note, "A La Recherche du Temps Perdu: The Constitutionality of Denial of Credit on Revocation of Parole," 35 U. Chi. L. Rev. 762 (1968); Hand & Singer, American Bar Association Commission on Correctional Facilities and Services, *Sentencing Laws and Practice* (1974). A majority of courts have upheld the constitutionality of statutes that deny credit for "street time." See *Hodge v. Markely*, 399 F. 2d 973 (7th Cir. 1963); *Bates v. Rivers*, 323 F. 2d 311 (D. C. Cir. 1963); *Van Buskirk v. Wilkson*, 216 F. 2d 735 (9th Cir. 1954); *Hedrick v. Steele*, 187 F. 2d 261 (8th Cir. 1951); *Dolan v. Swope*, 138 F. 2d 301 (7th Cir. 1943); *Woods v. Steiner*, 207 F. Supp. 945 (D. Md. 1962). Some court decisions, however, indicate that such statutes are unconstitutional. *Conner v. Griffith*, 238 S. E. 2d 529 (W. Virg. 1977). See also *North Carolina v. Pearce*, 395 U. S. 711, 719 n. 13 (1969). Additionally, a number of jurisdictions, including New York and the Federal system, have adopted

statutes which specifically provide that credit be given for "street time." See, e.g., Ala. Code tit. 42, §12; Ill. Ann. Stat. ch. 38, §1003-3-9 (a) (3) (i) (Smith-Hurd); Mich. Stat. Ann. §28.2308; N. H. Rev. Stat. Ann. §651.3; Tenn Code Ann. §40-3619; N.Y. Penal Law §70-40 (1) (McKinney); See also *Daniels v. Farkas*, 417 F. Supp. 793, 794 (1976) (holding that 18 U. S. C. §4210 (b) "clearly indicates and intends that a prisoner is to receive credit for that time which he has served on parole.") Such statutes are consistent with the recommendations by the American Law Institute, *Model Penal Code*, at §305.17 (1) (1962). See also National Council on Crime and Delinquency, *Standard Probation and Parole Act*, at §27 (1955); and the National Advisory Commission on Criminal Justice Standards and Goals, *supra* note 5, at §16.15(3).

9. National Commission on Law Observance and Enforcement Reports (Wickersham Commission), *Report on Criminal Statistics, No. 3*, at 3 (1931).

10. New York State Division of Criminal Justice Services, *Crime and Justice: Ann. Rep.*, at 149 (1977) (Nassau County is the jurisdiction referred to in the text).

11. National Advisory Commission on Criminal Justice Standards and Goals, *A National Strategy to Reduce Crime* (1973).

12. National Advisory Commission on Criminal Justice Standards and Goals, *A National Strategy to Reduce Crime*, at 70-73 & 84-88 (1975) (paperback); S. Wildhorn, M. Lavin, & A. Pascal, *Indicators of Justice*, at 196 (1977).

13. R. Pound, "Judicial Councils and Judicial Statistics," 28 A.B.A. J. 98, 102-104 (1942).