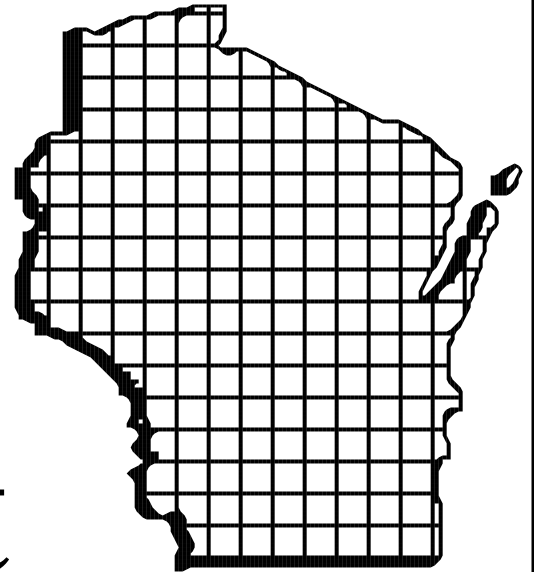
Wisconsin
Policy
Research
Institute
Report



March 1998 Volume 11, Number 2

THE TRUTH ABOUT SENTENCING IN WISCONSIN

Plea Bargaining, Punishment, and the Public Interest

REPORT FROM THE PRESIDENT:

Wisconsin faces extremely important issues, none more so than sentencing practices in our criminal justice system. Over the years, we have researched issues such as probation, parole, and the prison system. We thought it was time to examine the role of criminal sentencing.

We asked George Mitchell to analyze the current sentencing system. Mitchell is a public policy researcher from Milwaukee and a member of the 1996 Governor's Task Force on Corrections. He has authored several previous studies on crime and correctional policies. Working with him was David Dodenhoff, Ph.D., a visiting research fellow at the Institute.

Mitchell and Dodenhoff examined the actual files of a representative sample of prison inmates who were sentenced in Milwaukee County. The results are, at a minimum, troublesome. Contrary to much conventional wisdom, they find that serious, repeat felons often receive sentences that are less than half the maximum which could have been imposed. The result is that convicted criminals are spending very little time in prison.

Many of these abbreviated sentences result from a discounting procedure known as plea bargaining. Through plea bargaining, a defendant — well before a judge passes sentence — already has had his potential punishment shortened. An example might involve a repeat criminal who commits a robbery and two burglaries. To convince him to plead guilty, prosecutors might recommend charging only the robbery and dismissing the burglary charges or charges of habitual criminality. In plea bargain cases Mitchell and Dodenhoff studied, the average sentence exposure was reduced from about 44 to 25 years. It is time to question whether the outrageous practice known as plea bargaining should be eliminated.

The current truth-in-sentencing debate also has highlighted the need to understand the actual amount of time a criminal spends in prison, not just the overall length of a sentence, which might also include probation and parole or intensive sanctions.

For years, the public has clamored for more accountability from the Department of Corrections and the bureaucrats involved with probation and parole. Judges and prosecutors need to face the same kind of accountability. Today, there is far too little accountability for the actions of the court system in our state. That must change.

James H. Miller

WISCONSIN POLICY RESEARCH INSTITUTE, INC.

P.O. Box 487 • Thiensville, WI 53092

(414) 241-0514 • Fax: (414) 241-0774

E-mail: wpri@execpc.com • Internet: www.wpri.org

THE TRUTH ABOUT SENTENCING IN WISCONSIN

Plea Bargaining, Punishment, and the Public Interest

GEORGE A. MITCHELL and
DAVID DODENHOFF, PH.D.

Page

SECTION 1: INTRODUCTION AND SUMMARY OF FINDINGS 1

SECTION 2: CRIMINAL SENTENCING — THE WISCONSIN CONTEXT 6

SECTION 3: PLEA BARGAINING 14

SECTION 4: INTENSIVE SANCTIONS 24

SECTION 5: CONCURRENT SENTENCES — A "BARGAIN BASEMENT" SYSTEM 34

SECTION 6: SENTENCING OF DRUG DEALERS 43

SECTION 7: JUDICIAL DISCRETION — USES AND ABUSES 49

SECTION 8: CONCLUSION AND RECOMMENDATIONS 59

BOARD OF DIRECTORS

Robert Buchanan, *Chairman*
Roger Fitzsimonds
Michael Grebe
Roger Hauck
James Klauser
San Orr, Jr.
Robert O'Toole
Brenton Rupple
Paul Schierl
Edward Zore
James Miller, *President*

SECTION 1: INTRODUCTION AND SUMMARY OF FINDINGS

This study analyzes the felony sentences of a representative sample of Milwaukee County defendants who were sentenced to the Wisconsin state prison system. Inmates from Milwaukee County comprise almost half of total admissions to state prisons.

We believe the study is the first of its kind in Wisconsin. Its findings address several issues in the current discussion about "truth-in-sentencing." The study also sheds light on other topics and perceptions in the debate about Wisconsin's correctional policy.

A lack of accountability

We believe the participants in Milwaukee County's criminal courts — defense lawyers, prosecutors, judges — tend to be more accountable to each other than to the general public. This is so for several reasons.

First, many judicial and corrections system officials use a nomenclature in which words are disconnected from their normal meaning. Individuals who commit multiple burglaries and traumatize a neighborhood are often described as "low-risk." Swindlers who exploit the elderly are "non-assaultive." A five-week crime spree involving seven aggravated holdups is a "single crime episode." Courtroom discussions occur as to whether a nine-year-old rape victim with vaginal wounds suffered "bodily harm." A felon's "criminal history score" can exclude violent juvenile offenses, including sexual assault or robbery.

Participants in Milwaukee County's criminal courts — defense lawyers, prosecutors, judges — tend to be more accountable to each other than to the general public.

Second, meaningful public access to information is limited. Much information we reviewed for this study is confidential and not even available for public inspection. In addition, our sponsor incurred substantial expense simply to acquire transcripts of **public** hearings on plea bargains. Many court files we reviewed were missing key information, such as transcripts from **public** sentencing hearings. We sought copies of missing sentencing transcripts, but in some cases it took weeks for them to be filed. We asked for, but were unable to secure, copies of "offer letters" that prosecutors had presented defendants at the start of the plea bargaining process. The cumulative effect of such problems is that the voting public is flying blind when it seeks to evaluate the performance of elected judges and prosecutors.

Third, the structure of a "prison sentence" often defies clear explanation — except to those who are part of the system. As Milwaukee Judge John DiMotto explained in giving long-time drug dealer Karl Freeman a 10-year prison sentence: ". . .You know ten years doesn't mean ten years. You've been in the system long enough to know that." The definitions at the end of this Section highlight the complexity that characterizes the system.

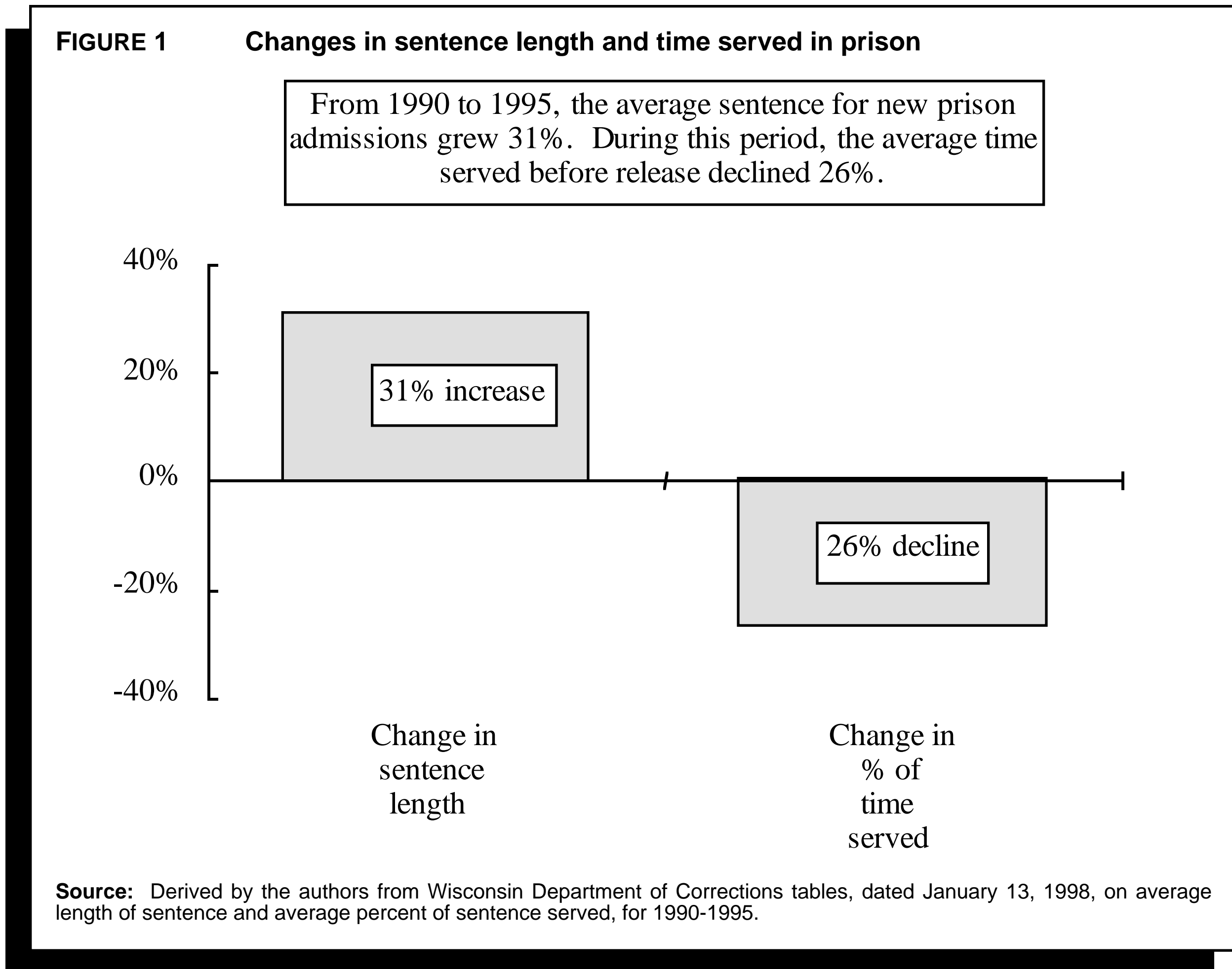
Overall, felony sentences are lenient

We analyzed the structure and severity of sentences using a variety of measures. Among our findings:

- While judges have considerable discretion in sentencing felons, other participants in the criminal justice system have the effective authority to limit or even reverse the impact of a judge's sentence. As one example, while judges statewide increased sentence lengths between 1990 and 1995, early release practices of the State Parole Commission offset many of those judicial decisions. See Figure 1.

- Few offenders receive "maximum" sentences, even though most in our study were repeat criminals. A majority received sentences that were less than half of the maximum possible.

- Several factors combine to produce relatively lenient criminal sentences. The most important include: plea



bargaining; the use of overlapping ("concurrent") sentences for more than one crime; judicial substitution by defendants; and the impact of prison crowding on early release practices.

- Plea bargaining cut maximum prison exposure by an average of about 42%, or 12.4 years per defendant.

- For felons convicted of more than one crime, concurrent sentences cut overall sentence exposure by about 43%, compared with back-to-back ("consecutive") sentences.

- Two "sentencing reforms" authorized by the Wisconsin Legislature have been eliminated, in one case, and sharply curtailed in another. The Wisconsin Sentencing Commission was abolished in 1995. The Intensive Sanctions program was scaled back in 1997. The Legislature will need to consider the shortcomings in each as it debates new sentencing policies.

The impact of truth-in-sentencing

We did not specifically examine what impact truth-in-sentencing legislation might have had on sentence lengths or prison populations. However, our study suggests that truth-in-sentencing will increase prison populations **only if judges modify their current motives in issuing sentences.** Judges clearly understand that a "prison sentence" now does not equal the amount of time an offender actually will be incarcerated. Judges often estimate the likelihood of early release and impose a longer sentence, in order to achieve a certain period of actual incarceration.

Whatever impact truth-in-sentencing has on sentence lengths, bills now pending in the state Legislature should greatly clarify much of the complexity and ambiguity that now limits accountability.

Methodology

Our research began in late 1995, using a random, representative sample of Milwaukee County inmates in state prison.[1] In 1996 and 1997, we examined: confidential records for these inmates in files of the Wisconsin Department of Corrections; and court transcripts, police reports, and other information available from records at the Milwaukee County Clerk of Courts. Records we examined included: juvenile crime reports; inmate evaluations by state social workers and parole and probation agents; crime victim statements; and other information about current and prior offenses. The study's sponsor also incurred significant expense to obtain copies of previously unavailable records that describe plea bargains. In total, our various sources of information allow for a unique and comprehensive analysis of sentencing practices.[2]

Judicial reaction: agreement and disagreement

We also interviewed judges, prosecutors, and others in the criminal justice system. Among judges who reviewed drafts, reactions ranged from strong disagreement to strong approval. We discuss several of their comments in Section 8. One constructive critic said our analysis presented an unfair or unrepresentative view of some judges. This underscores three key points regarding this report: (1) it does not "rate" individual judges or in any way evaluate an individual judge's sentencing patterns — our sample does not allow that; (2) we chose the cases described in the report to illustrate important overall characteristics of the sentencing process; and (3) our analysis of these cases, by necessity, reflects a subjective point of view.[3]

The conventional wisdom often is wrong

Eighty-eight percent of cases studied involved defendants sentenced to prison in the years 1990-1995, a period of substantial inmate population growth. As a consequence, the study helps address some popular perceptions about the relationship between sentencing practices and prison populations.

For example, the *Milwaukee Journal Sentinel* has observed that the "Legislature's insatiable penchant for lengthening sentences helps explain prison congestion." As to this and some other elements of conventional wisdom, this study suggests different conclusions. It also provides information about sentencing practices for those convicted of so-called "non-violent crimes," e.g., burglary, theft, and drug trafficking. Some commentators have suggested that growing prison populations reflect longer sentences for, and increased incarceration of, such offenders. This is a widely held view that is not supported by cases and data in this study.

TERMINOLOGY

We encourage readers to review the following definitions of frequently used terms and their meaning **in this study.**

Truth-in-sentencing. Confusion and ambiguity about criminal sentencing has prompted various legislative proposals which often are labelled "truth-in-sentencing." These proposals primarily address the wide variance that historically has existed between an offender's so-called "prison sentence" and the amount of time actually spent in prison. Thus, a typical truth-in-sentencing proposal will provide that an offender's sentence be much clearer in terms of how much time will be spent in prison versus community supervision. Other definitions that follow demonstrate the complexity of the current system and why this complexity has given impetus to truth-in-sentencing proposals.

Sentence (or actual sentence). The total length of time the sentencing judge commits a convicted defendant to Department of Corrections supervision, either in prison or community supervision (parole, probation, or Intensive Sanctions).

Maximum sentence exposure. The longest sentence a defendant could receive if convicted of all charges initially filed by the district attorney. See plea bargaining below.

Prison term (or prison sentence). The portion of the sentence that the convicted defendant spends in prison. This usually ranges between 25% and 67% of the actual sentence, due to "early release" and "mandatory release" parole practices. See below.

Parole. A status of community supervision into which most convicted felons are placed after serving the prison term portion of their sentence. Also see probation below.

Prison release. Most inmates are released from prison before completion of their sentence. We discuss three categories of prison release dates in the text, as follows:

- **Mandatory release date.** The date by which the statutes require that most inmates are to be released from prison — usually after they have served two-thirds of their actual sentence.

- **Early release date** (also discretionary parole date, or parole eligibility date). The earliest date that most inmates can be released from prison by authority of the Parole Commission, a separate authority from the Department of Corrections. Early release eligibility usually occurs after 25% of the actual sentence has been served, or six months, whichever is greater.

- **Probable release date**. The date by which the average inmate is likely to be released from prison and placed in parole status. Inmates usually will be paroled after serving between 25% and 67% of their actual sentence. In 1994 and 1995, inmates being released for the first time from a new sentence had served an average of 42% of their actual sentence.

Intensive Sanctions release. Most paroles are granted by the Parole Commission. The Department of Corrections may administratively transfer an inmate to community supervision under the Intensive Sanctions program. Generally, this can occur at any time, including before eligibility for early release.

Maximum initial prison exposure. Due to mandatory release policies, maximum initial prison exposure is usually two-thirds of maximum sentence exposure (non-life cases only).

Maximum actual prison exposure. Two-thirds of the actual sentence (non-life sentences only).

Probable prison exposure. Forty-two per cent of actual sentence. See probable release.

Life sentence. A period of Department of Corrections supervision — in prison or on parole — equivalent to the length of the offender's life. Depending on the offender's record and the decision of the sentencing judge, offenders with a life sentence may be eligible for early release to parole status. The judge has three basic options: 1) parole eligibility after a minimum prison term of 13 years, four months; 2) parole eligibility at a specified time longer than 13 years, four months; or 3) no parole eligibility. Offenders with life sentences are not eligible for mandatory release.

Concurrent sentences. Sentences for more than one crime that are served simultaneously. For example, an offender with two concurrent sentences of five years has a total sentence length of five years, not 10.

Consecutive sentences. Sentences for more than one crime that are served back-to-back. The opposite of concurrent. An offender with two consecutive sentences of five years has a total sentence length of 10 years, not five.

Plea bargaining. The process through which prosecutors seek a guilty plea from a defendant. In return for a guilty plea, prosecutors may agree to recommend one or more of the following: 1) dismissal of one or more charges; 2) reduction in severity of some charges; and/or 3) a specific sentence length or type of sentence (probation, concurrent prison terms, etc.). Prosecutors also may agree to present other information that a judge might consider in sentencing. Also, some plea bargains are based on a prosecutor's agreement not to increase the severity of the initially filed charges. An important element in some plea bargains is an agreement by the prosecutor to make no recommendation on sentencing severity to the judge in the case.

***Alford* plea.** A plea which often is entered by a defendant as part of a plea bargain. The defendant does not admit guilt, but does admit that the state's evidence could convince a jury or judge to convict. Under an *Alford* plea, a defendant effectively agrees not to contest the charges or a judge's decision to convict. (Other common pleas are: not guilty; guilty; and no contest.)

Intensive Sanctions. A sentencing option for judges (and a parole option for the Department of Corrections) under which an offender spends a brief portion of the actual sentence in prison and the rest of the sentence in community supervision. This program was terminated by the Legislature in 1997.

Probation. A sentence served in community supervision, under rules of the Department of Corrections, with supervision provided by a Department parole and probation agent.

Stayed sentence. A sentence that includes prison time but "stays" the implementation of the sentence in favor of alternative conditions, such as a probation and perhaps a short period of time in a local jail. If the offender commits a new crime or violates the conditions of probation, the stayed sentence is automatically imposed and the offender usually will be sent to prison. Separate penalties may be imposed for the new crime or other violation of probation.

Notes to Section 1

1 The following provides an overview of the sample.

Size of sample	3.6% of all Milwaukee County inmates in Wisconsin state prisons as of Oct. 17, 1995 (n = 173)
Characteristics of sample	Representative of inmates from Milwaukee County, as measured by age, gender, race/ethnic group, length of sentence, type of crime; see further information below
Type of plea	128 guilty; 45 not guilty (convicted by jury)
Type of sentence	152 non-life; 21 life
Year of sentencing	88% between 1990 and mid-1995; 12% before 1990
Number of sentencing judges	29

Here is a comparison of characteristics of the study sample and all Milwaukee County inmates.

	Study Sample	**All Milwaukee County Inmates**
Male	96.0%	95.0%
Female	4.0%	5.0%
Non-white and Hispanic	83.0%	84.0%
Age		
Male	30	30
Female	33	33
Sentence length		
Male	14.4	13.7*
Female	8.8	7.9*
Type of Crime		
Drug only	7.1%	9.6%
Property & other	17.1%	17.4%
Violent	75.9%	72.0%

* Data are statewide.

Also see Appendix A: Study Design, from John J. DiIulio and George A. Mitchell, "Who *Really* Goes to Prison in Wisconsin?," *Wisconsin Policy Research Institute Report*, Volume 9, No. 4, April 1996. This material presents several measures demonstrating that the average age, length of sentence, and type of crime committed by inmates in our sample was similar to — in some cases identical — with data for the overall cohort of Milwaukee prison inmates.

While the overall sample is representative of Milwaukee County prison inmates in 1995, we cannot say that various subgroups we discuss are representative. For example, the discussion of inmates in the Intensive Sanctions program is based on 16 cases which were not randomly drawn from a universe of Intensive Sanctions participants. A representative study of Intensive Sanctions participants, or any other subgroup, would require a random sample focusing on that category of inmate.

2 Access to confidential records was allowed per a statutory provision affecting research projects. Where this study uses any confidential information, the real names of inmates and victims are not used.

3 We acknowledge and appreciate the assistance of several judges who reviewed drafts of the report, provided suggestions, and also offered criticism. Representatives of the Milwaukee County District Attorney provided advice. Kate Rathburn of the Wisconsin Department of Corrections and several staff in the Milwaukee County Clerk of Courts provided considerable assistance. Attorney Chris Carson provided research assistance in 1996. Among those receiving draft copies were the outgoing and incoming Chief Judge, the Presiding Judge of the Felony Division, and the District Attorney. All errors are ours.

SECTION 2: CRIMINAL SENTENCING — THE WISCONSIN CONTEXT

Judges have substantial discretion in deciding how criminals are sentenced. However, other participants and factors in the criminal justice system also affect sentencing and limit judicial discretion. Some are well-known; others are less understood. Here are examples:

- The Legislature and Governor set maximum statutory penalties and establish other policies, such as the capacity of the prison system, that directly influence how much of an offender's sentence is served in prison.

- Wisconsin judges are bound by Supreme Court ("the Court") and Court of Appeals case law on sentencing and the proper exercise of discretion. The Court also has set guidelines on the process of plea bargaining, which has a significant impact on sentencing.

- For most of the period covered by this study, the Wisconsin Sentencing Commission "promulgate[d]. . .guidelines for use [by judges] in sentencing defendants. . ."[1]

- Prosecutors have considerable discretion in determining what charges are filed and whether charges are bargained away in return for a guilty plea.

- Defense lawyers who believe a judge is a tough sentencer have one opportunity to move the case to a different court.[2]

- The Department of Corrections, the State Parole Commission, and Administrative Law Judges have considerable authority in determining how long offenders are in prison and what the consequences are for those who violate while serving a portion of their sentence on parole or probation.

The overall result, according to our study and other data, is a system of sentencing in which most convicted offenders don't go to prison and those who do serve relatively short sentences.

The impact of these external factors varies among individual judges. Sentences often are heavily influenced by factors beyond a judge's control, including: the credibility of a victim or other witnesses; the quality of evidence gathered by police; the substantial discretion of prosecutors in deciding which charges to file and in bargaining for a guilty plea; the significant impact of the judicial substitution law; the completeness and accuracy of information provided to a judge about a convicted defendant's prior criminal record; and the authority of state administrators to affect implementation of a sentence once it is issued.

The overall result, according to our study and other data, is a system of sentencing in which most convicted offenders don't go to prison and those who do serve relatively short sentences.[3] This conclusion conflicts with much conventional wisdom in major media, such as a prominent commentator who says Wisconsin is in a "lock 'em up craze" that assumes the state "can make do without alternatives to incarceration."[4] Such generalities are not supported by the facts. For example:

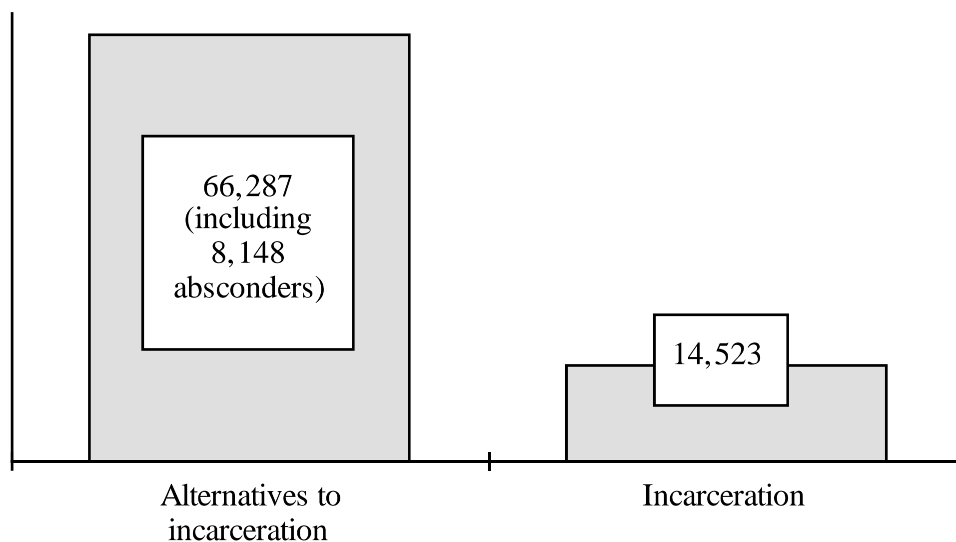
- Most offenders are not in prison; they are in "alternatives to incarceration" (Figure 2);

- The majority of new offenders in the corrections system in this decade are in "alternatives to incarceration" (Figure 3);

- Those in prison serve less than half of their sentences there;

- The representative sample of Milwaukee County inmates we studied included few with a maximum sentence. In fact, of those with non-life sentences, about 60% received less than half the maximum sentence.

FIGURE 2 Most Wisconsin offenders are not in prison



Source: Department of Corrections, "Offenders Under Control on January 30, 1998," Form DOC-302.

The outcomes depicted in Figures 2-3 arise from a combination of judicial sentencing decisions and various other factors which have an important impact on sentencing. Several of these factors are described in the remainder of this Section.

Supreme Court guidelines. Milwaukee County judges receive a "Bench Book" listing case law on sentencing standards. This case law says ". . .[p]robation should be the sentence. . ." unless a judge specifically identifies factors requiring incarceration.[5] Referring to this guideline, the Court said:

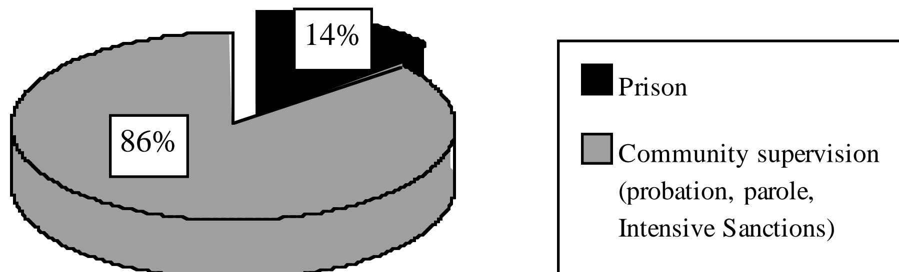
> Rejection of probation [by a sentencing judge] is a necessary predicate to a determination that incarceration is required in a particular case.[6]

The Supreme Court has listed these criteria for judges to review in rejecting the use of probation:

- Confinement is necessary to protect the public from further criminal activity; or
- The offender needs correctional treatment which can most effectively be provided in prison; or
- Probation would "unduly depreciate the seriousness of the offense."

The Supreme Court has suggested that judges apply these criteria by evaluating: (1) the nature and circumstances of the crime; (2) the offender's history and character; and (3) the availability of institutional and community rehabilitation.[7]

FIGURE 3 **Offenders in the state corrections system grew by 29,000 between 1989 and 1995; 86% of the net growth was accounted for by those in alternatives to incarceration**[8]



Source: see Note 8.

The type of crime for which an offender is convicted is a key factor in sentencing debates. In general, the policy that has emerged tends to favor incarceration for those convicted of so-called "violent" crimes (homicide, rape, assault, and robbery). There also tends to be agreement that most first-time, so-called "non-violent" offenders (burglars, car thieves, and some drug offenders) warrant probation.[9]

Disagreement is greatest regarding offenders who fall between these two categories. Specifically, a major issue is whether, and for how long, prison is appropriate for **repeat** burglars, car thieves, and drug dealers. This debate often obscures the fact that the vast majority of non-violent offenders already are in alternatives to incarceration. This fact (Figure 4) contradicts a great deal of misleading conventional wisdom fostered by the media commentators, some reporters, and opponents of prison construction. The truth is that fewer than 10% of offenders whose most recent crime was "non-assaultive" are in prison. And, among that group, most are repeat offenders.

Again, contrary to much conventional wisdom, most offenders are sentenced directly to community supervision (probation) or are paroled to community supervision after brief prison terms. Thus, from 1990 to 1995, most of the net growth in offenders entering the correctional system came in alternatives to incarceration, or community supervision (Figure 3).

Legislative and administrative actions. In addition to Supreme Court guidelines, the outcomes described in Figures 2-4 reflect various other actions that have an important impact on sentencing.

- **The Wisconsin Sentencing Commission**

  Almost all Milwaukee County sentences analyzed for this study were issued while the Wisconsin Sentencing Commission existed.[10] In creating the commission, the Legislature mandated that judges ". . .shall take the [commission's] guidelines. . .into consideration" and that if a judge ". . .does not impose a sentence in accordance with. . .the guidelines, the court shall state. . .its reasons for deviating" from them.[11]

  The commission's published description of its work illustrates the policy it sought to advance (emphasis added):

FIGURE 4 **"Non-assaultive" offenders (other than homicide, sex, or other assaultive) under control of the Department of Corrections**

Source: Department of Corrections data as of mid-1996, the latest period for which complete reports could be obtained. Data in this table refer only to the most recent offense; many current non-assaultive offenders have committed prior assaultive offenses.

> The [commission's] guidelines. . .set forth proportional recommended sentence lengths including *presumptive intensive sanctions*. They help foster a rational sentencing policy that recommends incarceration for violent and repeat offenders and recognizes the necessity to conserve costs by recommending alternatives to sentencing or intensive sanctions for nonviolent property offenders. . .The commission also investigates alternatives to [incarceration].[12]

Following enactment in 1991 of the Intensive Sanctions parole program, the Legislature directed the commission to provide guidelines for judges when ". . .the presumptively appropriate sentence is to the intensive sanctions program. The. . .guidelines shall. . . encourage the use of [Intensive Sanctions] for offenders who show a low risk of assaultive behavior. . ."[13]

Examples we studied show that the commission's guidelines often called for sentences which were less than half of the maximum possible, including in cases where repeat offenders had committed violent crimes. Factors tending to produce such relatively lenient recommendations included a crime severity scoring system that diminished the impact of so-called "property" crimes and did not take into account juvenile records. Often, sentencing judges specifically cited and followed the guidelines.

- **Early release from prison**

Wisconsin statutes let judges impose "a sentence at hard labor for the maximum term fixed by the court. . ." News reports of sentencing often begin by stating that an offender has been sentenced to X years "in prison."

TABLE 1 The early release rate more than doubled between 1980 and 1992[14]

	1980	1992
Mandatory release (offenders serving 2/3 of sentence in prison), as % of all releases	55%	17%
Early release (offenders serving less than 2/3 of sentence in prison), as % of all releases	35%	74%

However, this judicial sentencing authority is subject to "release from [prison] confinement" through the paroling authority of the Department of Corrections and Parole Commission. Under this authority, most felons are eligible for (1) early release after serving one-quarter of their sentence in prison and (2) mandatory release after serving two-thirds of their sentence. Paroled offenders are in community supervision for the remainder of their sentence. Community supervision can cover a wide range of activities: periodically reporting by telephone; in-person visits with a probation and parole agent; drug testing; residency in a halfway house; and others.

The Intensive Sanctions program (Section 4) greatly expanded the Department's administrative authority to place inmates in community supervision or to keep offenders who had violated parole out of prison.

For example, if a parolee violates rules or commits a new crime while on parole, the Department of Corrections has wide latitude in responding. It may revoke parole and return the offender to prison or, even in the case of rules violations which can be serious (drug use, absconding, etc.), it may pursue an "alternative to revocation" (ATR), which lets the violator remain in community supervision. An offender who commits a new crime while on parole (or probation) might or might not be charged with that crime. If a local prosecutor chooses not to file a charge, the consequence for a new crime usually will be revocation of parole or probation, with the offender going to prison in connection with the original sentence for the initial crime.

Thus, a judge's initial sentencing discretion can be greatly affected by administrative actions and through increased use of early release parole. Table 1 shows the impact of this between 1980 and 1992.

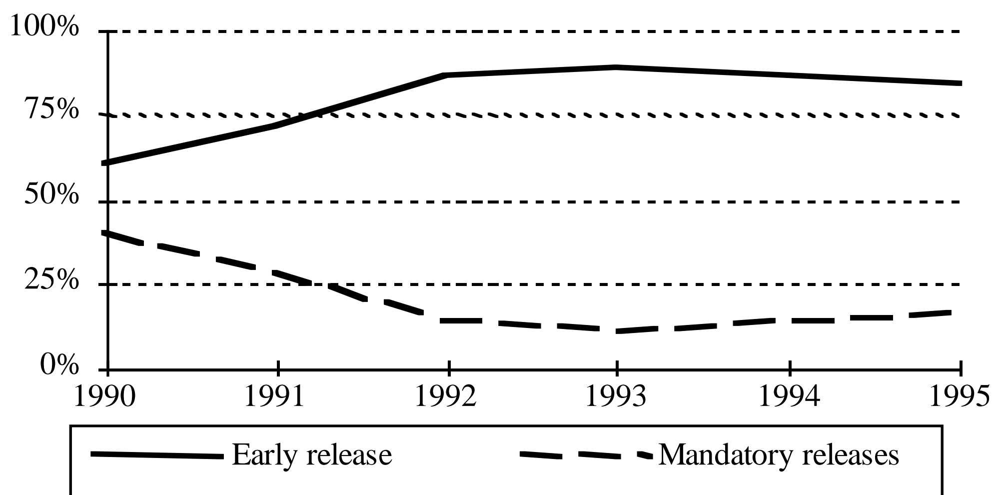
- **Prison construction**

The impact of a judge's sentencing decisions also is influenced by available prison capacity. For example, in the early and mid-1980s, the state encountered difficulties in implementing a prison expansion program. This accelerated prison crowding and was a major factor in the growth of early releases. Thus, state action (or inaction) altered the practical impact of sentencing decisions that had been independently issued by the state's judges. Prison crowding also undercuts the effectiveness of community supervision programs, because the lack of space reduces the likelihood that a violator in such a program will face the serious consequence of reincarceration.

This crowding continued into the 1990s. In response to prison crowding, Governor Tommy Thompson proposed a 4,500-bed expansion of the state prison system. State Rep. Walter Kunicki, then-Speaker of the Assembly, opposed this as too costly. Kunicki named a commission to prepare an alternative. The commission's 1991 report was written by University of Wisconsin Law Professor Walter Dickey; it recommended a 3,000-bed cut in Thompson's prison program and creation of the Intensive Sanctions program.[15] Professor Dickey's main rationale for the program was that thousands of prisoners would ". . .pose little risk of harm to others [and] are not likely to again [commit crimes] if they are intensively involved in an intermediate sanction program."

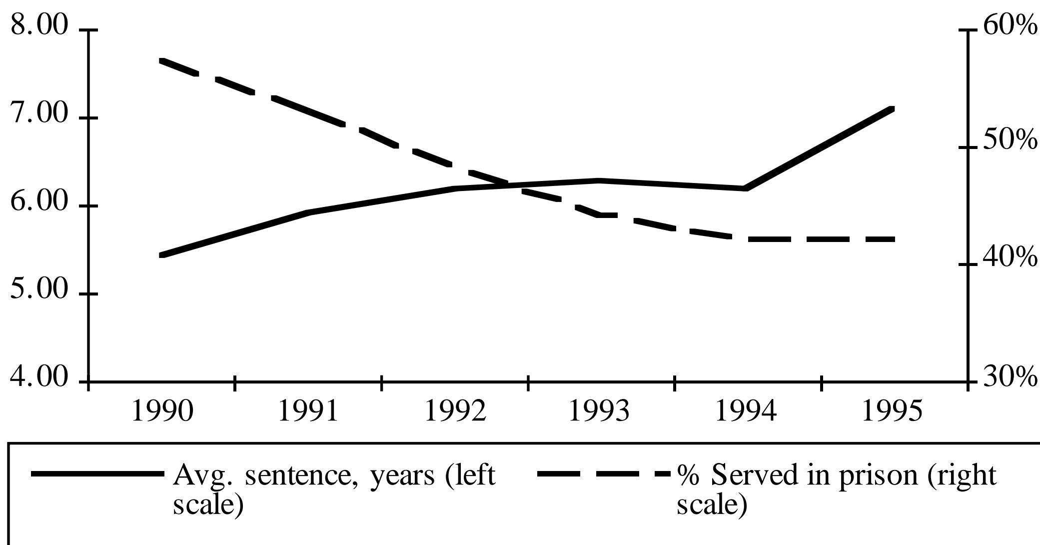
Professor Dickey's main rationale for Intensive Sanctions was that thousands of prisoners would ". . .pose little risk of harm to others [and] are not likely to again [commit crimes] if they are intensively involved in an intermediate sanction program."

FIGURE 5 Growth in early releases, 1990-1995



Source: Wisconsin Department of Corrections (January 12, 1998, transmission from Mark Loder).[16]

FIGURE 6 Change in average length of sentence and time served in prison



Source: Wisconsin Department of Corrections, various tables, January 13, 1998.

The Legislature agreed and: removed about 3,000 beds from Thompson's prison package; directed him to develop the Intensive Sanctions program; and, through the Sentencing Commission, encouraged judges to use Intensive Sanctions ". . .for offenders who show a low risk of assaultive behavior."[17]

The Legislature's decision to cut the prison expansion program had two important impacts. First, prison crowding worsened and the number of early prison releases continued to grow (Figure 5). Second, at a time when judges increased the overall length of sentences, their efforts largely were offset by the increased use of early release, which cut the average portion of the sentence served in prison (Figure 6).

Summary

During the period covered by this study, Wisconsin's overall criminal sentencing policy was characterized by a large per cent of offenders in alternatives to incarceration, increased numbers of early releases, and a reduction in the average per cent of a prison sentence actually served in prison.

Statewide and in Milwaukee County, these outcomes reflected a combination of factors, including the substantial sentencing discretion of judges and the several other factors external to the courtroom.

The remainder of this study illustrates how the judicial discretion and other various factors affected the sentencing of a representative sample of Milwaukee County felons.

Notes to Section 2

1 Wisconsin Legislative Reference Bureau, *State of Wisconsin 1995-1996 Blue Book*, p. 386. The Sentencing Commission was abolished as part of the 1995-97 state budget. It was in existence for almost the entire time period covered by sentences analyzed in this report.

2 *1995-96 Wisconsin Statutes*, section 971.20.

3 Several developments in recent years — and potential changes in 1998 — illustrate new policies that might affect the results we describe. For example, the 1995 Legislature abolished the Sentencing Commission, a body whose guidelines generally resulted in relatively light sentences (as we document). Also, the 1997 Legislature eliminated the six-year-old Intensive Sanctions program, a sentencing option we discuss in Section 4. Currently, the Legislature is considering various "truth-in-sentencing" proposals which would alter fundamentally the system of sentencing we describe in this study.

4 Gregory Stanford of the *Milwaukee Journal Sentinel* editorial board is the paper's specialist on analysis of correctional issues. See "Lock 'em up strategy has limits" (January 21, 1998) and "Prisons don't tip crime scale" (February 1, 1998).

5 *Bastian v. State*, 54 Wis. 2d 240 (1971), which approved Standard 1.3 of the ABA's 1970 *Standards Relating to Probation* (American Bar Association Project on Standards for Criminal Justice, February 1970), p. 30. The ABA analysis of this standard includes the following (pp. 28-30):

> Probation often will offer far more meaningful possibilities for rehabilitation than will other sentencing alternatives, particularly in the case of first offenders.
>
> Continuing normal community contacts has much to offer by way of affirmative contributions to the reintegration of the offender as a useful and non-offending citizen. It is, after all, the normal community in which the ex-offender must learn to live. [Further], there are. . .negative and frequently stultifying effects of confinement which can unnecessarily complicate this process of reintegration.
>
> . . .[P]robation maximizes the liberty of the individual while at the same time vindicating the authority of the law and effectively protecting the public from further violations. There have been numerous efforts at documentation of the point, most of which have shown the results to be encouraging.
>
> . . .Probation costs something on the order of one-tenth of the cost of imprisonment, and while probation ought to cost more (i.e., it ought to be implemented more effectively), it is still apparent that the per-offender cost of a properly functioning system of probation will be substantially less than the cost of institutionalization.
>
> . . .Imprisonment has its hidden costs, [including] removing the main source of income from a family. The effect of the criminal sanction on innocent dependents will be much less if the offender can be put on probation and can work to support his family at the same time.

6 *Anderson v. State*, 76 Wis. 2d 361 (1976).

7 *Garski v. State*, 75 Wis. 2d 62 (1977). While there is a requirement that probation must be considered — and rejected — before a prison sentence is imposed, the Court has been clear that it will support a prison sentence when the judge has used "a process of reasoning based

on. . .the defendants' personality and attitude, the viciousness and aggravated nature of the crime, the manner in which the crime was planned and executed, the need for close rehabilitative control, and the rights of the public." *Cranmore v. State*, 85 Wis. 2d 722 (1978).

8 These data, from the Wisconsin Department of Corrections, are for 1990-1995, when about 80% of the sentences reviewed for this study occurred. Data for Figure 3 are below.

	Prison	**Intensive Sanctions**	**Parole**	**Probation**	***Total***
12/31/89	6,609	0	3,976	25,975	*36,560*
12/31/95	10,660	1,616	8,332	44,898	*65,506*
Net growth	*4,051*	*1,616*	*4,356*	*18,923*	***28,946***
% of total	*14%*	*6%*	*15%*	*65%*	***100%***

These data show that, contrary to some conventional wisdom, the state is relying relatively less on prison. Specifically, while in 1991 about 17% of offenders were in prison, between 1990 and 1995, about 14% of **new offenders** under state supervision were in prison.

9 Some media commentators argue for such a policy, as though it does not already exist. A Milwaukee *Journal Sentinel* editorial (January 21, 1998) said: "Give first dibs on prison space to violent criminals, please. Onetime losers who are not a threat should come under some sort of loose supervision while living regular lives."

Several Milwaukee County judges believe the labels "violent" and "non-violent" can be misleading. Their views are summarized elsewhere in this study, along with several illustrative cases.

10 The commission was created in 1983 and abolished by the 1995 Legislature.

11 *1991-92 Wisconsin Statutes*, section 973.012. Defendants were prohibited from basing an appeal on the grounds that a sentence did not fit the guidelines.

12 *State of Wisconsin 1995-1996 Blue Book*, pp. 386-87.

13 *1991-92 Wisconsin Statutes*, section 973.011(2).

14 Wisconsin Department of Corrections, "Types of Releases from the Wisconsin Correctional Institutions," 1980-1992. Table 1 excludes releases other than early release or mandatory release, which are about 10% of all releases. Other release include completed sentences in prison, deaths, etc.

15 Kunicki appointed the Wisconsin Correctional System Review Panel in April, 1991. Later that year, its main recommendations were adopted by the Legislature. Subsequent actions of the Legislature, including elimination of Intensive Sanctions in 1997, have undone most of the panel's recommendations.

16 Data for this chart reflect "first releases," not all releases, as were depicted in Table 1.

17 Examples of cases in which Milwaukee County judges used the Intensive Sanctions program are in Section 4. These examples illustrate that the program overstated substantially the number of "low-risk" prisoners who would be good candidates for community supervision. On November 6, 1997, a Wisconsin Department of Corrections report said public safety could be enhanced under a reconstituted program that "would no longer be a placement option for offenders who would otherwise be incarcerated."

Section 3: Plea Bargaining

Christmas probably will never be the same for Brenda Jones and Amy Spencer (not their real names).[1]

On December 24, 1991, after a Christmas eve party at Amy's house, the nine- and 10-year old Milwaukee girls went to sleep — Amy in her bedroom and Brenda on the living room sofa. A guest at the party, 25-year-old George Coats, had stayed behind. Coats had a long criminal record. He was being sought at the time for armed robbery and for absconding from his probation supervision.

Why did the prosecution propose this agreement? Why did the judge agree?

Coats — who later told authorities he was "roasted" after hours of drinking and using cocaine — woke Brenda and offered her five dollars in return for sex. She resisted. Court records say Coats then approached Brenda and ". . .got on top of her. . .[S]he eventually. . .push[ed] him off and tried to run. . .but he grabbed her shoulders and he pushed her down to the floor. He then pulled up her nightgown and pulled down her panties. . ." As Brenda "struggl[ed] and tr[ied] to get away," Coats performed an oral sex act, and then "unfastened his pants, took his penis out, and had an act of intercourse. . .[A]fter this happened, [Brenda] got up and went to the bathroom and saw that Coats had gone" into Amy's room.

Amy "woke up to find [Coats] pulling on her underwear. . .[H]e also offered her $5 to 'do him' and she said no. Amy immediately went and told her mother."

The presentation of a plea bargain to the judge

For these and other offenses, Coats appeared, on February 17, 1993, in the Milwaukee County courtroom of Judge Victor Manian. A trial had been scheduled, but Coats' lawyer told Judge Manian:

> Your honor, my client has entered [a plea bargain] with the District Attorney. We're going to be entering a no-contest plea to count one, first degree sexual assault of a child. . .[T]he State [will move] to dismiss count two, attempted sexual assault of a child and also the robbery charge in its entirety. . .[T]his plea is also based [on an agreement] that there's a pending charge of battery to an officer that will not be charged. . .[2]

If he had been convicted of all pending charges (robbery, battery to a law enforcement officer, one count of sexual assault and another count of attempted sexual assault), Coats faced a maximum sentence of more than 40 years. His actual exposure could have been more than 60 years, because his uncontested actions with respect to Brenda constituted two separate acts of assault, while he was charged with only one.

The proposed plea bargain cut Coats' exposure to 20 years, the maximum penalty at that time for first degree sexual assault. Coats' reason for entering the plea bargain became even clearer when his lawyer said ". . .the State will be asking for eight years incarceration. . ." out of a maximum of 20.[3] After Judge Manian accepted the agreement and recommendation, Coats left court knowing he was eligible for parole in two years and would reach his mandatory prison release in about five years.

Coats is scheduled to reach mandatory release in mid-1998, under circumstances that are a cause for possible concern: apparently due to rules infractions, his release in February, 1998, was delayed and he was transferred to a maximum security prison.

The rationale for Coats' plea bargain

Why did the prosecution propose this agreement? Why, for a career criminal, did it negotiate away a number of criminal charges and then seek a sentence that was only 40% of the maximum on the sole remaining charge? Why did the judge agree? The answers show why plea bargaining is both controversial and likely to remain a central part of the sentencing process.

On the one hand, there are some understandable elements of this and other plea bargains. On the other hand, plea bargains can sometimes offend common sense and undermine justice.

Consider, first, the justification for dropping charges of robbery and attempted sexual assault against Coats.

- The robbery victim, Coats' grandmother, had initially provided enough evidence to support the charge. But several years had passed; she now was reluctant to testify.

- As to the sexual assault victims, the prosecutor told Judge Manian: "It has been the hope of the State, throughout the course of these negotiations, to avoid having either [Brenda or Amy] testify [at a trial] about these incidents, because it was already very traumatic for them to experience [the incidents] and report them to the parents."

Thus, Coats was able to exploit his own victims' vulnerability and their reluctance to testify publicly. Such circumstances are often cited to justify plea bargaining. The ramifications of such an outcome are discussed in the following excerpt from a law review article by Court of Appeals Judge Ralph Adam Fine:[4]

Coats' sentence appears to have been derived almost totally from the arbitrary numerical scoring of a "sentencing matrix," as developed by the since-abolished Sentencing Commission.

> **Judge Fine:** The "spare the victim" excuse for leniency raises difficult questions, some of which the Wisconsin Supreme Court has addressed in the context of a child abuse case:
>
> > **Justice Shirley Abrahamson:** Were the district attorney to decide not to call the child as a witness, the district attorney may protect the child's emotional interest in not being forced to face the alleged abuser and accuse the abuser of criminal acts, but may inflict a greater harm on the child by allowing the alleged abuser to go free and by demonstrating to the child that the state of Wisconsin does not place a high enough value on the child's suffering to bring to justice the person alleged to have caused the suffering.[5]
>
> **Judge Fine:** Prosecutors must avoid the trap of using expressed concern for a victim's sensibilities as a mere rationalization for inappropriate concessions.[6]

Even with the understandable rationale of attempting to protect current victims, why also recommend only an eight-year sentence? Does that not depreciate the seriousness of the crime(s)? With Coats' release imminent, does it not accelerate unduly the time when he might re-offend? Why did the judge accept such a recommendation?[7] Here, the answers are problematic.

The "sentencing matrix"

Court records indicate that the eight-year sentence recommendation apparently did not reflect an independent judgment either by the prosecutor or the judge, such as through an evaluation of the total facts in the case or of Coats' long record (ten arrests, two incarcerations, and various probation violations) or of the need to protect society. Instead, as part of the plea bargain, the prosecutor and defense effectively used a "third party" to recommend a sentence, as explained by the prosecutor to Judge Manian:

> [Coats' lawyer] and I filled out the [state Sentencing Commission guideline] matrix for the first degree sexual assault charge and the [8-year] recommendation is in accord with the matrix guidelines."

Thus, Coats' sentence appears to have been derived almost totally from the arbitrary numerical scoring of a "sentencing matrix," as developed by the since-abolished Sentencing Commission.[8] The matrix purported to measure objectively the severity of a defendant's criminal history and current offense. A review of the matrix (in its various iterations) shows a scoring system that tilts unambiguously against incarceration. For example, in all cases in this

study in which the matrix form was available for review, none took a defendant's juvenile record into account unless at least four "felony-type" crimes had been committed. Further, the scoring essentially gave identical numerical weight to a given type of crime (burglary, robbery, assault, etc.), regardless of the circumstances. And, in several cases, the completed forms omitted prior adult crimes.[9]

Did Brenda Jones suffer "bodily harm"?

The Coats case illustrated how the matrix could sometimes reduce the sentencing process to an outrageous level of absurdity. Opposing lawyers in the case explained to the court that they disagreed as to whether Brenda had suffered "bodily harm," *as defined by the matrix instructions*. Remember, this was a nine-year-old girl who had been raped. According to medical reports cited by the prosecution, she had "adhesions" and "slight tears" in her vaginal area. Still, several pages of a sentencing transcript are devoted to whether she had suffered "bodily harm" consistent with the bureaucratic jargon of the Sentencing Commission. After this dialogue, a somewhat astounding result emerged: when viewed through the prism of the sentencing matrix, Judge Manian (emphasis added) explained that:

> [B]odily harm [per the matrix] includes pain [and] contusions. . .I think this was bodily harm. . .so [the] box under 23 of the matrix should be checked "yes" and it puts the total. . .severity of offense score. . .at six, but [the resulting sentence still is eight years] *so it doesn't make any difference*.

Plea bargaining — a larger context

Several sentencing issues evident in the Coats case surfaced in other plea bargains we examined. Circumstances and specific facts varied greatly from case to case, so we concluded, with some exceptions, that broad generalizations about plea bargaining are not particularly useful. As a result, our primary method in this study is to discuss specific cases that illustrate how the process works. What appear to us as apparent shortcomings may be seen by others as compromises that "keep the system running" and do not unduly diminish the outcome's impact on justice. Recognizing the substantial debate on this topic, we are concerned with the lack of informed discussion about it. One reason is the unwarranted lack of ready access to information about plea bargaining. In Section 8, we strongly recommend that Milwaukee County judges and prosecutors and the Legislature take steps to improve public access to information about plea bargaining. We think this is the best single step to insure that the worst aspects of the system are minimized.[10]

What appear to us as apparent shortcomings may be seen by others as compromises that "kept the system running" and do not unduly diminish the outcome's impact on justice.

Some opinions about plea bargaining

The literature on plea bargaining is vast. We do not review it in this study. What follows is simply a selected summary of views from two Wisconsin judges and from a widely used law school text on the criminal law.

First, an overview of plea bargaining as presented in the law school textbook[11] begins by quoting a 1937 description of why plea bargaining is prevalent:

> If all the defendants should combine to refuse to plead guilty, and should dare to hold out, they could break down the administration of justice. . .But they dare not, for such as were tried and convicted could hope for no leniency. The prosecutor is like a man armed with a revolver who is cornered by a mob. A concerted rush would overwhelm him. . .[A] criminal court can operate only by inducing the great mass of actually guilty defendants to plead guilty.

Although this statement was made 60 years ago, it highlights an issue cited by many with whom we spoke: day-to-day workload and case volume. "The volume of cases is great. The workload creates a sense of urgency. Everything is happening quickly," according to one judge, who said this climate influences attitudes toward plea bargaining and many other aspects of the sentencing process.

Disagreement about plea bargaining extends even to the issue of what does and does not constitute a plea bargain. For example, some judges and prosecutors said plea bargains often reflect an appropriate assessment of the available facts and the probability of proving them in court. Others said that cases meeting that definition really aren't plea bargains, because the state has not agreed to drop or reduce a charge that it probably could have proved.

The following excerpt, also from the textbook, describes the legal climate in which plea bargaining occurs:

> [This] process. . .is usually described as plea bargaining, and there is at least a superficial resemblance to the image of a marketplace invoked by this language. The defendant exchanges the only thing of value he will usually possess — his right to insist upon government expenditure of time and money for a trial — in order to limit his losses and resolve the tension produced by uncertainty about his fate.
>
> . . .[A]long with whatever pressure there may be to keep dockets moving, how far the prosecutor is willing to mark down the price of any particular defendant's crime in order to obtain trial avoidance may involve political, cultural, and tactical considerations. Uncertainties about the effectiveness of a complainant's or eyewitness's testimony, questions about the admissibility of a confession or other evidence, the need to enlist the defendant's cooperation as informant or as government witness in other cases, the existence of overcrowding in pre-trial jail or post conviction prison facilities, the estimate of the defendant's character, or the importance of maintaining smooth working relationships with defense counsel with whom one deals on a continuing basis — all are factors which may influence the prosecutor's pricing policy. Thus the model implies [the] give-and-take and mutuality of advantage of a commercial transaction: each side makes concessions and each obtains something which would otherwise be doubtful or unrealizable.
>
> . . .The defendant may not always have been adequately counseled about potentially serious consequences of the criminal record created by pleading guilty, e.g., prejudice in obtaining employment or the defendant's worsened situation in the event of a future conviction. Even if this is known to him, however, from the defendant's perspective such long-range contingencies [often] are likely to be outweighed by the immediate prospect of getting a present difficulty out of the way. . .
>
> . . .It seems likely that the underlying ambiguity of plea bargaining will remain; even the words are misleading. . .[I]t would be more accurate to substitute "sentence" for "plea," since it is the punishment which the accused [might] receive which gives the persuasion its leverage. Indeed, even if. . .bargaining could be effectively prohibited, a high percentage of guilty pleas would nonetheless be generated as long as it was believed that judges could and at least sometimes would impose more severe sentences on those convicted after having insisted on a trial.

"[A]long with whatever pressures there may be to keep dockets moving, how far the prosecutor is willing to mark down the price of any particular defendant's crime in order to obtain trial avoidance may involve political, cultural, and tactical considerations."

Two Wisconsin judges whose views we summarize below — Charles Schudson and Ralph Adam Fine — are members of the Court of Appeal, District I, headquartered in Milwaukee. Each has a long previous record of criminal trials as a Milwaukee County judge. While they generally are seen as representing different legal philosophies, they appear to have some views in common when it comes to plea bargaining.

Writing the majority opinion in a 1996 case, Judge Schudson said he shared "Judge Fine's passionate opinion that injustice often flows from courts that seem eager or at least content to grease the wheels of unfair plea agreements."[12]

Judge Schudson also called attention to a practice we found to be common, namely, the use by the defendant of a so-called *Alford* plea as part of a plea bargain. In such a plea, the defendant does not specifically admit guilt, but agrees there is enough evidence that a jury might reasonably convict him. The legal effect of the plea, if accepted by the judge, is that the defendant can be found guilty of the charges and subject to the same penalties as if a guilty plea had been entered. Of this practice, Judge Schudson had strong words:

> I have written in the past to explain why conscientious trial judges should never accept *Alford* pleas. . .I have implored trial judges to include in their plea colloquies [with a defendant] the crucial question, "Are you pleading guilty because you really did the crime?" As a trial judge for ten years, I frequently rejected plea agreements when defendants apparently were attempting [to maintain] their innocence [such as through an *Alford* plea]. As a result, I, like Judge Fine, presided over many more jury trials than those judges who [accepted questionable plea bargains] because, in the midst of their heavy caseloads, they made the mistake of elevating case-flow over justice.

Judge Fine's criticism of plea bargaining is long-standing and widely known. A book he authored in the 1980s presented his concerns and resulted in a program on the topic by the CBS news magazine "60 Minutes."[13] The excerpts below are from a contemporaneous law review article.[14]

> . . .[A]n overwhelming majority of those in the criminal justice system accept plea bargaining as an "important component of this country's criminal justice system." The natural question is "Why?" The answer is a combination of "myth" and "expediency."
>
> Most defenders of plea bargaining believe that without it an already overburdened criminal justice system would grind to a halt. Thus, for example, the Wisconsin Supreme Court has recognized that "plea bargaining is accepted pragmatically as a device to speed litigation. . ." [T]his "system would become clogged" rationale is a myth. Plea bargaining has been successfully abolished when those in the system have wanted to make a ban work: in Alaska; in New Orleans, Louisiana; in Oakland County (Pontiac) Michigan; in Ventura County, California; and, in a petri dish example, in New Philadelphia, Ohio. Stripped of the only reason for which courts have tolerated the practice, plea bargaining stands naked against the winds of justice.
>
> . . .[W]hatever form the leniency takes [in plea bargaining], the leniency is payment to a defendant to induce him or her not to go to trial. The guilty or no-contest plea is the *quid pro quo*. . .there is no other reason. Thus, plea bargaining does not encompass those situations where the facts. . .may justify a lenient sentence, a dismissal, or reduction. Obviously, for example, if a case initially charged as "first degree murder" is discovered to be, in reality, "manslaughter," reducing the charge to "manslaughter" is not plea bargaining but justice. By the same token, consideration to a defendant may be warranted, in appropriate cases, to get his or her help in catching or convicting a "bigger fish" or to avoid the trauma of a trial for a particularly fragile victim. Again, this is not plea bargaining but — if appropriate — just for society and for the victim.

Plea bargaining cuts the risk of punishment

However one evaluates the arguments about plea bargaining, we reached one indisputable conclusion: plea bargaining, as practiced in Milwaukee County, appears to cut substantially the exposure of criminals to punishment. We documented at least 50 apparent plea bargain cases in which charges were dropped or reduced. For non-life sentences (42 of the 50 cases), the average reduction in sentence exposure was similar to that for George Coats, e.g., a probable prison term of about five years for defendants who initially faced exposure of more than 40 years (Figure 7).

However one evaluates the arguments about plea bargaining, we reached one indisputable conclusion: plea bargaining, as practiced in Milwaukee County, appears to cut substantially the exposure of criminals to punishment.

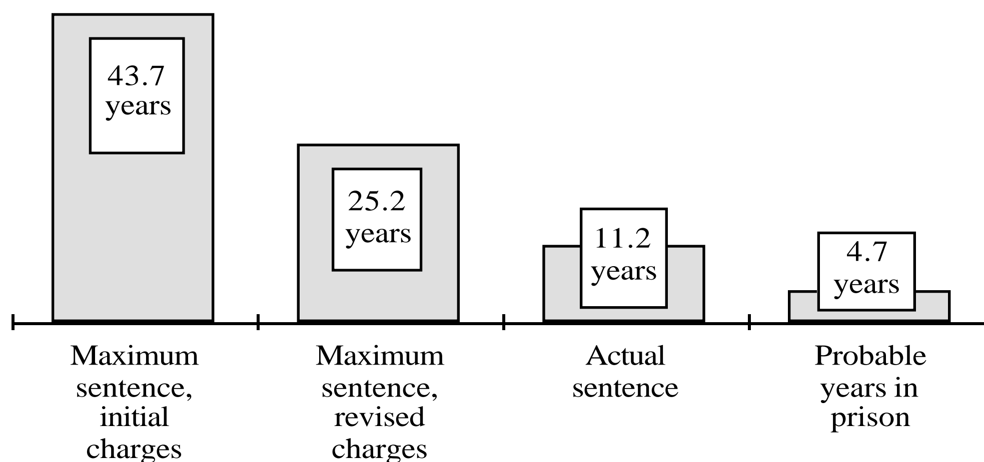
Figure 7 deals with plea bargain cases in which initial charges involved a non-life sentence. Our study also identified cases in which plea bargains led to dismissal of initial charges carrying a life sentence. See Table 2.

Do prosecutors overcharge or undercharge?

We compared the actual sentence of offenders with the maximum sentence exposure they faced based on charges initially filed against them. We also made this comparison for various subsets, including the 50 plea bargain cases we identified that involved a reduction or dismissal of charges.

FIGURE 7 **Estimated impact of plea bargains on non-life sentence exposure and prison terms**[15]

In plea bargain cases in which charges were reduced or dismissed, the average actual sentence was 11.2 years, compared to initial exposure of 43.7 years. Based on state parole practices, these defendants will serve about 4.7 years in prison.



n = 42, based on cases in which defendants faced an initial non-life sentence and one or more charges were dismissed or reduced based on reported plea bargaining.

TABLE 2 **Estimated impact of plea bargains where initial charge involved a life sentence**[16]

Number of cases	Maximum sentence, initial charges	Maximum sentence, revised charges	Actual sentence	Probable years in prison
8	Life (+)	37 years	29 years	12.5

In making these comparisons, one assumes that the charges initially filed are those that the prosecutor believes it can prove if the defendant does not plead guilty. To the extent that some prosecutors might overcharge or undercharge, as an initial step in the plea bargain process, these comparisons won't precisely reflect the reduction in a defendant's real sentence exposure that results from plea bargaining.

Jon Reddin, who supervises felony prosecutors for District Attorney E. Michael McCann, stated to us that the office's overall policy is to charge that which can be proved before a judge and/or jury. The scope of our study did not include an independent evaluation of whether individual plea bargain cases involved apparent "charging high" or "charging low." This would have required access to and examination of records regarding: initial police reports; charging conferences between police and prosecutors; and other sources.

One of the judges we interviewed, and the published opinion of another judge, addressed the issue as follows:

> . . .Three to four years ago, in serious cases, the DA switched from "charge high, plead low" to "charge low, but upgrade charge if no plea," effectively masking a lot of "plea bargaining."[17]

> . . .[Y]ears ago it used to be State was amending down [to get a guilty plea], now for some reason I see more and more cases with different [prosecutors seeming] to be amending up and I don't know if there's been a change in the District Attorney's policies, but I'd like to see charges issued that the state can, I believe, prove and there not be amendments down or amendments up.[18]

We identified four cases in which new charges were added when plea negotiations broke down and a defendant did not plead guilty to the original charges. All four were convicted by a jury trial of more serious charges. Three received maximum sentences, including one of 120 years and another for life.[19]

A guilty plea means a lighter sentence

Nearly nine in 10 non-life cases we studied resulted in a guilty plea. Those who pleaded not guilty — and thus were convicted by a jury — received sentences that were about 50% more severe (actual sentence as a % of maximum).

Judges, other court officials, and attorneys we interviewed said several factors explain this:

- Many judges and prosecutors will give defendants credit for pleading guilty and showing remorse.[20]
- Many judges and prosecutors will give a defendant credit, implicitly or otherwise, for helping to avoid the time and expense of a jury trial.
- A jury trial can expose the judge to much more emotional and damaging evidence, in comparison to the relatively understated evidence usually presented at a guilty plea hearing. For some judges, our study indicates this can influence the severity of a sentencing decision, particularly when a defendant appears defiant and uncooperative in the face of strong evidence against him.

TABLE 3 Severity of non-life sentences, guilty vs. non-guilty pleas

Plea	#	Maximum exposure, revised charges[21]	Actual sentence, revised charges	Actual, as % of maximum
Guilty	125	24.5 years	10.6 years	43%
Not guilty	27	35.8 years	23.3 years	65%
Total	*152*	*26.5 years*	*12.8 years*	*48%*

In the Coats case, for example, it appears reasonable to assume that a more severe sentence would have been issued after a trial requiring Brenda and Amy to testify and including evidence as to physical and psychological damage.

Another factor — the specific judge assigned to a case — also can affect the willingness of some defendants and their lawyers to seek a plea bargain.

Judges vary widely in sentencing records

Another factor — the specific judge assigned to a case — also can affect the willingness of some defendants and their lawyers to seek a plea bargain. Our study shows a wide range of sentencing patterns among judges, including their willingness to accept the specifics of a prosecutor's recommendation.[22] Experienced defense lawyers understand these differences and can factor them into the advice they provide clients.

While the sentencing impact of the Coats plea bargain is similar to others we studied (see Figure 6), the overall average calculations mask important variations in how judges handle individual cases.

For example, in two cases described below, while the defendants benefited from considerable reductions in initial exposure, in both cases the judges appeared to compensate by issuing the maximum sentence on the revised charges.

- On March 29, 1995, Judge Diane Sykes sentenced Diane Odom for three counts of "arson to property other than a building." The incident involved a dispute that resulted in Odom setting fire to a camper vehicle. The fire spread to another vehicle and to a garage. Odom had a history of two arson-related convictions, each having resulted in probation sentences.

  Odom initially was charged with a single count of Arson of Building, which carries a maximum sentence of 40 years. Plea bargain negotiations apparently focused on whether the damaged property met the statutory definition of Arson of Building. The result was a guilty plea to three lesser counts of arson, each carrying a maximum sentence of two years.

  Judge Sykes accepted the plea bargain and issued the maximum sentence: six years, based on three consecutive two-year terms. She said: "It's clear to me that the community's interest, over and above deterrence, is in protection. The community needs to be protected from further criminal conduct. . .It's clear to me that if you are released [on probation] that you will reoffend. . .because you will get angry. . .and your pattern of dealing with people who cross you is to set fires and, that being the case, the community deserves to be protected from you."

- In 1994, Judge Lee Wells sentenced Wallace Jones for attempted robbery, aggravated battery (two counts) and recklessly endangering safety (2nd degree).[23] The charge arose from two separate incidents. In one, Jones was attempting to steal a car when he beat the owner with a baseball bat; the victim was hospitalized in a coma for three days. In the second case, Jones and an accomplice were drinking in a cemetery and violently attacked a man who was visiting a gravesite.

  It is very difficult for the average citizen to gain access to information about how plea bargaining works.

  The initial charges against Jones carried a maximum sentence of 19 years. The revised charges had a maximum sentence of 11 years. Why the reduction? Discussing the plea bargain at the sentence hearing, Jones' lawyer said:

  > It was done because there were problems in both cases, and because we took advantage of one plea bargain in one case, we wanted to take advantage of a plea bargain in the other case and combine it and get it over with and get on with our lives. Otherwise, we would have had two jury trials.

  In response, Judge Wells said:

  > [W]e did discuss that at the time of the plea. . .[We also] discussed. . .a substantial number of the proof problems the district attorney had. . .[W]ithout consideration of proof problems one could recognize how the district attorney could. . .have supported much more serious charges. . .The proof problems affected both sides. . .causing an unknown that they had to deal with. [T]hat is in a sense a roll of the dice. It's a negotiation that's reached [where] both sides ultimately feel [the outcome] is best for them. . .

  Wells accepted the plea bargain and sentenced Jones to the maximum of 11 years. From records we reviewed, this appears to have reflected a lengthy juvenile record (Jones had no adult convictions) and Wells' own view that, despite "proof problems," the evidence was sufficient to indicate that Jones instigated two violent crimes.

It is significant that in both of these cases the sentencing judge did not appear to rely on the arbitrary "sentencing matrix" guidelines (as had been used in the Coats case). Instead, each judge appears to have relied on his or her independent assessment of the specific facts and a more comprehensive set of information about each offender's criminal record. To us, the eventual outcomes, while still reflecting a substantial reduction in exposure, nevertheless appear more "just" as a result.

Summary

The long-standing, and sometimes ill-defined, practice of plea bargaining is a central element in the day-to-day administration of the criminal justice system. It is very difficult for the average citizen to gain access to information about how it works. We believe defenders of the practice should be accountable for making more information available to the general public. This would allow voters to evaluate cases and to take a more informed position in the ongoing debate about plea bargaining.

As significant as plea bargaining is, the following Sections illustrate that it often is just one of several sentencing practices that have the ultimate result of producing lenient sentences.

Notes to Section 3

1 For a number of cases described in this study we omit or alter the names of victims. Also, some offenders' names are altered when the description of the case relies on information obtained from confidential state prison records.

2 "Transcript of No-Contest Plea," *State v. George Lamont Coats*, February 17, 1993.

3 A sentence of ". . .eight years incarceration" does not mean eight years in prison. See discussion of Terminology, Section 1, for "Sentence," "Early Release," and "Mandatory Release."

4 Fine, Ralph Adam. "Plea Bargaining: An *Un*necessary Evil," *Marquette Law Review*, Vol. 70, No. 4, Summer 1987, pp. 615-632.

5 *State v. Gilbert,* 109 Wis. 2d 501, 507, 326 N.W.2d 744, 747 (1982).

6 In Fine's *Marquette Law Review* article, he presents the text of a letter from ". . .a young woman in California [who] wrote to me of her ordeal. Those in the criminal justice system had used the 'spare the victim' excuse as one of the reasons to permit her rapist to escape just punishment." Portions of the letter follow:

> I was raped in my apartment one night in July of 1986. . .[T]he rapist. . .was arrested two days later, and I picked him out of a line-up without any problems. . .[T]he detective in charge of the case told me that out of the approximately 600 rape cases he had investigated, mine was the most "solid" he had come across.
>
> . . .[T]he rapist had a long history of sexual abuse crime [and] was on probation for child molestation. (Actually, he molested his five year old daughter, but the charge had been reduced to "Lewd and Lascivious Conduct with a Child under 14," for which the Court placed him on 90 days probation!)
>
> . . .[These] details. . .help to explain my shock and anger at what happened next. Two weeks later, I received a subpoena which ordered me to appear in court. . .I arrived at the courthouse early. I was scared and nervous, and I had no ideas what to expect. I was instructed to sit in a small room until the D.A. had time to see me, and I was informed that the pre-trial hearing was scheduled for 10 a.m. The D.A. [saw] me two very long hours later. As we were going over my statement, he received a phone call which made him extremely happy, and which infuriated me. In the D.A.'s words, "[the rapist] accepted our deal."
>
> . . .I requested him to explain the details of the plea bargain several times. . .[He] avoided the question, but he did explain that plea bargaining was necessary because if every case had to go to trial, the courts would be back-logged for years. . .He also explained that even if we went to trial, and the rapist was found guilty, some liberal judge may sentence him to less than what "we got" from the plea bargaining (I found this irrelevant and illogical). Finally, he told me that I should be "happy" that he had "spared me the pain of going to trial." I was amazed that a man whom I had not met in the time this "bargain" was planned, had the extra-sensory power to know that I would be "pained" by going to trial. In short, I felt cheated, and I still am very angry. Not only was I completely ignored, but the rapist got a good deal.
>
> My frustration increased. . .One judge told me that I should 'try to understand the poor guy because he was the product of a broken home, alcoholic parents, and a poor childhood.' That same judge told me I should be 'grateful that he didn't hurt me!' When I spoke at the sentencing, the judge told me I should 'just forget the whole thing,' and that I should have no trouble getting my life back together since I'm so young (I'm 25). I find it hard to quantify the contempt I feel for those men.
>
> — Letter from Jane Doe to Judge Ralph Adam Fine (Mar. 9, 1987).

7 The sentencing judge is under no obligation to accept any aspect of a plea bargain presented to the court.

8 See Section 1 (Terminology).

9 Further evidence of the Commission's point of view on sentencing comes from its own description of its mission — see Section 2, p. 9.

A current Milwaukee County judge told us that written summaries of a defendant's criminal record that are presented to judges "are the single biggest source of inaccurate information we receive at sentencing."

10 This study describes sentencing practices, including plea bargaining, in Milwaukee County felony courts. It is not a detailed evaluation of the pros and cons of plea bargaining.

11 Foote and Levy, *Criminal Law — Cases & Materials*, Little Brown & Company, Boston, 1981, pp. 322-327.

12 *State v. Green*, 1998 WL 37954 (Wis. App.) (Feb. 3, 1998).

13 *Escape of the Guilty*, Dodd, Mead & Co., 1986. The "60 Minutes" broadcast was January 18, 1987.

14 Fine, "Plea Bargaining: An *Un*necessary Evil."

15 Plea bargains likely were a factor in many of the remaining cases studied. How many is not known, because often plea transcripts were unavailable in court files. ***Such transcripts are not required to be filed unless a judge so directs. As a result, if no transcript is ordered, there is no public record of a plea bargain***. The sponsor of this study paid more than $1,000 for the production of plea transcripts in a sample of cases in which they were not filed. An obvious remedy to this situation is a legislative requirement that all case files contain a plea transcript for public review.

16 We have no basis for knowing if these eight cases are representative of the overall impact of plea bargaining where the initial charge is a life sentence. See Note 1, Section 1.

17 From written comments anonymously provided by a Milwaukee County judge who reviewed portions of our study.

18 Milwaukee County Judge David Hansher, as quoted in *State v. Green*.

19 See Section 1, Terminology, for description of life sentences.

20 Examples later in this study show that some defendants exploit this tendency effectively.

21 "Revised charges" are those for which the defendant was convicted. It excludes charges on which a defendant was acquitted by jury or charges which were filed initially but later modified or dismissed.

22 A total of 29 judges issued sentences in the cases we studied. On a judge-by-judge basis, the average actual non-life sentence ranged from 18% of maximum to 100% of maximum. The average was 48%. Because our sample of cases was representative of state prison inmates from Milwaukee County, but not individual judges, we do not present data as to which judges were more lenient or severe sentencers. Our data do not allow that conclusion to be drawn. To do so would necessitate a completely different and larger sample designed to be representative of sentencing patterns for a given set of felony judges.

One judge who reviewed our draft argued that it was inappropriate to identify any judge's names in discussing cases in this study. He said the individual cases we discuss might not be representative of a particular judge's overall record. In response, we noted that by that standard it effectively would be impossible to ever quote a judge unless one did a complete review of his or her work.

23 Because this description involves use of confidential information, the date of the sentence is not specified and the real name of the offender is not used.

SECTION 4: INTENSIVE SANCTIONS

Early in 1995, 19-year-old Freddie Nash appeared for sentencing in Milwaukee County Circuit Court. Nash had pleaded guilty to a Class B felony — armed burglary — and faced a maximum sentence of 40 years.

"I know that when. . .I'm given another chance at a free life, there's no way crime is going to interfere with my future. . .My criminal life is over," Nash told Judge John Franke. In support of his client, Nash's lawyer said: "While ordinarily the court sees many such conversions, particularly on the day of sentencing, I do believe that Mr. Nash is sincere."

In response to this and other testimony, Judge John Franke discussed his options — probation, prison, or the three-year old Intensive Sanctions program. He chose Intensive Sanctions. Had the program worked as Judge Franke expected, and as the name "Intensive Sanctions" implies, Nash would have been monitored closely and would have faced meaningful consequences for not complying. Instead, for the next two years, Nash received modest sanctions despite documented drug use and other serious misconduct. His violations escalated dramatically in mid-1997 and resulted in his shooting and killing another man. In mid-February, 1998, Judge Diane Sykes gave him a maximum, 47-year sentence for reckless homicide and other offenses.

The various arguments for and against Intensive Sanctions are central to the current debate about "truth-in-sentencing."

Nash's failure in Intensive Sanctions was among several highly publicized crimes last year by offenders in the program. The net result: 1) an administrative decision to curtail the program; and 2) the Governor's naming of a three-member panel to evaluate what went wrong.[1]

The policy debate that prompted the program's creation in 1991 remains alive. The various arguments for and against Intensive Sanctions are central to the current debate about "truth-in-sentencing." This Section describes various aspects of the program in a way that focuses on some key issues. We begin with Judge Franke's remarks at the sentencing of Freddie Nash.

> I face an issue that is not unusual here. . .what to do with a young man who's here for his first felony conviction with a lengthy juvenile record? Do I treat you as a first offender?. . .[G]enerally even an offense of this severity is one that I would consider probation. . .for a first offender. Or do I treat your juvenile record as evidence that you've pretty much made up your mind how you want to conduct yourself and that we've lost you and you've lost us and that you should be simply treated as a repeat offender and sent off to prison?
>
> . . .Given that this is your first adult conviction and given all the other circumstances here, I find it very hard to simply impose 20 years [or] 10 years in prison, even six or seven years for a man who shortly after he became an adult committed this kind of offense. On the other hand, a short prison sentence like three years doesn't tend to give the community a whole lot of protection. . .
>
> . . .With some reluctance here, because I don't particularly like any of these alternatives, I'm going to impose a sentence to the Division of Intensive Sanctions. This is a prison sentence. It gives you the benefit of. . .what I would call "extremely early parole," and I'm going to sentence you to the Division of Intensive Sanctions for a period of five years.
>
> . . .[T]his is a year of confinement time. It doesn't necessarily mean you spend a year. You're basically eligible for parole immediately. . .[T]he advantage of. . .some intensive supervision for you is probably the best thing. It has not worked for you as a juvenile but I'm willing to give it another shot in your adult years.

The judge's expectation of "intensive supervision" proved wrong. According to a *Milwaukee Journal Sentinel* review of Nash's Department of Corrections "case file:"[2]

> Freddie Nash spent much of his time on intensive sanctions smoking marijuana and racking up a poor job history. . .Homicide charges were filed Wednesday against Nash [who] confessed to [a] fatal shooting. . .July 23 outside a tavern. . .

> [While on Intensive Sanctions,] Nash tested positive for marijuana every time he was tested. Urine screens were described in his file as "continually dirty." He also used cocaine, the file says. His regular drug use was one of the factors considered when Nash was revoked from parole status and sent back to prison in March of this year. But most of the infractions brought just a warning.
>
> Nash was punished in April 1995 with a month in jail for returning to a community correctional center late and drunk. And he was slapped with 60 days in jail in the fall of 1995 after he disappeared from his house for 20 days after he gave police a phony name when they came to break up a fight on a west side street corner. He admitted cutting off his electronic bracelet and throwing it away.
>
> Nash had a lengthy juvenile record and no work history coming into intensive sanctions. . .While on the monitoring program, he lost numerous jobs. Some of the reasons for being fired include "terrible attendance" and "standing around." In January 1997, Nash committed another felony, fleeing from police in his car, and wound up back in prison — until only until May, when he was released on the bracelet again.
>
> He was trusted enough to be taken off the bracelet on July 14, just nine days before Cameron was murdered. Nash was charged Wednesday with first-degree reckless homicide while using a dangerous weapon, second-degree recklessly endangering safety while using a dangerous weapon, possession of a firearm by a felon and habitual criminality for the fatal shooting. . .

Nash's arrest, and that of many other violators, made it clear that Intensive Sanctions simply had failed, especially when measured against criteria set by those who initially proposed it.

Nash's arrest, and that of many other violators, made it clear that Intensive Sanctions simply had failed, especially when measured against criteria set by those who initially proposed it.

This failure — and the 1995 demise of the Wisconsin Sentencing Commission — are more than historical footnotes. This study provides new evidence as to why "Intensive Sanctions" — and "sentencing guidelines" — failed to meet their goals.[3]

The historical context for Intensive Sanctions

Historically, Wisconsin legislators have pursued many responses to the public's concern over crime. Some initiatives were at odds with others, reflecting strong divisions about the best course of action. On one hand, the Legislature approved stronger penalties and an approximate doubling in prison capacity between 1977 and the early 1990s. But some legislators felt these steps went too far; in their eyes, judges were imposing inappropriate sentences and many offenders were being sent to prison unnecessarily. One result was legislation designed to slow the growth in "nonviolent" felons sentenced to prison by local judges. Examples include the creation of the Sentencing Commission (1983) and enactment of the Intensive Sanctions program (1991). Proponents explained the basis for these programs as follows:

- A "large number of. . .[prison inmates] are not violent or assaultive [and] pose little risk of harm to others. . .if they are intensively supervised [in the community]. . .

  "[In 1990, 1,467 new inmates were] identified on the 'low-risk sentence track' by the internal Dept. of Corrections assessment. . .system."[4]

- "While there certainly are some assaultive, dangerous, sophisticated offenders in Wisconsin's prisons, most do not fit this profile."[5]

- "Sentencing Commission . . .guidelines. . .foster a rational sentencing policy [of] incarceration for violent and repeat offenders [and] alternatives [such as] intensive sanctions for nonviolent property offenders."[6]

Examples in this study, and other evidence, show that these assertions frequently were at odds with reality. In many cases, these claims are based on a use of words that is disconnected from their actual meaning.

Consider Freddie Nash. Judge Franke relied on the Department of Corrections' assurances that it would provide strict monitoring and supervision. Franke and other judges had a basis for thinking this might occur:

- As evidence of its ability to more closely monitor people such as Nash, the Department's budget for Intensive Sanctions was 400% larger, per offender, than for typical probationers or parolees.

- One of Franke's most respected colleagues, Judge John DiMotto, was on the 1991 task force that proposed Intensive Sanctions.

  In later sentencing a burglar to the program, DiMotto had said: ". . .you're going to be watched like a hawk by your [state] agent. If you get out of line, they are just going to take you in to custody [and] put you in [the state prison at] Waupun. . ."[7]

- The Wisconsin Bar Association had praised the program. "Numbers don't lie for intensive sanctions success," said the bar's magazine, *The Wisconsin Lawyer*.[8] It said Intensive Sanctions ". . .affords protection through more restrictive supervision" and quoted Frank Gimbel, chair of the bar's Prison Overcrowding Committee, as saying Intensive Sanctions ". . .is not a slap on the wrist. It is a significant punitive sanction. . ."

In this context, Franke's sentence was preferable to straight probation and a plausible alternative to a prison sentence, where early release and light parole supervision for burglars is common. However, the *Journal Sentinel*'s account of what actually happened to Nash shows: repeated rule violations; almost non-stop drug use; at least one new crime; and destruction by Nash of his electronic monitoring bracelet. The minor sanctions he received contrast starkly with the sterner response that Judge Franke (and DiMotto and Gimbel) would have expected.[9] The Department's actual response was what Gimbel had been led to believe would not occur — a slap on the wrist.

The Intensive Sanctions cases in our sample show that the phrase "intensive sanctions" is one of many misnomers that contaminate and distort the debate about sentencing policy.

The failure to rein in Freddie Nash is one of many examples where the rhetoric of Intensive Sanctions was at odds with reality. *Journal Sentinel* reporting, and other examples in this study, show that many serious rule violations were accompanied by few or no consequences.[10]

"Non-violent property offenders"

The cases in our sample show that the phrase "intensive sanctions" is one of many misnomers that contaminate and distort the debate about sentencing policy.

Another involves burglars, who specialize in sizing up a neighborhood to identify houses where they can break in without encountering anyone. To argue against incarcerating a repeat burglar is a formidable task, but it becomes easier if burglars instead are labeled "non-violent property offenders." The same is true for car thieves. But to argue that burglars, other thieves, and swindlers are only "non-violent property offenders" is to deny the real anguish, fear, and apprehension they inflict.[11]

Discussions about crime and policy responses can be influenced greatly by such misleading words and phrases. Judge Arlene Connors called attention to this in a 1993 sentencing of a 19-year-old convicted of auto theft. The offender's juvenile record included four separate convictions for auto theft. Judge Connors told him:

> Let me tell you what's bad about stealing a car. . .[S]ome of those cars are the sole means of transportation for people, to get groceries, to go to the movies or whatever, entertainment and, more importantly, to go to work.
> When you steal a car, and when it comes back to the owner, nine times out of ten, it's so damaged, it's useless. The steering column is peeled away. There are dents in the car. Sometime the tires are off.
>
> The insurance company takes care of the payment of the car if the man has insurance; but then the insurance

> premiums go up for that person, too; and, indirectly, when you have so many cars being stolen in our community, that means the premiums of everyone who pays for automobile insurance goes up. People like me, everybody in this courtroom is paying for it. And, so, it isn't just a lark. It isn't just a property offense.[12]

In another case, Judge DiMotto said the following to a criminal who had burglarized a home while in the Intensive Sanctions program:

> What brings you here is a property crime, a property crime not unlike many burglaries that are committed in our city or not unlike many burglaries that are committed throughout the country. While it is a property crime [and] there was no physical violence, these are still cases that are very distressing for people because their sense of security is damaged by the commission of a crime like this. I don't know if you have ever been the victim of a property crime yourself. If you were, then hopefully you can have a real good appreciation for what I'm saying.
>
> To own a home, to leave it locked up with your personal possessions in the home and then to return only to find that your house was broken into and that the possessions that you worked very hard obtaining are gone is real distressing. It doesn't physically hurt a person, but psychologically it causes that person to be very angry and causes that person to want some form of retribution. It's the impact that this crime has on people's sense of security that makes it so serious. This case is also aggravated to the extent that you were already on supervision when this crime was committed.[13]

In sentencing Freddie Nash, the felon identified at the beginning of this Section, Judge Franke said the following of his burglary:

> [T]he offense that's before this court is very serious. . .entering [the] dwelling of another. . .[W]hen a person does that. . .the resident of that dwelling will not feel safe for a long time. . .This. . .serious burglary offense. . .involved breaking into the house of a woman who had apparently resided there for 20 years. It obviously had a very serious effect on her.

"[S]o, it isn't just a lark. It isn't just a property offense."

Here's how a state corrections official described an 81-year-old burglary victim who lives in Milwaukee's central city:[14]

> Since the most recent break-in, she has been extremely nervous. She has had barred doors and windows put on the front porch for a cost of $1,110. She said she feels a little more secure, but she is extremely nervous abut anyone coming to the house. She won't answer the door unless she knows who is coming, and when I went to visit her, I had to call her right before I got there so that she would be watching for me. . .[S]he has emphysema and hypertension, and both have been worse since these incidents. She has had to have her medications increased, and isn't able to be as active as she was in the past. Because of the claims made on the insurance company. . .her insurance company dropped her after covering her for 35 years.

This is what the state knows about the person convicted of this "non-violent" victimization:

> She was fired from one [nursing home] job because of theft from a resident. Considering her past arrests in Chicago, her involvement in the current crime, and her employment pattern, I feel that it is quite possible that these are not the only times that the defendant had victimized older people. . .
>
> Current Offense: Subject pled guilty. [She] impersonated a security company employee and talked to the 81-year old victim in the victim's home about putting bars on the windows and other safety equipment. The victim had recently been burglarized (the convicted felon's fingerprints were found at the burglary site). The subject went to the restroom, and took some blank checks and 2 credit cards from the victim's purse. . .in the bedroom next to the bathroom. The subject then cashed a check taken from the victim for $193 by forging the victim's name on it.

The "non-violent property offender" in this case was charged, initially, with burglary (for the first break-in) and forgery (in connection with items stolen at the second visit). These offenses carried a maximum sentence of 20 years. On the day of sentencing, the prosecutor also informed the court that the facts of the second offense would

have supported a second burglary charge, involving "obtained consent to enter through fraud with intent to steal. It's burglary in every state of the union but she was only charged with forgery."

Due to a plea bargain, one count of burglary was dropped, cutting maximum sentence exposure to 10 years from 20. Prior to sentencing, Judge Victor Manian had been informed that the defendant had missed 19 required supervision visits while on bail in this case. He imposed a sentence of three years.

The "low-risk sentence track"

This lenient sentence described above was issued on October 21, 1994, resulting in a parole eligibility date of May 26, 1995 (according to state records). Within six weeks of sentencing, the Department of Corrections had identified the offender as a good candidate for Intensive Sanctions — or, as Judge Franke called it in the Nash sentence, "extremely early parole." This highlighted a significant power given to the Department of Corrections when the Legislature created Intensive Sanctions — the power to administratively transfer offenders to Intensive Sanctions even if a judge had sentenced the criminal to prison. See Note 1.

This inmate was a candidate for Intensive Sanctions because she not only was a "non-violent property offender," but also was on the Department's "low-risk sentence track." In proposing the Intensive Sanctions program, University of Wisconsin Law School Professor Walter Dickey (see Notes 3 and 4) had told legislators that thousands of such criminals were good candidates for early release because of their "low-risk" status. Considering that Dickey formerly headed the state's prisons, this either was a surprisingly uninformed statement or an outright falsehood. This is because the Department of Corrections' risk-rating system focuses exclusively on the potential for misconduct *within prison*. This was explained to the 1996 Governor's Task Force on Corrections. John Bett, director of Assessment and Evaluation for state prisons, told the Task Force that the risk-rating system addresses "the inmate's risk while in a correctional setting" and "has nothing to do with their risk in the community."

Here, excerpted from state records, are portions of a description of the offender described above, who burglarized the elderly woman's home and forged stolen documents (emphasis added):

> Current Offense Rating: *Low* (there are no high/moderate factors documented).
>
> Juvenile: In 1983, the subject had an Aggravated Assault. She got 1-year probation. . .In 1984, the subject was guilty of a theft under $300 (shoplifting). She received another 1-year probation.
>
> Adult: In 1985, the subject was guilty of Theft. The disposition is not clear. . .In 1985, she was also found guilty of a Retail Theft and she received 3-months probation. All of the subject's criminal activity took place in Chicago. . .
>
> Offense History Rating: *Low* (there are 4 low risk factors).

This offender was regarded as "low-risk" because her crimes did not give strong indication that she was a risk for violence or misconduct within prison. Her short (three-year) sentence and early transfer to Intensive Sanctions illustrates the cumulative effect of plea bargaining, a light sentence, the Department's administrative transfer power, and the tortured terminology that is ever-present in the debate over criminal justice policy.

A significant power given to the Department of Corrections when the Legislature created Intensive Sanctions was the power to administratively transfer offenders to Intensive Sanctions even if a judge had sentenced the criminal to prison.

The result? In this case, "extremely early parole" for a repeat offender with three prior probation sentences. Given the victim's plight, and her expenditure of more than $1,000 for bars and other security measures, this appears to be a case of where the wrong person — *the victim* — was "incarcerated."

In part because of problems with the Intensive Sanctions program, some judges and other officials have called attention to the misleading nature of phrases such as "non-violent property offender."

Most other offenders in Intensive Sanctions in this study's sample had committed a current or prior violent crime.

Washington County Judge Richard T. Becker, in a 1994 sentencing of a burglar, said "I'm not satisfied that residential burglaries are property crimes."[15] The case in question also illustrated two additional troublesome aspects of the Intensive Sanctions program:

- The Department of Corrections was willing and able to override a judge's decision to keep a repeat criminal out of Intensive Sanctions.

  The offender before Judge Becker had been convicted of burglary. His record involved several adult burglaries and at least eight juvenile offenses — including robberies and burglaries. As part of a plea agreement, charges of habitual criminality and possession of burglar tools were dismissed. These would have added eight years to the maximum possible sentence of 10 years for burglary.

  Prior to trial, the Department had proposed Intensive Sanctions as an "alternative to revocation" (ATR),[16] because this offender was on probation at the time of the burglary. Following the trial, the Department repeated this recommendation.

  The prosecutor objected, noting that background information from the Department showed that the offender was not a good candidate: ". . .[T]he word 'abscond' [from probation] is used five times on that page alone. . .What we have here is somebody who simply has no intent of following any type of rules. . ."

  Judge Becker agreed: "I was somewhat surprised at the [Intensive Sanctions] recommendation after reading [the Department's description of the offender]. . .We are getting occasionally rather strange recommendations which can only lead me to believe that [the Department has] the word that we are overcrowded" in state prisons.

  The Judge then said Intensive Sanctions was inappropriate "with the kind of record we have here. . .[T]his case clearly calls for a prison sentence, straight up and outright." He then imposed a relatively stiff sentence of seven years (70% of the maximum for the revised charges; 39% of the maximum for the original charges).

  Notwithstanding this, the Department later administratively transferred this offender to the Intensive Sanctions program. It wrote the judge — in a form letter — that "If the inmate violates the rules of supervision the administrative transfer gate allows for immediate transfer back" to prison. Note this does not say "requires" immediate transfer.[17]

- While Professor Dickey and others told legislators that Intensive Sanctions was for "non-violent property offenders," large numbers of criminals in the program have records of violent crime.

  The offender in the case just discussed had a prior conviction for robbery, defined by the FBI as a "violent crime." As described further below, most other offenders in Intensive Sanctions in this study's sample had committed a current or prior violent crime.

  The *Milwaukee Journal Sentinel* has documented that this pattern appears common. In a story headlined "Convicts in program have long records — Repeat felons in sanctions," it found that 53% of the Intensive Sanctions cases it studied involved offenders with a "violent charge in their criminal history" and 41% had been charged at least once with "habitual criminality."[18]

The facts involving the offender sentenced by Judge Becker again show how several factors often combine to produce a lenient sentence and, in this instance, one that the judge specifically didn't intend. These factors include a

favorable plea bargain, the Department of Corrections' substantial administrative authority, and a program such as Intensive Sanctions.

The case also illustrates the distorted impact that the sentencing guidelines could have if a judge were to follow them without an independent and subjective evaluation of specific facts. Specifically, despite a long record that included an escape, a robbery, several probation violations, and a dismissed charge of habitual criminality that was read into the record, the "matrix guideline" before Judge Becker suggested a sentence of 4.0 to 4.8 years — less than half the maximum on the reduced set of charges.

Reflecting the notion that the current crime of residential burglary was a "non-violent property crime," the guidelines resulted in a "severity of offense" score of "0." These are the same guidelines that prompted a courtroom disagreement as to whether rape involved "bodily harm" (see Section 3).

Intensive Sanctions offenders in this study

State and court records used for this study identified 16 offenders in the Intensive Sanctions program.[19]

In February, 1998, the Department of Corrections provided information on the status of these offenders,[20] based on one of the following four categories:

- Community supervision — Intensive Sanctions;
- Community supervision — regular parole (following Intensive Sanctions);
- Successful completion of sentence; or
- Reincarceration — either for a new crime or for major rules violation(s).

Figure 8 shows that the majority of Intensive Sanctions offenders in this study have been re-incarcerated. In these cases, then, that outcome conflicts with early predictions that program participants would "pose little risk" of re-offending. All 16 cases involved offenders with prior probation or parole violations. As explained below, there has been no independent evaluation of the Intensive Sanctions program; we thus cannot know how the 16 cases in our sample compare with a representative profile of those in the program.

An evaluation of Intensive Sanctions

When Intensive Sanctions initially was proposed, Professor Dickey correctly identified the need for an evaluation of its results:

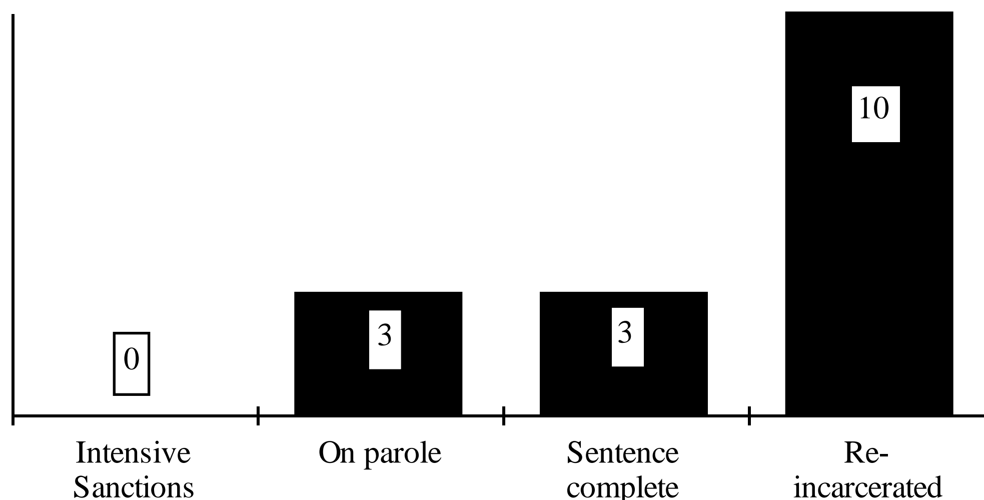
> **Evaluation.** There is [a] need to know whether experience supports the Panel's belief that the [intensive] sanction program will save a large amount of tax dollars, will not jeopardize public safety and will furnish an effective correctional response particularly to non-assaultive property offenders. This can be accomplished by an adequate evaluation program.[21]

A proposed independent evaluation of the Intensive Sanctions program was blocked.

However, there has been no comprehensive evaluation. In 1996, Professor Dickey blocked a proposal for such an evaluation. This occurred despite (1) his 1991 statement that one would be needed and (2) data which strongly suggested that the program might not be cost-effective.[22] Table 4 summarizes these data, which compare groups of offenders in Intensive Sanctions and regular parole.

Table 4 suggests that many offenders placed in the Intensive Sanctions did not fit the description offered in 1991 as

FIGURE 8 **Current status of Intensive Sanctions offenders in this study**



justification for creating the program (e.g., a "large number of. . .[prison inmates] are not violent or assaultive [and] pose little risk of harm to others. . .if they are intensively supervised [in the community]. . .). These are the kind of data which illustrated clearly the need for more information about who actually was in Intensive Sanctions and why the re-offense rate was so similar to those on regular parole.

TABLE 4 **A comparison of re-offense rates and cost of supervision for offenders in Intensive Sanctions and on parole**

	Intensive Sanctions	Parole
Number of offenders studied	195	220
Re-offense rate (escapes, revocations, new crimes)	31.3%	31.8%
Cost per offender	$8,800	$1,189

The Department of Corrections' current position

On November 6, 1997, the Department recommended an "end [to] Intensive Sanctions as we know it" and specifically proposed that the "program would no longer be a placement option for offenders who would otherwise be incarcerated. Instead, a community-based, strict supervision plan would be developed for offenders leaving prison and for some high-risk probationers."[23] The Department estimated that the per-offender cost of the new program would be $11,200 per year, compared to $8,800 for Intensive Sanctions.

This recommendation involves a fundamental change in the basic policy assumption behind the original program, which originally was intended to reduce prison populations. The new recommendation is more in line with "truth-in-sentencing" proposals advanced by various legislators, Governor Thompson, and Attorney General James Doyle. Many of these plans, including ones that have been approved by the Wisconsin State Assembly and Senate, call for offenders with prison sentences to serve all the specified time in prison, followed by a period of community supervision.

Summary

As the debate continues on truth-in-sentencing and other sentencing options, this study illustrates that the experience of the original Intensive Sanctions program provides important lessons:

- New programs that deal with the sentencing and supervision of prison inmates are unlikely to be "low risk." That and other misleading phrases will create false public expectations and distort the debate.
- New sentencing programs must be independently evaluated so legislators and the public can have an informed debate about results.
- Accountability for effective program administration is essential. The Intensive Sanctions program has not been administered effectively or consistently. The program's day-to-day experience has been at odds with public pronouncements. We are unaware that any officials have been held accountable for this.

Notes to Section 4

1 In late 1997, some media reports stated or implied that the Legislature had eliminated or curtailed use of the Intensive Sanctions program. Actually, no legislative changes occurred. Instead, the Department of Corrections told legislators that it would cease the practice of administratively transferring offenders to the program. The statutory authority to do so remains, as does the authority of judges to sentence offenders to the program.

2 Stingl, Jim, "Drugs, trouble dot suspect's record — Man accused of slaying while on sanctions," *Milwaukee Journal Sentinel*, September 4, 1997.

3 Almost all the cases analyzed in this study occurred when one or both of these programs were in place.

4 Dickey, Walter J., Wisconsin Correctional System Review Panel, *Final Report*, June, 1991. The panel's report provided the impetus for legislative approval of the Intensive Sanctions program.

5 Dickey, *Dollars and Sense, Policy Choices and the Wisconsin Budget, Volume III*, 1994, Robert M. La Follette Institute of Public Affairs, University of Wisconsin-Madison.

6 Partial description of Wisconsin Sentencing Commission, *State of Wisconsin 1995-96 Blue Book*.

7 *State v. Eric Ray*, sentencing transcript, August 31, 1993.

8 April, 1993, p. 9.

9 On September 11, 1997, Judge DiMotto wrote to Judge Elsa Lamelas, the chair of a committee created by Governor Thompson to investigate problems with the Intensive Sanctions program. A portion of his communication said:

> While it is unfortunate that the program has been 'misused' or 'abused' in a number of instances, I do not think it should be totally abandoned. . .[For the most serious parolees] Intensive Sanctions is far better than ordinary parole . . .WITH THE PROVISO that even at the first infraction offenders will be revoked [and reincarcerated]. If that is known. . .then perhaps [parolees] will be more likely to think twice before violating. . ." (DiMotto's emphasis)

10 Two (of several) *Journal Sentinel* stories were headlined:

"Supervision [on intensive sanctions] didn't stop burglary career, police say" (September 9, 1997); and

"Suspect triggered 158 alerts, log shows — Teen on sanctions charged in shootings" (August 28, 1997).

A separate story — "Arrests of sanctions offenders add up" — reported 75 arrests involving offenders on electronic monitoring "under the controversial intensive sanctions program." (September 11, 1997)

Madison's *Capital Times* newspaper had criticized a legislative candidate in 1996 for attacking Intensive Sanctions. The cascade of evidence about problems in the program resulted in a different approach in 1997. On October 25, 1997, the paper published four separate articles documenting various problems. The lead article was headlined: "Teen's story shows failings of the prison without bars."

Disregarding these and other reports, a recent *Journal Sentinel* editorial attempted to imply that the termination of Intensive Sanctions arose from isolated examples: "Lawmakers curtailed intensive sanctions because two men being monitored under the program were involved in murders. Maybe better supervision would have headed off those crimes." ("Lock 'em up strategy has limits," January 21, 1998.)

11 Not all justice system terminology minimizes burglary as "non-violent" or "property" crime. The Federal Criminal Code and Rules describes a circumstance where burglaries qualify as "violent felonies" for purposes of sentence determination.

12 *State v.* ___________, sentencing in October, 1993. The defendant's name and date of sentencing are omitted, as this example involves use of confidential state records other than the public sentencing transcript.

13 *State v. Ray.*

14 The victim and criminal are not named in this example, because the information used is from confidential state records.

15 Because of juvenile records and other confidential information, the criminal's name is not used in describing this case. While it involves a crime in Washington County, it was part of this study because of prior Milwaukee County offenses by the criminal.

16 See Section 1 (Terminology).

17 The point of this anecdote is to illustrate the Department's substantial administrative authority. In this case, after several months of the offender's experience in Intensive Sanctions, he was transferred to regular parole status.

18 September 7, 1997. In this article, Professor Dickey appeared to revise his 1991 assessment that the best candidates for the program were first-time offenders or "low-risk" offenders. The *Journal Sentinel* reported as follows:

> . . .Walter Dickey, a key figure in the creation of intensive sanctions, said. . .in many cases public safety actually benefits by having offenders with long records in intensive sanctions, because the alternative is often regular parole with much less supervision. 'If you put all your altar boys in [Intensive Sanctions], dress it up. . .what you've done is sacrifice public safety,' said Dickey.

19 Records for the initial sample (DiIulio and Mitchell, see Note 3, Section 1), drawn in 1995, identified 13 offenders in Intensive Sanctions. From court records reviewed in 1997, we identified three more.

20 As explained in Section 1, the cases in this study are a representative sample of the overall population of Milwaukee County prison inmates. Descriptions of individual subgroups, such as Intensive Sanctions offenders, are anecdotal.

21 Dickey, *Final Report* of Wisconsin Correctional System Review Panel, June 1991, p. 23.

22 Dickey chaired the Governor's Task Force on Corrections and Sentencing. He said there was not enough time or money to evaluate the program. The Task Force recommended expanding the program and renaming it as Community Confinement and Control. The Legislature rejected this recommendation and later eliminated Intensive Sanctions entirely. As of February 1998, a special panel created by Governor Thompson to assess the Intensive Sanctions program had not issued its report.

Absent a comprehensive evaluation, there are two data sets that compare Intensive Sanctions offenders in community supervision with other offenders on parole or probation. The first, in the body of Section 4, was provided in May, 1996, to the Governor's Task Force on Corrections and Sentencing.

The second was provided to the three-member panel named by Governor Thompson to evaluate Intensive Sanctions. It showed the following "reconviction rates" for an overall group of about 2,000 offenders in community supervision after three years: Intensive Sanctions — 28.2%; parole due to mandatory release — 30.4%; and parole due to early release — 34.5%. These data appear to exclude any information on re-offense rates for revocation due to rule violations.

Finally, the *Milwaukee Journal Sentinel* has reported the existence of a study by "a colleague of [Professor] Dickey's," University of Wisconsin Law Professor Michael Smith. Smith is quoted by the *Journal Sentinel* as saying, "Intensive sanctions inmates re-offended at half the rate of [early release] parolees and a third the rate of inmates released at the last possible moment." He said there are "thousands of successes" showing that "the use of Intensive Sanctions unquestionably reduced harm to the citizens of this state and their property." Professor Smith provided staff support to the 1996 task force. He did not share these findings with it and, when asked in late 1997 for a copy of the study, declined to provide it.

23 Department of Corrections, Division of Community Corrections, "Alternatives to Intensive Sanctions: At the Request of the Review Panel on Intensive Sanctions."

SECTION 5: CONCURRENT SENTENCES — A "BARGAIN BASEMENT" SYSTEM

During three months in 1987, 22-year-old Stanley Wilson[1] committed two burglaries, burned down a restaurant, and held up seven different people while armed and masked.

He could have been sentenced to 197.5 years. Instead, Wilson's 15-year sentence made him eligible for parole in less than four years and mandated his prison release in 10 years.

Court records show that many factors led to this outcome. Plea bargaining played a role, but the most important was the decision of two separate judges to issue concurrent instead of consecutive sentences.[2] In dozens of cases reviewed for this study, the practice of concurrent sentencing contributed to a pattern of relatively lenient sentences. Sometimes, concurrent sentences are a major inducement in reaching a plea bargain.

The concurrent vs. consecutive issue divides many judges and highlights a key area of sentencing discretion, one that has gone to the Wisconsin Supreme Court on several occasions. In 1991, for example, the Court addressed an effort by the American Bar Association to require judges to use a modified form of concurrent sentencing.[3] The Court declined, saying "This court has repeatedly refused to accept guidelines or limitations on consecutive sentencing." It explained its rationale by saying that limits on consecutive sentencing:

> . . .would create a "bargain basement" sentencing system that would encourage continued crime. Once a criminal knows that no matter how many crimes he or she commits there is no punishment that can be imposed, the "incentives" are all in favor of continued criminal activity, and a "window of opportunity" is opened to create an unlimited number of victims. When three [crimes] go for the price of two, or twenty for the price of two or one hundred for the price of two, the 'discount' is too much for society to bear. We will not accept it.

Ninety-six of 173 cases reviewed for this study presented the judge with the option of concurrent or consecutive sentencing. A slight majority chose concurrent sentences. As Table 5 shows, the effect was to cut sentence exposure by almost 50%, compared to offenders receiving consecutive sentences.

TABLE 5 Impact of concurrent sentences on sentence length and exposure

	Concurrent sentences	Consecutive sentences
Number of cases	51	45
Maximum sentence exposure (years)	29.1	32.0
Actual sentence (years)	10.3	19.9
Actual as % of maximum	35%	62%

If concurrent sentencing has the potential to create a "bargain basement" system, why do so many judges use it? In this Section, we review two cases that illustrate the most common explanation, which is that several charges arose from "the same event." Concurrent sentences also are often used in connection with plea bargains involving crimes that do not arise from the "same event."

Stanley Wilson

Wilson's various crimes resulted in two sets of charges. He came for sentencing before Milwaukee County Judge Michael Skwierawski in late 1987 and Judge Charles Schudson in 1988.

Each judge had a pre-sentence report documenting a pattern of serious delinquency:

- By age 15, Wilson was spending about $100 a week to support a whiskey and vodka addiction. He drank "just about every day." He could afford such an expensive habit because he was working "most of the time," having dropped out of Milwaukee's Custer High School because he was "constantly involved in fights."

- He was arrested for burglary at age 20 (the charge was dismissed) and soon thereafter he was fined for misdemeanor "assaultive battery." While still 20, he received an 18-month probation sentence for unlawful entry into a locked vehicle and criminal damage to property.

- At age 21, a time that coincided with his probation sentence, he later told state officials he used cocaine "morning and night." His weekly cocaine costs ranged from $500 to $1,500, which he earned (while on probation) driving drug dealers from suppliers to buyers.[4]

Table 6 summarizes the crimes that brought Wilson before Judge Skwierawski and Judge Schudson.

Wilson appeared for sentencing before Judge Skwierawski on the armed robberies. His involvement in the arson and burglaries was not known to Judge Skwierawski at that time.

In explaining his sentence,[5] the judge said:

> Sentencing has to be approached consistent with the guidelines adopted by our Supreme Court [see Section 2], and that is, the court is supposed to impose the minimum amount of custody or confinement consistent with the seriousness of the crime, the nature or character of the defendant, and the need for society for protection. . .[6]

TABLE 6	**Stanley Wilson's three-month crime spree in 1987**
2/20/87	With an accomplice, Wilson broke into a restaurant where he worked and stole $2,000.
2/28/87	Wilson and the accomplice were apprehensive that evidence of the burglary was going to be found. They broke in again, stole more money, and burned the restaurant down.
4/4/87	Masked and armed with a pistol, Wilson confronted a pizza store manager at 3 a.m and told him to "freeze, sucker." The manager dropped a bag containing $440. Wilson took it and fled.
4/11/87	Masked and armed with a handgun, at 1:15 a.m., Wilson forced a supper club employe to give him money from a safe.
4/16/87	Masked and armed with a handgun, Wilson robbed the same pizza store manager who was victimized in the 4/4/87 incident.
4/20/87	Armed with a handgun and wearing a stocking over his head, Wilson forced a steak house employe to give him two bags containing $2,000 and his key ring. Wilson fled in the man's car.
5/6/87	With an accomplice (both armed and wearing stockings), Wilson forced a tavern owner to surrender $2,500 from a safe. This armed robbery lasted more than an hour; the tavern owner "was totally petrified" and assumed he would be killed.
5/11/87	With an accomplice (both armed and wearing stockings), Wilson attempted to rob a chicken restaurant employe. The employe was able to escape and shouted for help; Wilson and his accomplice fled.
5/12/87	With an accomplice (both armed and wearing stockings), Wilson robbed a tavern owner of $50. The owner said she "was frightened to death" and "has tremendous fear of running her business. . .is scared to close the business and go out."

> . . .I think Mr. Wilson is right and his mother’s letter is accurate, that [these crimes were] out of character for him. . .
>
> . . .My analysis of [the] factors. . .leads me to believe you should be removed from the streets of this community. . .for a significant time. I have to consider. . .what the likelihood is of your release on parole. I think you should get older before you are released from prison. . .People who commit crimes, I think, statistics show tend to grow out of it in their 30s, early 30s [when] people stop committing crimes of youth [and] of excess. . .You’re 22 years old now, you ought to get to be about 30 years old before you get out of prison. That’s a long time. And that means to me in terms of parole eligibility that the sentence in this case ought to total, however it’s calculated, something in the vicinity of 15 years (emphasis added).”[7]

Three factors appeared most important to the judge: (1) the “minimum” thrust of Supreme Court “guidelines;” (2) the judge’s assessment of the time — eight years — Wilson needed to be in prison to protect society; and (3) the judge’s agreement with statements in court by Wilson and his mother that his behavior appeared to be an aberration. It is difficult to reconcile the latter conclusion with information in the presentence report that previously was summarized in this Section.

The judge agreed with Wilson’s assertion in court that he had “snapped,” thus leading to the several crimes.

The judge explained his choice of a concurrent sentence. He first noted that he agreed with Wilson’s assertion in court that he had “snapped,” thus leading to the several crimes. Accordingly, the judge then said: “I do consider it to be a single crime episode.” As it turns out, Wilson had been lying to the judge, because it later became known that he had been involved in the burglaries and the arson. Even discounting that fact, we question Judge Skwierawski’s belief that seven violent crimes over the course of five weeks was “a single crime episode.” The judge earlier stated that “. . .short of actually killing somebody,” Wilson had been involved with “. . .the most violent kind of crime that occurs. . .”

A few weeks after the initial sentence, Wilson’s involvement with the burglaries and arson became known and new charges were filed. With an initial exposure on these charges of 40 years, and given his new status as a “violent, repeat offender,” he appeared to be a candidate for a severe sentence. Yet he ended up with *no additional punishment*, because:

- In a plea bargain, the burglaries were dismissed and 40 years of sentence exposure were reduced to a maximum of 20 years.

- When the arson case went before Judge Charles Schudson, Wilson received a 15-year sentence, *concurrent* to Judge Skwierawski’s 15-year sentence.

Judge Schudson’s sentencing comments are excerpted at some length here, because they address key issues in the concurrent sentencing debate and several problems associated with the practice.

> I really feel somewhat compromised in approaching the sentencing today. . .I have been presented with a situation here that’s already partially done. . .because of what has already occurred in another court [Skwierawski’s initial sentence] and. . . occurred in yet another court with your accomplice.
>
> [Ideally], an entire set of cases would come to one court at one time, and one judge then would have some sense of what’s taking place. . .It wouldn’t be what we have here today, which is the crime really being carved up, different defendants, different Courts, different counts, different dates of sentencing.
>
> . . .[S]eparate crimes, particularly separate serious crimes, should carry separate consequences. If we just strip away all the complexities and the realities, and just put this in simplest terms, if people walked in here today, they would probably say no, wait a second, Judge, here we have got a guy who committed a bunch of armed robberies, and a few months before he did those, he committed two burglaries, and on the second one his accomplice burned the building down. Now, Judge, are you telling us that because he has been able to accumulate all of those crimes, that he’s not to get a single day more in prison for the arson and those burglaries than if he hadn’t done them?

And that's what concurrent time means. It means you're not going to do one more day in custody, that you have managed to somehow commit so many crimes, get them accumulated, get them into court at roughly the same time: that, in a sense, that arson doesn't count, the burglaries don't count. They're just consumed by the others.

That's something that we hear about a lot in the courts. We see that happen a lot, and it's something that I think is so offensive, offensive to law, offensive to reason, offensive to the citizens who expect more common sense, who expect when it comes to that day of sentencing, each victim will be shown sensitivity, each crime will gain a response from the court.

Consequently, before [Wilson's lawyer] just told me about the concurrent time ordered to [Wilson's] accomplice on the arson, I was quite certain that I would be ordering consecutive time on the arson today, and I was also quite certain that the length of consecutive time ordered would be less than it ordinarily would be for a case for crimes of this magnitude, and it would be less because of the 15 years that [Judge Skwierawski] ordered on the others.

[Your lawyer] has explained that the co-defendant in the arson, who was also the co-defendant in the armed robberies, received concurrent time [from a third judge, other than Skwierawski or Schudson). And with that, I have to keep in mind one other important consideration in sentencing: The appearance of fairness and. . . relative consistency among the courts, and the treatment of different defendants for like crime[s].

I'm concerned also with the appearance of strength and fairness in the community. That ironically cuts in a very strange way. When we think about the way the community might perceive a sentence and whether it's strong enough and fair enough, we sometimes know that sentencing is done with mirrors, that if I were to order today 15 years, it would sound like a tough sentence, and if I attach the word concurrent, it would sound strong and perhaps not be so.

"I read that pre-sentence report, and I was struck by a number of things; first of all, that this was not [your] first time in trouble."

Conversely, if I ordered a year or two or three years, it would sound weak. But if I attach the word consecutive, it would have a greater practical impact on you than if I ordered a lot of years concurrent.

I read that pre-sentence report, and I was struck by a number of things; first of all, that this was not the first time in trouble. Granted, the offenses of 1985 were far less serious, and granted, I don't know their circumstances, but it does tell me that after a period of crime and probation, you, in 1987, committed some incredibly horrible crimes. The armed robberies were worse than we would fear just from the name, armed and masked robberies, case after case after case, guns, with weapons, people were terrified, lots of money was taken. And the arson and burglary read-ins[8] we find here today are as much as one could imagine from that.

You commit a burglary on February 20, 1987 with someone else, eight days later you go back and do it again. You go back doing it again, knowing that your accomplice expects to burn the place to cover up evidence, and you go along with that anyhow.

The thought that those separate offenses don't receive separate consequences is horrendous, and in saying that, I don't imply any criticism of what was done in another court. I don't know the pre-sentence the other judge read. I don't know the circumstances that were described. I do know that just as a matter of basic decency and common sense, and I think quite consistent with law, where we have separate and serious offenses like that, there should be separate and serious consequences. The victims and the community deserve no less, and your perception of fairness deserves no less.

Unfortunately, I don't think the Court today can attain that fair response to what you did last February of 1987, and I don't think that's possible because I think to sentence you fairly in light of that would produce unequal injustice. I don't think it would be possible to sentence you as I think you should be without you leaving the courtroom feeling that there had been considerable unfairness, that by virtue of you being with a different court, with a different judge, on a different day, an equally or even more culpable defendant got off with less. After all, I have to keep in mind that person we're talking about. That other person who got concurrent time is who went back and did the burning of the building. . .

> Frankly, I think for the kinds of armed robberies you committed and for the kinds of arson and burglary that have been read in here, that the [15-year] period of incarceration is too short, given my sense that we should have truth in sentencing. I don't look at the sentence merely in terms of what the label is at the top, 15 years, 20 years. I look at the parole eligibility and mandatory release dates, and in my estimation, the time in custody is far too short, even at the maximum levels.

Walter Simpson[9]

Because of Judge Laurence C. Gram's 1990 interpretation of the concurrent vs. consecutive issue, Simpson represents a truly threatening prospect: a defiant, HIV-positive rapist and psychopath with a mandatory release date in the next decade.

After a jury trial, Gram sentenced Simpson to two 20-year *concurrent* sentences — effectively, a 20-year sentence — for rapes involving first an act of vaginal intercourse followed by an act of anal intercourse. A knife was held to the throat of the victim, who was "extremely traumatized because of the fear of contracting a terminal illness from Mr. Simpson, [who] expressed no remorse or any concern for his victim."[10]

As a result of this discretionary sentence, Simpson's initial mandatory release date, based on two-thirds of his total sentence, was to occur in the year 2003 (while he initially was eligible for early release in the 1990s, such a decision by the Parole Commission would appear totally out of the question). Had Gram imposed consecutive sentences, Simpson's mandatory release date would have been in 2017.[11]

Judge Gram explained his sentence by saying: "Where I have some problem is whether or not it's appropriate, given the fact that we have two counts, to make those two counts consecutive [or back-to-back sentences], and I don't think it is. I think the two counts were the product of the *same event*.[12] I think it's stretching the direction of the Legislature [to make the sentences consecutive], which says for this offense a maximum penalty of twenty years (emphasis added)."

Had Gram imposed consecutive sentences, Simpson's mandatory release date would have been in 2017.

The "same event" test mentioned by Judge Gram is referred to, often implicitly, in some other cases we reviewed. Yet the 1991 Wisconsin Supreme Court case we cite (see Note 3) does not mention such a test and in fact emphasized the Court's view that "We choose not to adopt limitations on consecutive sentencing. . ." The case occurred a year after Gram's sentence and cites many cases that preceded the sentence. The Wisconsin Statutes say judges ". . .may impose as many sentences as there are convictions and may provide that any such sentence be concurrent. . .or consecutive. . ."[13]

Time will tell if Judge Gram was right when he claimed that his concurrent sentence "probably [is] a life sentence for this defendant," given that he might die in prison from AIDS. He was alive as this report was written eight years later, with new medical advances perhaps meaning he once again will be free.

A Department of Corrections report (see Note 9) identified Simpson as "a Vice Lord gang member from Chicago" with a juvenile record that kept him detained until age 19 in Illinois. His adult record includes bail jumping, armed robbery, theft, and strong armed robbery three years before the two (one?) Milwaukee rapes. *The 1986 strong armed robbery occurred while he was on parole; had Illinois authorities sanctioned him at the time and given him a tougher sentence, he would have been in prison in 1989 and not in Milwaukee committing rape.*

The Stanley Wilson and Walter Simpson cases only illustrate some of the issues that arise from concurrent sentencing discretion exercised by judges. We found a number of instances in which the rationale was other than compelling.

For example, Judge Manian gave a 12-year concurrent sentence for armed robbery to a defendant who had a separate conviction, in Illinois, for a similar incident. The judge explained that ". . .it just seems to me that the [18-year

Illinois] sentence [was], uh, sufficiently long to give plenty of control. . .after [he is] released from prison" on parole. To add a consecutive sentence, either of prison or probation, ". . .seems to me, to be really overkill." In this and many other cases, the rationale for concurrent sentences either involved the "same event" concept, the judge's view that some mitigating factor warranted leniency, or both.

Charging discretion and concurrent sentencing

While judges may issue concurrent sentences — with the result, in Judge Schudson's words, that some crimes "don't count" — prosecutors effectively have a similar power. Say an offender commits a crime while on a probation or parole sentence. The Department may pursue revocation of probation or parole, while a prosecutor may choose not to seek a separate conviction on the new crime. In such cases, a hearing examiner reviews the case and determines how much of the sentence remaining on the original crime — the one for which the offender was on probation or parole — must be served in prison. This results in no punishment for the new crime.

Leroy Smith[14]

The case of Leroy Smith further illustrates the significant charging discretion vested in prosecutors. It shows how lenient juvenile sentences, and layers of concurrent sentences, can reduce substantially an offender's exposure to punishment and accelerate his or her release and opportunity to commit new crimes. His case also provides yet another prime example of how such phrases as "low-risk," "moderate risk," or "first-time offender" can distort and mislead.

Juvenile record. Robbery (1 year probation), 2 counts of auto theft (six months detention), another auto theft (1 year detention), and armed robbery. The last crime — the most serious — resulted in no new sentence. Instead, Smith's juvenile parole for the auto theft was revoked and he was "returned to Ethan Allen [juvenile detention facility] until discharge" from the auto theft sentence. Over a three-year period, he had thus committed two "violent" crimes and three "property" crimes and had served 1.5 years of confinement.

Adult record. Smith's first offenses led to concurrent prison sentences of 1.5 years and nine months (effectively, 1.5 years) for auto theft and resisting arrest. Although this was his fourth conviction for auto theft (counting the three juvenile counts) he was officially a "first-time, non-violent [adult] offender." As a result, the 1.5-year prison sentence was "stayed" and he received two, two-year probation sentences — concurrent — for auto theft and resisting.[15] His "current offense rating" at this point was "LOW RISK."

While on probation, Smith was convicted of possession with intent to deliver cocaine base, while armed, and possession of controlled substance-cocaine, while armed. These crimes carried "penalty enhancers" created by the Legislature for crimes it deemed particularly serious, resulting in a maximum exposure of 21.5 years (not counting the previous 1.5-year stayed sentence). His actual sentence was five years in prison on the first drug count, nine months on the second, both to be served concurrently with the stayed 1.5-year sentence. The net effect of the concurrent terms was that the original auto theft and resisting no longer "counted," and his sentence for armed drug offenses was less than one-quarter of the maximum.

While on probation, Smith was convicted of possession with intent to deliver cocaine base, while armed, and possession of controlled substance-cocaine, while armed.

After his early release to parole, police suspected his involvement anew in drug dealing. Here is a description from subsequent parole revocation proceedings:

> . . .[P]olice executed a search warrant at the home of the [Smith's] girlfriend. [Smith] was present. . .In the bedroom where [he] was found, police recovered a "Timberland" type hiking shoe, size 8, which contained a rolled marijuana cigarette and loose marijuana in a plastic bag. A digital pager was found at the foot board of the bed. Police also found a brown leather jacket which contained cocaine base in a knotted plastic bag.

> A set of automobile and house keys were found in the jacket. A search of the petitioner uncovered $173.00 in his left front pants pocket and two clear corner cut baggies, each containing cocaine base, in his right front pants pocket. . .
>
> . . .[P]olice obtained a search warrant for the [Smith's] residence [and] found $400 in a shirt pocket, a box of ammunition for a .357 Magnum firearm, a parole agent card, a 9 mm cartridge, and [Smith's] inmate release papers. In duct work above the dresser, police recovered a .357 Magnum Smith and Wesson revolver. In addition, police found a show box for a size 8 Timberland hiking boot.

Responding to these facts, the Department of Corrections recommended revocation of parole and reincarceration for "two years, eight months and fourteen days." However, the administrative law judge who heard the case believed the recommendation was "inadequate [and] ordered [Smith] reincarcerated for the full 3 years, 7 months and 14 days available on his sentence." No new charges were filed, so all the apparent crimes leading to revocation were not "counted." Once Smith serves out this term, he will have served five years in prison for offenses that might have exceeded 50 years of exposure, including penalty enhancers.

His story did not end there. Smith appealed the revocation sentence as being too severe, even though it involved no new charges. Judge Maxine White denied the appeal; a portion of her decision explains the technical distinction between a parole revocation and a proceeding involving new criminal charges.

> A parolee. . .has already been convicted of the underlying crime charged; in [Smith's] case, he was convicted of possessing both cocaine and cocaine base while armed. Revocation proceedings serve a different purpose than do criminal prosecutions. Revocations concern the ability to safely reintegrate convicted offenders into society. It should be noted that [Smith] is not being "punished" for violating the conditions of his parole. Revocation proceedings are not punitive in nature. They are administrative determinations as to where, geographically and institutionally, convicted offenders should best serve their sentence; on the street, in a half way house, or in a prison.
>
> State law recognizes that because a revocation proceeding concerns the reintegration of a prisoner into society and is not a punishment for his actions, a lesser burden of proof is required to prove a violation. . .

Judge White also offered observations on the conduct leading to the revocation, conduct for which no new criminal charges were filed:

> [Smith] was on parole for just under seven months. He was sent to prison for possession with intent to deliver a controlled substance while armed. Less than a year after being released on parole, [he] was found in possession of both controlled substances, including cocaine, and a firearm. At the time of his arrest, he was under investigation by authorities for being a dealer of narcotics. When arrested, he was in possession of a pager and found in a home containing paraphernalia used in the sale of controlled substances.
>
> Furthermore, although the Department did not charge him with violations for the incident, petitioner admits to driving another vehicle without the permission of his agent and receiving traffic citations while driving without a valid driver's license. He also admits to testing positive for marijuana use three times during his short parole. In his statement to police on the day of his arrest, [he] admitted to the use of illegal drugs on a daily basis.
>
> It is more than evident from this record that [Smith] learned nothing from his prior period of incarceration and returned to his prior criminal activity almost immediately upon release. [Smith] treated his parole rules with disdain and violated them consistently while he was permitted to remain in the community. It is clear from the record that community supervision is not an appropriate alternative for the petitioner. The [administrative law judge] had a more than sufficient basis upon which to rationally conclude that reincarceration of the petitioner for the maximum time available was appropriate. This court will not disturb that conclusion.

Once Smith serves out this term, he will have served five years in prison for offenses that might have exceeded 50 years of exposure, including penalty enhancers.

Perhaps it is wrong to say Smith had "learned nothing." At this point in his criminal career, he might have learned a good deal about the criminal justice system's response.

Our evaluation of other concurrent sentence cases identified many with similarities to Smith's. This is especially so regarding a number of cases in which new crimes were committed by offenders who were on parole or probation due to relatively lenient concurrent sentences.

Summary

We found that judges imposed concurrent sentences in about half of the non-life cases in our sample which involved more than one crime. The effect was to reduce exposure to punishment by almost 50%.

The Department of Corrections also has the *de facto* authority to impose concurrent sentences, such as when an offender on probation or parole has committed a new crime but is sanctioned only based on the original sentence.

As with plea bargaining, concurrent sentencing is a practice which we expect is little understood by the general public. The examples cited in this Section show that it is a sentencing option that warrants much wider discussion and debate.

Notes to Section 5

1 Not his real name. Portions of his record described in this study are based on confidential records.

2 As the Terminology section explains, when a defendant receives concurrent sentences for more than one offense, the sentences overlap and, effectively, the longest one governs. For an offender sentenced to a 15-year and 10-year concurrent sentence, the overall sentence is 15 years (not 15 + 10 = 25). The overall sentence length would be 25 years if the sentences were consecutive instead of concurrent.

3 *State v. Paske*, 163 W2d 52 (1991). Paske argued that a modified form of concurrent sentencing should be used, e.g., that his maximum sentence exposure should be limited to twice the maximum for the most serious crime.

4 Wilson's official criminal history at this point illustrates the highly misleading nature of various shorthand labels used in the criminal justice system to describe offenders.

For example, because he had only one felony conviction by age 21, Wilson was officially a "low-risk, non-violent offender" at that point. This for someone who was constantly in fights at school, had become a cocaine addict, and supported his habit by driving drug dealers around Milwaukee. It later turned out there was a juvenile arrest for sexual assault that was not in the pre-sentence report.

Records for many others in this study reveal similar examples of "low-risk" or "non-violent" or "non-assaultive" offenders in which the actual history logically would lead to a much different description. These misleading labels have been inserted into and institutionalized in the criminal justice jargon. They have been adopted by many in the media, often contaminating a rational discussion of sentencing policy. Thus, for example, a recent *Milwaukee Journal Sentinel* editorial proclaimed: "Give first dibs on prison space to violent criminals. One-time losers who are not a threat should come under some sort of loose supervision while living regular lives." In 1986, Wilson's official status would have qualified him as a "onetime loser" who was not a threat.

5 Six 15-year terms for armed robbery, one five-year term for attempted armed robbery — all concurrent. The 15-year sentence made Wilson eligible for early release in 1992 and mandatory release in 1997 His mandatory release date was extended beyond 1997 following a 1995 escape from a minimum security prison. Due to a one-year sentence for escape, he is now scheduled for release early next year.

6 A 1970 Wisconsin Supreme Court case (*McCleary v. State*, 49 W2d 263) said the following:

> We recently quoted with approval *Standard Relating to Sentencing Alternatives and Procedures*, American Bar Association Project on Minimum Standards for Criminal Justice, Approved Draft, 1968, page 14, sec. 2.2:
>
> "The sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant."

7 The judge apparently assumed Wilson would be released later than his initial parole eligibility (3.5 years) but before his mandatory release date (10 years).

8 A "read-in" charge is a charge which was filed and dismissed, usually in a plea bargain. The parties agree that it can be "read in" to the record for the judge to consider in sentencing on the filed charges.

9 Not his real name. Portions of his record described in this study are based on confidential records.

10 From a Social Worker Report completed when Simpson arrived at prison.

11 Subsequent events have delayed the ominous prospect of Simpson's eventual freedom. First, Wisconsin's Sexual Predator Law might provide enough authority for the state to delay his release. And, three months after Gram's sentence, Judge Rudolph Randa added about 4.7 years of mandatory prison time when he imposed the maximum allowable seven-year *consecutive* sentence on Simpson's, for arson and recklessly endangering safety. This involved a fire Simpson started in jail and the harm it caused another inmate. Judge Randa ignored a defense request that these crimes also be sentenced concurrently; Simpson's lawyer said Judge Gram's sentence already was stern enough.

12 Can the victim possibly have considered these two forced sex acts to be the"same event"?

13 Section 973.15(2)(a). This quote is from the 1991-92 Wisconsin Statutes. We submitted a written inquiry to Judge Gram asking if any earlier statutory provisions or case law provided the basis for his determination. He did not respond.

14 Not his real name. Portions of his record described in this study are based on confidential records.

15 Judges often will "stay" a prison sentence and impose probation instead. If the offender is found to have violated probation, the stayed sentence takes effect. If the violation is a new crime that is charged, an additional sentence may be imposed.

SECTION 6: SENTENCING OF DRUG DEALERS

When Melvin Slater first was arrested in 1994, he was not a likely candidate for a prison sentence.[1] Milwaukee police observed him exchanging something for money; when they approached, Slater tried to discard a plastic baggie containing a small amount of cocaine. The case seemed to be a "possession-only" drug case, for which judges typically issue a probationary sentence.

New evidence showed that Slater had intended to sell the drugs to a third party — a more serious offense. Now, it was possession with intent to deliver — drug dealing. Still, absent other information, this small transaction — $50 worth of cocaine — likely still would result in a probation sentence or a stayed prison sentence. Slater later acknowledged that he had made three other transactions that day, but insisted it was the first time he had sold drugs.

Slater ended up in prison with a four-year sentence. The facts surrounding his specific offense and sentence illustrate why drug crimes have become a major topic in the debate over sentencing practices.

According to one school of thought, much of the growth in Wisconsin prison populations is explained by sentences such as Slater's.

According to one school of thought, much of the growth in Wisconsin prison populations is explained by sentences such as Slater's. Those who hold this view believe there are hundreds — perhaps thousands — of similar offenders in prison who should not be there.[2] Opponents of sending these drug offenders to prison use criminal justice shorthand to describe drug dealers: "non-violent," "lower-level," "drug-only," or "drug-possession only," and so on. Such labels can mislead, especially when based only on an offender's most current offense or isolated portions of his criminal record.

As a juvenile, for example, Slater was found guilty of two burglaries and receiving stolen property. In 1981, he was found guilty of his first adult crimes: robbery and endangering safety by conduct regardless of life. Three years into an eight-year sentence, he was given early release. State records describe several years without documented violations. Then:

> On or about 1/25/89 the defendant's parole supervision was revoked. The defendant was revoked due to his periods of absconding, consuming cocaine, failing to complete his batterer's group, throwing bleach in a violent manner, cutting a TV cord, shoes and couch up with a knife. The defendant was reincarcerated for one year, six months for that violation.
>
> He was [then] released to community supervision on Count 2 [of the 1982 sentence] — Endangering Safety by Conduct Regardless of Life, which was a consecutive probation term to his prison term [for robbery].
>
> The defendant did have several periods of absconding. . .He was in absconded status [on five occasions] from July 1991. . .through 7/9/94. On 4/1/93 the defendant was arrested for [drug dealing]. The defendant was at his cousin's house when police raided the home for drugs.

In September, 1993, Judge Stanley Miller sentenced Slater to a four-year term, but he stayed the sentence (keeping Slater out of prison) and instead placed Slater on three years of probation, beginning with 60 days of "electronic monitoring surveillance." According to state records, Slater:

> . . .did not report to his. . .agent until he was placed in custody on 11/2/93. . .He was arrested due to loitering in front of a tavern. He did state at the time of his arrest that he had used cocaine and that he needed treatment. A decision was made to release the defendant. . .with a referral to alcohol/drug treatment. . .The defendant was sporadically employed after his release back into the community until his [1994] arrest.

Slater came before Judge Lee Wells in 1994 for sentencing. Based on his background and on a personal interview, a state parole agent told Wells that Slater "seems to rationalize his behavior. . .[He] seems to like his current lifestyle and has shown little effort to change it. [He] engaged in similar behavior when he was sentenced to proba-

FIGURE 9 **Drug offenders in the Wisconsin prison system**

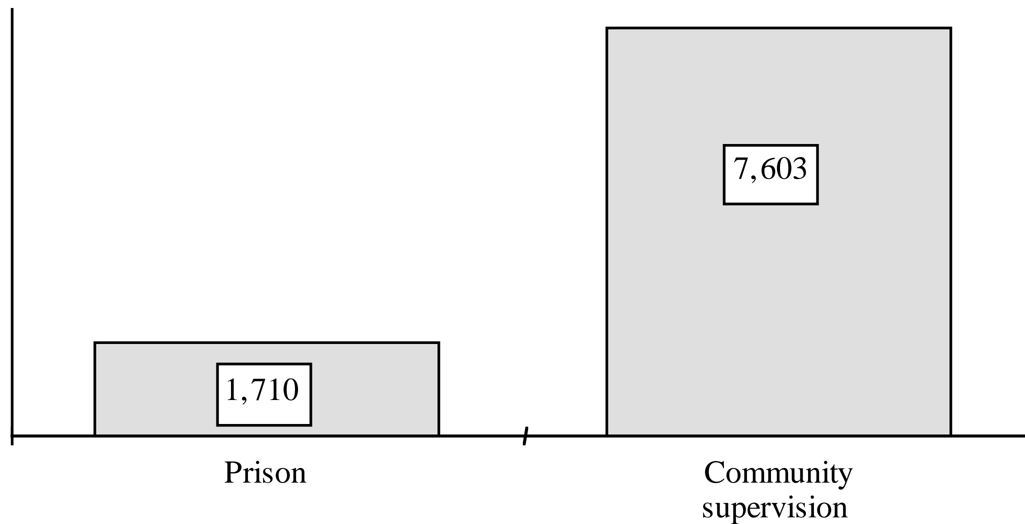


TABLE 7 **Per cent of sentence served in prison — inmates released in 1995**[3]

Type of current offense	% of sentence served before early release
Drug	33%
Fraud	39%
Public Order	40%
Theft/Robbery	41%
Burglary	42%
Assault	44%
Homicide	48%
Sexual	58%

tion [by Miller, in 1993, for drug dealing]. The defendant does pose a risk to the community [and] has shown a blatant disregard to the community. . ."

While Slater faced a maximum sentence of 10 years, Judge Wells effectively gave him no new sentence. Instead, he imposed a four-year sentence *concurrent to, or overlapping*, the four-year stayed sentence that Miller imposed in mid-1993.

The facts in Slater's case are inconsistent with the profile often suggested by those who believe too many drug offenders are in prison, i.e., that of a "low-risk" offender who has received a harsh sentence. How typical is he?

Judges interviewed in connection with this study said they usually will not sentence "first-time" drug offenders to prison if the charge involves possession or possession with intent to distribute a relatively small amount of drugs (drug dealing). They estimated that most drug offenders receive probationary sentences or relatively short prison sentences, followed by early release. Data from the Department of Corrections support these conclusions. For example, fewer than 20% of drug offenders are in prison. They also serve a lower percentage of their sentence than other classes of felons. See Figure 9 and Table 7.

Judges we interviewed said drug offenders are more likely to receive a prison sentence if they are repeat offenders

and/or have violated conditions of a probation sentence and/or have violated after being released from prison on parole. Data for drug offenders in our sample were consistent with this assessment. The data also confirm the judges' view that drug offenders in prison receive relatively lenient sentences, such as the concurrent sentence issued to Slater.

For example, the median drug offender in this study's sample had five adult arrests and had been incarcerated twice as an adult. Eighty-six per cent had violated probation or parole. Yet the median sentence for the current offense, as a per cent of the maximum, was only 18%. See Table 8.

As an initial proxy for determining which drug offenders might be good candidates for early release, or no prison sentence at all, some corrections officials use the length of an offender's imposed sentence. For example, those with relatively short sentences, say three or four years or less, more likely might have been involved in less serious crimes. But, the length of the imposed sentence can be misleading, especially for drug offenders, because it omits any measure of what the maximum sentence might have been. Thus, a serious potential sentence of 20 years (the median in our study among drug offenders) is not reflected by measuring only the imposed sentence (the median in our study was 2.4 years).

Nine of 16 drug offenders in our study had "net sentences" of three years or less; eight of 16 had sentences of less than two years. [5]

Table 9 provides some general information as to why sentencing judges said they were imposing a prison sentence for these offenders.

TABLE 8 Data for drug offenders in this study (16 of 173 cases)

Adult arrests (median)	Adult incarcerations (median)	Probation or parole violators	Maximum sentence, current offense (median)	Actual sentence (median)	Actual as % of maximum (median)
5	2	86%	20 years	2.4 years	18%

Note: For 16 drug offenders in this study, the data above show the median number of times they had been arrested and incarcerated and compares their actual median sentence with their sentence exposure. It also shows that most have a record of parole or probation violations.

TABLE 9 Sentencing factors for drug offenders with a sentence of three years or less[6]

Times in prison	#	Reasons for prison
First time in adult prison	2	Both were convicted of drug dealing. Both were on probation. One was armed. Both had juvenile records, one including a violent offense.
Second time in adult prison	2	Both were convicted of drug dealing. One was a repeat dealer. Both had violated probation or parole in the past.
Third time in adult prison	4	Three of four were convicted of drug dealing and were on probation or parole at the time of the current offense. The fourth was convicted of drug possession only and has a prior record of drug dealing and probation-parole violations.

We looked in some detail at the current crimes and backgrounds of these drug offenders with relatively short sentences.[7] In addition to Slater, we found two other examples below that are illustrative anecdotes from this group.

Both of the following cases involved sentences issued by Judge Jeffrey Kremers. Two other judges who reviewed and critiqued a draft of our report said our characterization of these sentences as lenient was out of context. They said that when Kremers was in felony drug court, he was seen as a stern sentencer and that this was indicated by a large number of defendants who used their power under the judicial substitution law to remove him from their case.

As previously noted, this study makes no representation about the overall sentencing approach of any judge whose cases we discuss. We selected cases to describe in the report not based on who the judge was, but rather because they illustrate important overall aspects of the sentencing process in Milwaukee County. For example, the cases that follow mainly illustrate two broader points that we found in our sample:

Drug offenders generally receive relatively light sentences, as a per cent of maximum exposure, contrary to some conventional wisdom that prison crowding is heavily influenced by overly punitive terms for drug offenders.

- Drug offenders generally receive relatively light sentences, as a per cent of maximum exposure, contrary to some conventional wisdom that prison crowding is heavily influenced by overly punitive terms for drug offenders.

- Drug offenders who do receive prison sentences typically have lengthy records, sometimes including violent crime and often including parole or probation violations.

Rex Ingram[8]

In April of 1995, Judge Jeffrey A. Kremers sentenced Ingram to a two-year sentence for dealing in cocaine and a one-year sentence for escape. Ingram could have been sentenced to 15 years. By virtue of the three-year total sentence, Ingram would be categorized by some as a drug offender who perhaps is not a good candidate for prison. However, in light of his record, the sentence seems anything but severe.

For example, Ingram was in community supervision for robbery at the time of his 1995 arrest. Records from the robbery sentencing indicate the following:

> . . .According to the [juvenile] records, at the time of the Second Degree Sexual Assault in 1984, the defendant claimed that _____________ had grabbed the victim on the buttocks. The defendant told police that he [also] accidentally touched the victim [who] told police that as she was ascending the stairs, the defendant grabbed her buttocks. She told him to stop and he grabbed her again and laughed.
>
> As a adult, the defendant was arrested on 10-31-88 for Second Degree Sexual Assault. . .[but] a decision was made not to prosecute. The defendant said he had no recollection of what this arrest involved. On 10-3-89, he was arrested for Endangering Safety by Use of a Dangerous Weapon. He was also arrested for Battery on the same day. According to the defendant, the defendant and his mother and girlfriend had gone to Kohl's to grocery shop. As they were out in the parking lot, the security guard grabbed his girlfriend. The defendant said [they had] not paid for the groceries. After the guard grabbed his girlfriend, the security guard kicked the defendant and the defendant caught him by the leg and threw him to the ground. The defendant hit the security guard with his fist. [Ingram] claimed that the victim never stated that he was a security guard. . .
>
> On 3-23-91, the defendant was arrested for Reckless[ly] Endangering Safety. The case was dismissed on 4-3-91. The defendant had no recollection of what this involved. [He] was arrested on 7-7-91 for Bail Jumping. He had failed to appear in court following an [operating after revocation] — Fourth Offense. The defendant claimed that he had no [other] way to get to Racine.
>
> One 3-1-92, he was arrested for Criminal Damage. According to the defendant, he and his girlfriend [were] fighting. He had gotten drunk and he then threw bricks through the window. His girlfriend did not appear in court and the case was dismissed. On 8-31-92, the defendant was arrested [in connection with a homicide. No charges were filed.]

> When asked what his explanation was of his overall arrest record was, the defendant said he has no explanation because he has never been sober when he had been arrested.

When arrested in early 1995, other records indicate he was considered for transfer to Intensive Sanctions as an alternative to revocation (ATR), despite this summary of his "adjustment under supervision:"

> Out of the eight-or-so months [he] has been on supervision, he. . .absconded for five months. . .On September 29, 1994 he escaped from the Milwaukee House of Correction. . .where he was serving a one year term as condition of probation. Rex was not seen by his agent until February 27, 1995 when he was placed in custody after arrest for Possession of Controlled Substance With Intent to Deliver, two Felony Escape Warrants and Violation of Probation. A decision was made to revoke with a possible Alternative To Revocation to the Division of Intensive Sanctions being offered at this time.

Although he was facing a 15-year maximum, the prosecutor reported a plea bargain to Judge Kremers as follows:

> The State would be recommending 24 months in the Wisconsin State Prison System. . .[W]e'd recommend that this be concurrent to any time he's serving. Apparently he is revoked or going to be revoked.

Kremers followed the recommendation.

Thomas Wilson[9]

As a repeat drug dealer, Wilson faced a maximum 20-year sentence in 1994 for drug dealing. State records show the following:

> . . .He was initially placed on. . .probation [in 1983] following a conviction for Obstructing an Officer. [H]e was involved in Theft from Person amended to misdemeanor Theft on 11-10-83, approximately one month after being placed on probation. [He] was placed on one year probation on this charge.

> . . .[H]is adjustment to supervision was not positive. . .[H]e had frequent violations of supervision. On 1-22-85 he was involved in the theft of a radio and this resulted in another one-year probation term on 10-7-85. It was also noted that [he] failed to report to his agent as directed. He was required to report twice a month but generally only managed to report once per month. On 2-10-86 an Apprehension Request was issued. . .due to his whereabouts and activity being unknown. He was finally arrested on 5-6-86 on charges of Operating After Revocation. . .

> . . .[He] refused to seek employment. He indicated that his mother and sister usually gave him money and he did not need a job. He also indicated he did not have time to look for employment, especially if no one was going to hire him. Records indicate that [he] was not interested in doing volunteer work in the Community Service Program, a program that would enable him to defray paying his court costs and attorney's fees, which amounted to $324.50. As a result, his court-ordered financial obligations were not met.

> As a result of absconding from supervision and the arrest for Operating After Revocation and Without a License Plate, his probation was revoked on 8-25-86 and he received nine months straight time at the House of Correction.

> As a result of the conviction of Robbery, [carrying a concealed weapon] and Resisting of 7-7-88, [he] was sent to [prison]. The Parole Board summary of May, 1989 said "[He] has received a total of eight conduct reports including a major conduct report during this deferral. The majority of these conduct reports were for punctuality and attendance. The major conduct report which occurred on 3-13-89 was for violation of institution policies, lying and disruptive conduct."
> [He] was eventually released on parole supervision on his [mandatory release] date of 9-12-90. On parole, Robert's adjustment to supervision was negative. He had problems getting General Assistance and SSI Benefits, because of the lack of proper identification. . .He was then involved in a Strong-Armed Robbery which

The cases of Slater, Ingram, and Wilson, along with other data and comments from judicial interviews, suggest that drug offenders receive among the most lenient sentences in Milwaukee County courts.

> is the subject of the current Presentence report. The agent had requested that [his] parole be revoked due to the fact that he had absconded on or about 3-13-90 he was in possession of marijuana on 2-17-91, and because of his involvement in the robbery. . .
>
> The agent later decided not to proceed with revocation. . .because the victim. . .did not cooperate with the revocation hearing. Also, the agent decided that [he] would be held in custody pending the Robbery case and he also felt that [he] had spent enough time in incarceration. [he] was eventually discharged from parole supervision.

Judge Kremers sentenced Wilson to three years.

Summary

The cases of Slater, Ingram, and Wilson, along with other data and comments from judicial interviews, suggest that drug offenders receive among the most lenient sentences in Milwaukee County courts. Further, the relative few who do receive prison sentences appear to have a history of contacts with the criminal justice system, indicating a greater threat than might be suggested by the current offense alone. This information does not support the notion that large numbers of lower-level, non-violent offenders are receiving prison sentences for small amounts of drug dealing. Additional research would be needed to fully verify that proposition.

Notes to Section 6

1 Not his real name; confidential records used for this description.

2 For example, Professor Dickey said a plan to release hundreds of drug dealers from prison was ". . .long overdue. It is these lower-level offenders for whom we are building all of these new prisons. We could save a ton of money for the state, because this is the group we are building for." See "Plan on drug dealers praised — Official says community program would save state plenty of money," by Richard Jones, *Milwaukee Journal*, March 18, 1995.

Dickey was reacting to a report that Wisconsin Corrections Secretary Michael Sullivan had "decided to release drug dealers into the community under intense supervision." Sullivan's decision was called "a major policy change." Reporters attributed the change to: prison crowding; "the success of the intensive sanctions program. . .;" and "the type of drug dealer that would be eligible for supervision in the community."

After negative reaction from citizens, legislators, Attorney General James Doyle, Mayor John Norquist, then-Sheriff Richard Artison, and District Attorney E. Michael McCann, this plan was dropped.

3 Dickey, from the final report of the Governor's Task Force on Corrections and Sentencing (1996).

4 A net sentence takes into account the impact of a concurrent sentence. For example, if an offender was sentenced to five years on the current offense, concurrent to a three-year prior sentence, the net new sentence is two years (5 years — 3 years = 2 years).

5 While our overall sample of 173 cases is representative of the prison inmates from Milwaukee County, we do not know if subgroups (drug offenders, rapists, burglars, etc.) are representative of that class of offender. To be confident of having a representative sample of any given class of offender, one would need to draw a specific representative sample from the universe in that class.

Sentencing information in this table — the last three columns — was available for all 16 offenders in the sample. Information on arrests, times in prison, and probation or parole violations — the first three columns — was available for 14 of 16 offenders.

6 This table deals with eight of nine offenders with a sentence of three years or less. A sentence transcript was unavailable for one.

7 The seven other drug offenders in our sample with medium to long sentences were all repeaters. Many were convicted of drug dealing and other crimes, some while armed. They appear to have been unlikely candidates for anything but a prison sentence.

8 Not his real name.

9 Not his real name.

SECTION 7: JUDICIAL DISCRETION — USES AND ABUSES

Judges have wide discretion when imposing a criminal sentence. Subject to broad standards of reasonableness, a felon's sentence can range from no prison time to many years of incarceration.

A principal argument on behalf of judicial discretion is that the judge who presides over a case has access to all the facts. He or she is in the best position to weigh those facts — including confidential information and other data about a felon's prior record — and arrive at a just sentence.

Critics, however, correctly point out that a system of wide judicial discretion can produce very different sentences, even when the facts in a case appear similar. This was an argument used in the 1980s when the Legislature created the Wisconsin Sentencing Commission.

Two conditions are essential for a system involving wide judicial latitude and discretion to function successfully.[1] Wisconsin only partially meets one, and falls far short of the other.

- The first is a broad set of understandable sentencing criteria, including: statutory penalties set by the Legislature and Governor and sentencing guidelines, such as those set by Wisconsin's Supreme Court. Defendants must have a clear right to appeal a sentence based on noncompliance with the guidelines.

  The current push for "truth-in-sentencing" legislation is fueled in part by the absence of understandable prison sentences and prison release procedures.

- The second requirement is public access to useful information about sentencing decisions. In practical terms, this does not exist. Too often, voters are flying blind when they try to evaluate a judge's record.

A principal argument on behalf of judicial discretion is that the judge who presides over a case has access to all the facts.

Cases discussed in previous Sections provide several examples of how judicial discretion is exercised.[2] Its impact was summarized for us by a veteran Milwaukee County prosecutor: referring to the random assignment of cases to judges, he said that the sentence for the same crime can vary depending solely on the day of the week the accused offender is arrested. Additional cases we present in this Section illustrate further the wide latitude now exercised by individual judges.[3] We believe the public should know more about such cases so that it can take such information into account when voting.

A plea bargain that meant new crime

Judge David A. Hansher presided over the 1994 sentencing of Willie Thompson. As part of a plea bargain, Thompson entered an *Alford* plea (see Terminology, Section 1) to the charge of felon in possession of a firearm. Court records indicate Thompson also fired a shot and wounded another individual. This crime was not charged.

Thompson's record included 14 prior arrests and "a history of absconding from [community] supervision. . ." Earlier adult crimes included carrying a concealed weapon, disorderly conduct, battery (cutting), endangering safety by conduct regardless of life (originally charged as attempted murder), and receiving stolen property. Despite this, Thompson had served only one prison term, and that only after being revoked on probation.

After Thompson related his difficulty staying out of arguments and trouble, Hansher said: "Well, if you have problems with people on the street, you're safer. . .in jail. . .[I]f I send you to prison, you're probably the safest."

Later, Hansher asked Thompson: "Do you have a drug problem? Are. . .these drug dealers you're running around with?" Thompson replied: "Well, yes, but I don't myself have a drug problem." Thompson told Hansher the fight that led to the charge was "about drugs." When Hansher asked, "Do you take drugs at all?," Thompson said "No, I don't." Hansher: "Never?" Thompson: "No."

Hansher issued a two-year stayed sentence and 18 months of probation, consistent with the plea bargain. Within four months, Thompson was apprehended in connection with an attack on his son and wife and for possession of cocaine. His records show that when police were summoned, he resisted arrest. None of these actions brought new charges. Instead, Thompson was incarcerated on the stayed sentence issued for the earlier crimes. Within a few months, he was paroled. State records summarize what happened next.

> On 6/5/95, [Thompson] was paroled from Oakhill Correctional Institute with specific instructions to report to his field agent. [He] failed to report. . .[His] whereabouts and activities remained unknown to this agent until 6/9/96.
>
> On 6/9/95, [he] was arrested. . .following an incident involving [his] wife, his 3-month old son. . .and his neighbor. [Thompson] was charged with Battery — Domestic Violence, Battery and two counts of Endangering Safety by Use of Dangerous Weapon. . .
>
> . . .[His] adjustment under supervision continues to be very poor. He has a history of absconding from supervision and again chose, after parole, to abscond. [He] re-engaged in assaultive behavior toward his family and neighbors five days after being paroled from a prison sentence stemming from revocation of his probation for exactly the same assaultive behavior. Revocation is necessary to protect the public, as well as his family.

The various crimes and violations on probation and parole occurred in a period of time where Thompson would have been in prison if he had received a two-year sentence and served to mandatory release.

As described below, information in Thompson's state prison file shows he was untruthful to the judge about his drug involvement.

> [Thompson] has a serious chemical addiction problem. . .[F]or all of Mr. Thompson's pleadings, whenever he is in custody, that he needs treatment, he has shown repeatedly that he is unwilling or unable to participate in community based. . .treatment. Confinement is necessary for treatment. [Thompson] has again demonstrated his unwillingness to be supervised, to account for his whereabouts and activities, to engage in treatment, or to discontinue his assaultive behavior towards his family members or other members of the community.

The various crimes and violations on probation and parole occurred in a period of time where Thompson would have been in prison if he had received a two-year sentence and served to mandatory release.

A career felon's sentencing preference

In sentencing James Swenson for possession of drugs, Judge Lee Wells noted several prior arrests and two periods of federal prison confinement: "Obviously the defendant has a long history of drug relationships, either by using or selling. [He] has spent some time in the federal prison [as a result]. . .[I]t wouldn't surprise me that he might sell drugs from time to time, not necessarily in this case, but in other cases. . ."

Prior to Swenson's 1995 appearance for sentencing, he had twice failed to appear at earlier hearings. With these actions known, along with the rest of Swenson's prior record, a plea bargain was presented to Judge Wells. Swenson faced a maximum sentence of two years. The prosecutor recommended a prison sentence to be set:

> . . .[at] the Court's discretion. . .[He] has a very bad record. . .[drug] possession in 1990. . .felony [drug dealing] in 1991. . .disorderly conduct in 1978. . .[drug] possession in 1979. . .disorderly conduct in 1980 and 1982. . .and another disorderly conduct. . .He has a serious drug addiction problem.

The following exchange then occurred between Wells, Swenson, and Swenson's lawyer, Steven Chandler:

> **Wells:** I think the recommendation for incarceration is appropriate. The real question, I think, Mr. Chan-

> dler, maybe you want to address this — to some extent maybe he would be better off [serving a shorter time] in the State Prison than serving a long[er] time in the House of Correction. Does he have any preference with about that?
>
> . . .[Y]ou may just want to take a second and see what you want to do. Go to the State Prison for a short time or House of Correction for a long time. Would you — would Mr. [Swenson] — do you have any preference? Would you prefer — you're going to spend a little time incarcerated. Would you like to be in the State Prison or perhaps a longer time in the House of Correction?
>
> **Swenson**: A little time in the state prison or a longer time in the House of Correction?
>
> **Wells**: That's because you can get paroled [faster] from the State Prison. You're eligible for parole in three months. If I sentence you to 12 months in the House of Correction, you're basically there for nine months.
>
> **Chandler**: So prison would be better. [Discussion off the record.] He [Swenson] says he doesn't want to be in the House of Correction.

Wells sentenced Swenson to one-year (the maximum was two) and also agreed to Swenson's preference for a "shorter time" in state prison. Records in Swenson's file indicate he had misconduct reports in prison, lost his chance for early release, and instead served nine months to mandatory release.

When "sentencing guidelines" don't work

The case of George Coats (Section 3) involved a repeat offender who raped one child and attempted to assault another. After a ridiculous colloquy as to whether the victim had suffered "bodily harm," the lawyers and judge agreed that it didn't "make any difference" in terms of the sentenced recommended by the "sentencing guideline scoresheet" of the Wisconsin Sentencing Commission.

This was far from the only case in our study in which the sentencing guidelines appeared to play a role and where their impact seemed to be at odds with common sense or the known record.

Terrance Simpson. On an early morning in 1994, Simpson had approached Serena Parker as she was entering her car in a parking lot. He attempted to grab her purse, and said "Bitch, give me the purse." In an ensuing struggle, Simpson beat Parker and drove off in her car while she was hanging to a door. She eventually let go and was thrown to the ground. She was hospitalized and treated for "contusions and abrasions to her knees, legs, and buttocks. . ."

Weeks later, she ". . .frequently fear[ed] being alone. . .[did] not go out much and [felt] as though someone should be with her all the time. . .[S]he does not want to be threatened by or afraid of [Terrance] in the future."

"If I sentence you to 12 months in the House of Correction, you're basically there for nine months."

Simpson's initial exposure of 40 years (car jacking, a Class B felony) was reduced to 10 years when a plea bargain produced a guilty plea to Robbery (a Class C felony). Considering Simpson's prior record and the seriousness of this offense, a sentence at or near the maximum on this reduced charge appeared justifiable.

The prior record included burglary, possession of stolen property, and receipt of stolen property as a juvenile. These offenses had resulted in sentences of one year probation and 20 hours of community service. As an adult, Simpson had two misdemeanor offenses (battery and retail theft). He was on probation for these offenses at the time he attacked Parker and stole her car. The state's presentence report to Judge _____________[4] detailed a lengthy history of drug use by Simpson, who said he was high on cocaine when he attacked Parker and wanted money to buy more drugs.

Notwithstanding this, court files include a "sentencing guidelines scoresheet" presented to the judge that included the following:

Per the arbitrary guidelines used by the state as recently as 1995, a record of burglary, possession of stolen property, receiving stolen property, misdemeanor battery, misdemeanor retail theft, and an uncontradicted self-report of excessive drug use produced *no* "CRIMINAL HISTORY SCORE."

TOTAL CRIMINAL HISTORY SCORE (A SCALE)	0
TOTAL SEVERITY OF OFFENSE SCORE (B SCALE)	1

Thus, per the arbitrary guidelines used by the state as recently as 1995, a record of burglary, possession of stolen property, receiving stolen property, misdemeanor battery, misdemeanor retail theft, and an uncontradicted self-report of excessive drug use produced *no* "CRIMINAL HISTORY SCORE." This is because:

- The first three offenses were juvenile crimes. The "guidelines" didn't count those unless there were "FOUR OR MORE felony-type adjudicated juvenile offenses."
- Even though Simpson was on probation at the time of the offense, he received no "score" for this because he was not on probation for "adult felonies."
- Self-reported criminal activity doesn't count on the scoresheet.

Simpson, whose initial exposure was 40 years, received a four-year sentence, *concurrent* with a year remaining on his probation sentence (net sentence of three years). We encountered several cases in this study in which CRIMINAL HISTORY SCORES bore little resemblance to an offender's actual history.

The "SEVERITY OF OFFENSE SCORE" was similarly absurd. Simpson earned a "0" for using no weapon (other than his fists and Parker's car) and a "1" for causing bodily harm. The optional scores with respect to bodily harm are "0" for no harm or "1" for some harm.

Frank Stephens. At age 18, with a juvenile criminal career that included four auto thefts and several periods of "unsuccessful community supervision," Stephens was attempting to burglarize a garage when the 70-year-old owner arrived home and started to back his car in. Stephens (with an accomplice) confronted the man with a handgun, and said: "Put up your hands, we want all your money." Stephens then told his accomplice to "hit him and take his wallet." The accomplice hit the victim, knocked him to the ground, and removed his car keys and wallet. The two then drove off in the victim's car.

A weapon possession charge was dismissed as part of a plea bargain. Stephens faced a maximum sentence of 22 years for armed robbery and auto theft. Even though all four prior auto thefts were counted ("four or more" felony-type juvenile offenses), the sentencing guidelines recommended a prison sentence ranging from six to 7.5 years, or about a third of the maximum. If the weapons charge had not been dismissed, the score would have been only slightly higher.

Presiding Judge Arlene Connors, who was not bound by the guideline recommendation, addressed Stephens as follows:

> [A]s I see you sitting here, you look like you are a tall gentlemen, and you look pretty strong. I don't know what the victim looked like; but he was seventy years of age. There were two of you in this armed robbery.
>
> Don't you think that man was petrified by what happened to him? What made it worse, he was backing his car into his garage. He has every right to think he would be safe. And while he's doing it, you come along, your buddy comes along, you tell your buddy "hit him in the head"; and he was hit in the head; and then his wallet and car were taken. . .

In reviewing Stephens' record, Judge Connors said "the only saving portion I see here [on the sentencing guideline] is you have no adult record." However, Stephens was still 18, so this was indeed a modest achievement. As to Stephens' four prior auto thefts, the judge noted: "So you do like automobiles, it's obvious to me."

Judge Connors explained her eventual sentence in paradoxical terms, citing a need for deterrence and then choosing a sentence that arguably was quite lenient.

> . . .I think society mandates that the Court look at a deterrent [and] therefore, as I look at the sentencing matrix, I am going to place you at the lower end of the matrix. And I will today be sentencing you to six years in the Wisconsin Prison System — and that's the low point of the matrix — [for the armed robbery]. On the [auto theft] I will. . .place the defendant on probation.

Similar crimes, different sentences

Our study included many cases that confirm the prosecutor's observation — cited earlier — that an offender's sentence can be heavily influenced by the judge to which the case is assigned. This concerns us primarily because it is so hard for the public to get reliable information about different sentencing patterns. If this information were more readily available, voters could decide whether the different patterns were of concern and act accordingly. We present two comparisons below to illustrate this issue.

Willie McCoy and Harold Stone

McCoy and Stone were sentenced in 1993 by, respectively, Judge Jeffrey Wagner and Judge Victor Manian. As described below, each had committed a separate robbery and burglary within a few days of each other. Both were on probation at the time. Both pled guilty in return for plea bargains.

If this information were more readily available, voters could decide whether the different sentencing patterns were of concern and act accordingly.

Each robbery involved very aggravated circumstances.

In McCoy's case, according to state records:

> He absconded from probation and on 10/29/92 he robbed an elderly priest. He entered the priest's residence at about 12:15 a.m. and demanded money. During the robbery, [McCoy] shoved the priest against a kitchen chair and onto the floor. The priest laid there in great back and leg pain until 5 a.m., when he managed to get to his telephone and call for help. He was taken to the hospital and treated for contusions and spinal and leg injuries. He continues to be in pain and is in a wheelchair unable to walk for more than a few steps.

The burglary for which McCoy was convicted involved breaking into a travel agency and stealing $400.

As for Stone, Judge Manian was presented the following information regarding his robbery:

> Your Honor, had the case gone to trial, the victim would testify that he had come with his family from out-of-town to attend a concert at the Pabst Theater. [A]fter leaving the theater, he and his family walked to [a garage] about a block east where his car was parked. Because his wife had some emphysema or other lung problems, she didn't want to walk up the couple of flights to the ramp. . .so he left his wife and daughter, and perhaps another relative, waiting at the street level.
>
> He walked up, went to his car, observed the defendant there. The defendant confronted him in the garage and said, I have a gun. [The defendant] got into the car with [the victim and] directed him to drive out a different exit to the garage, then directed him to drive in areas of the City he wasn't familiar with. He ended up. . .in the area of. . . the Hillside Housing Project, and at that time the defendant asked for money. [The victim] gave the defendant his wallet because he was afraid. He surrendered possession of his car and the defendant drove off with the car. [The victim] then walked around a while, eventually found himself in a bar on Water Street where he found a phone and called the police.

Stone's burglary occurred two days after the robbery. Using the stolen car, Stone and an accomplice burglarized an apartment, converted the stolen merchandise into cash the same night, and purchased crack cocaine.

Stone was charged with robbery (not armed robbery), habitual criminality, and burglary, but not auto theft. His

TABLE 10 McCoy and Stone sentences as per cent of initial exposure

	Maximum exposure — new charges and revocation	Net sentence	Sentence as % of initial exposure
McCoy	26 years	20 years	77%
Stone	36 years	14 years	39%

maximum charge exposure on the initial charges was 32 years. Including four years for violation of probation increased his exposure to 36 years.[5]

Stone's record included 13 juvenile arrests beginning at age 11. Offenses included burglary, theft, carrying a concealed weapon, auto theft, and others. His adult record included convictions for robbery, escape, theft, and auto theft. By age 26, he came before Manian with three prior periods of adult incarceration and several periods of juvenile detention. A state social worker report described him as "a man with few internal controls [who] is ill-equipped to function independently and responsibly in society."

With this 15-year record of almost non-stop violations, the prosecution recommended dismissing the habitual criminality charge, reducing Stone's maximum exposure to 20 years (10 years for robbery and 10 years for burglary). The prosecution recommended, in effect, that one of these crimes "not count" and asked for a concurrent sentence.

Manian accepted the entire plea bargain and sentenced Stone to 10-year concurrent sentences, to be served consecutive to a four-year term for violation of probation.

McCoy faced a maximum exposure of 26 years (10 for robbery, 10 for burglary, and six for violation of probation). At his sentencing, Judge Wagner cited McCoy's long record and "the fact that you committed additional offenses while on probation [and] in the robbery you ended up picking on someone who was elderly [and] you have now restricted that person's mobility."

Judge Wagner gave McCoy a maximum sentence of two, 10-year terms, consecutive to each other, but concurrent to the violation of probation.

In the end, after taking into account the total charge exposure, including probation violations, the net sentences compare as in Table 10.

Theodore Holland and Fred Simms

Holland and Simms were sentenced, respectively, by Judge Dominic Amato (1993) and Judge Stanley Miller (1994). Both defendants had long records. Both faced initial charge exposure of at least 100 years. Each judge was presented with a plea bargain that cut the maximum exposure by at least two-thirds. Each judge needed to decide (1) whether to accept the plea bargain and, if they did, (2) what sentence to issue on the remaining charges.

Holland was 22 years old at the time of his arrest. Records from his state prison file show the following criminal record prior to that time:

> **Juvenile:** Subject [attended] special education classes at South Division High School. He was suspended in November, 1984. . .Prior to that he had attended Boys Tech where he was suspended for bringing a pair of karate sticks to school. He was also suspended from Vincent High School in 1983 because of a Battery.
>
> [T]he subject was convicted of shoplifting [and] sentenced to attend shoplifting classes. [H]e was convicted of Battery and [carrying a concealed weapon] for which he received 6 months probation. . .[H]e was convict-

> ed of Armed Robbery, Attempted Armed Robbery (PTAC) and Possession of a Pistol by a Minor [after robbing] a 59-year old individual at gun point. . .When apprehended, a .22 caliber steel handgun was found in the subject's jacket pocket. He was then placed at the Wyalusing Academy in Eau Claire, WI for one year. [After release], subject committed a Burglary. . .and was committed to six months probation. In August, 1986, there was another shoplifting charge and Attempted Theft by Fraud. This resulted in one year probation.
>
> **Adult:** [S]ubject's adult record consists of 1 conviction each in 1987 and 1988 for [marijuana possession]. He was fined for both offenses.

Thus, when arrested in 1992 for the crimes described below, Holland's *known adult record* consisted solely of "non-violent drug-only" misdemeanors. The following summary of his actual record reveals a different story.

> Current Offense[s]: Subject stated that he pled guilty to the offense[s] which occurred on a variety of dates. The Burglary occurred on 3/9/92. . .Subject smashed the glass door of a service station. . .and stole. . .parts totaling approximately $1,000. . .At the time of his arrest, it was discovered that he had 2 pending cases of 4 counts of First Degree Sexual Assault and a Theft from person.
>
> On 8/27/91, subject approached a female from behind and stole her purse. . . He ran, she chased him and confronted him [and] began to scream for help. Subject tried to run but the victim grabbed him. Subject told her to be quiet or he would hurt her. . .[He] struck her with a closed fist and then fled.
>
> . . .[O]n 8/18/90, subject met the sexual assault victim in a tavern. They proceeded to her home where they played cards. They arranged to meet again. . .That evening they also played cards. While the victim was in the bathroom, subject entered and showed her what appeared to be a gun and told her to go to the bedroom. He threw her onto the bed and told her to remove her clothing which she did. Subject put the gun in a box with what the victim thought was bullets at the foot of the bed. He removed his clothing and stated that he would kill her and the elderly man that she tended to and his son if she screamed. They then had an act of. . .intercourse. He also stated that he could kill her with one hand. He later told her to get on her hands and knees and he continued to have. . .intercourse with her. . .He then forced her to perform [various] oral sex [acts]. . .He then stated he was going to perform anal sex. The victim told him he would have to shoot her because she was not going to do that. He then put the gun back in his waistband [and] asked the victim for a ride home. . .After being arrested, the subject admitted to the facts as presented. . .[H]e now says the sexual relations were consensual and that he initially admitted to the crime because he was afraid.

"While the victim was in the bathroom, subject entered and showed her what appeared to be a gun and told her to go to the bedroom."

Court records show that through an inexplicable act of "judicial discretion," Holland was arrested and charged with the sexual assault offenses, but then was released on bail (our records do not show which judge or court commissioner approved bail). He failed to appear for required hearings; during that period he committed the burglary and robbery (that only was charged as theft from person).

Simms was 29 when he was arrested. His 11-year adult record, excerpted below from state files, is a sharp rebuttal of those who say: (1) the term "revolving door justice" is invalid; and (2) not enough effort is made toward treatment and rehabilitations of offenders.

> **Correctional Experience:** [Simms] was convicted of Attempted Theft and placed on probation in March, 1983. . .[He] violated his probation in August, 1983 by leaving the State of Wisconsin without agent approval or a Travel Permit. He continued to abscond until his arrest in March, 1984 for burglary. He was. . .given a five-year stayed sentence and two years probation. . .He. . .absconded from probation supervision [in early 1985 and] was later arrested [for] Retail Theft. He served 24 days. . .and was also fined. . .[He] was arrested in July, 1986 [for drug dealing and] received a 4-year stayed sentence with 4 years probation ordered and 90 days conditional jail time. Upon release. . .he was arrested. . .on a fugitive warrant. . .and returned to. . .Illinois to face Robbery charges. He received a three-year prison term and [later] was paroled. . .and accepted for supervision in Wisconsin. . .[H]e again absconded [and] was arrested for Retail Theft. .

> .His supervision was revoked and he was. . .sentenced on the new case to one year in the Wisconsin State Prison system. . .Upon being paroled in October, 1991, [he] reported to his agent as ordered, but failed to report to his agent again until 11/18/91 at which time he admitted to using cocaine. Mr. Williams was ordered to treatment [and] attended two group sessions but failed to report thereafter. He absconded from supervision again and efforts to locate him were unsuccessful. . .In March, 1992, [he] was arrested for Retail Theft at the Northridge Mall. In his attempt to flee security officers a glass door was broken and one of the security officers sustained injuries that rendered him unconscious. [Simms] was offered, and accepted on alternative to revocation at [a Milwaukee minimum security facility along with entry] into that 120-day AODA and Criminal Thinking Program [on] 6/1/92. On 6/7/92 he escaped [and] was arrested on 6/15/92. . .Upon return to [prison he] was again enrolled in the chemical dependency support groups but refused to participate. . .[He] was paroled on 4/6/93 and failed to report [and] was arrested on 4/28/93 with another Retail Theft case. . .It was again ordered that his supervision be revoked. . .He was paroled on 12/8/93. . .A urinalysis sample was taken on 12/14/93 which was later returned as positive for cocaine. On 12/15/93 a scheduled home visit was attempted but [Simms] failed to be present [and] an Apprehension Request was issued. . .[He] absconded from supervision until his arrest on 1/15/94 following a Domestic Violence disturbance. . .[He]. . .agreed to enter into treatment and was given a formal alternative to revocation with placement at NuWay Halfway House. He was transported to NuWay on 3/15/94. On 3/18/94, Mr. Williams absconded. . .His whereabouts and activities were unknown until his arrest on 7/6/94 for the current offense [which is summarized below]. . .

“. . .He absconded from supervision again and efforts to locate him were unsuccessful. . .”

> . . .During the afternoon of July 6, 1994, [Simms] was baby-sitting for [his niece] Theresa and her brother Bobby. . .Upon returning to her residence, [their mother] Denise was approached by Theresa who said she had something “really bad” to tell her mother. When they sat to discuss what happened, Jessica stated “[Simms] was humping on me”. . .Theresa. . .gave her the following account. . .Simms asked Theresa to go upstairs to help him iron clothes and she agreed. . .Theresa asked Simms where the iron was but he told her they would iron. . .after they took a nap. Both of them laid down on the couch. . .[Simms] turned Theresa over so she was laying on her back [and] then took control of her hand and made her touch “his stuff”. . .She attempted to get away but his leg was wrapped across Theresa so she couldn’t. . .She also was afraid to tell him no because she was afraid he might hurt her. . .[Simms] placed his hand inside [her] shorts and she pushed his hand away. He again placed his hands inside of her shorts and placed his finger in [her] vagina. He repeatedly told her not to tell anyone [and] also had taken her hand again and placed it on his bare penis. He asked her if it felt good and told her it felt good for him. She was finally able to free herself from the couch and ran downstairs. Frederick followed her. . .She attempted to call her aunt. . .but had to hang up because [Simms] was following her everywhere. . .

> . . .Denise. . .told of the effects this incident has had on Theresa. Her personality has been noticeably different from an outgoing and friendly child to becoming quiet and withdrawn. She’s experiencing sleep disturbances in which [Simms] is released from jail and chases her. Theresa is also experiencing. . .bed wetting on a daily basis because of being afraid to go to the bathroom alone at night. . .She is also being counseled at her grade school by their professional staff because of the persuasiveness of this incident into her school life (i.e., drawing pictures of a man behind bars and wetting her pants in school). Denise also. . .relayed that Theresa expressed to her [Simms] “should go to jail and never get out.”

The sentences issued by Judge Amato (to Holland) and Judge Miller (to Simms) illustrate one of the greatest contrasts in approach that we encountered in our study.

Holland’s initial charge exposure was 100 years (four sexual assaults, theft from person, burglary, and bail jumping). A plea bargain presented to Judge Amato in December, 1992, recommended dismissal of three sexual assault charges and bail jumping, reducing charge exposure to 35 years (one assault, burglary, and theft from person).

> Judge Amato: Can I have a reason on the record as to why the three additional counts of first-degree sexual assault [are proposed to be dismissed]?

> Assistant District Attorney: Yes, your honor. This case is 2.5 years old. The victim has become very upset.

> . .that it has taken so long to get the case to trial. She feels a jury would blame her for her conduct in inviting the defendant into her house.

Court records show that the prosecution recommended a 10-year sentence, meaning a maximum prison term of 6.7 years. Holland's lawyer sought probation. Judge Amato explained his sentence (the maximum, 35 years) as follows:

> You've been through the probationary system. You've had your opportunity. You also had an opportunity to be law-abiding [after the sexual assault arrest]. Some judge let you out [on bail] on four counts of first-degree sexual assault [and] you went and committed [burglary and theft from person].
>
> . . .[P]robation is not an effective, meaningful alternative [for you]. It's completely ineffective and it unnecessarily puts the public at risk. . .because the realities are, without any doubt by this judge, that you'll just go out and commit more crime. . .
>
> You have a life and history of crime and violence and anti-social, amoral behavior, where you do not care what happens to other people. . .You have chosen not to change your lifestyle. Every effort to work with you, rehabilitate you, has failed.
>
> . . .The public comes first. I've got to age you. I've got to make you older, I've got to make you less of a predator [and] I've got to make sure that there'll be no more victims out there that you can prey on. . .

Under the state's judicial substitution law, so many lawyers filed to remove Judge Amato (without cause) that he eventually had to be transferred to a non-felony judicial post.

This sentencing approach by Judge Amato effectively has been nullified by other defense lawyers. Under the state's judicial substitution law, so many lawyers filed to remove Judge Amato (without cause) that he eventually had to be transferred to a non-felony judicial post.

In the Simms case, prosecutors presented Judge Miller with a plea bargain that would dismiss two of three sexual assault charges (reducing exposure to 40 years from 120 — each charge carried a maximum penalty of 40 years, compared to a previous maximum of 20 years). Prosecutors recommended a 15-year sentence, meaning maximum prison time of 10 years. Judge Miller accepted this recommendation in its entirety. He said, in part (emphasis added):

> Your attorney points out in your behalf that there's some good here. That for instance. . .you . . .entered a plea which precluded the need for testimony from the young victim. . .And that's true. . .though [in return] the state agreed to a dismissal of two other counts that were read in for sentencing purposes. So you did substantially reduce your exposure [by pleading guilty]. *And even today, the state is recommending, where the maximum exposure on the one count. . is 40 years, the state is asking for only 15 years.*
>
> . . .[Mr. Simms], the court's satisfied from the testimony before it, given the nature of your activities in regards to the one count. . .as well as *your extensive prior criminal record and your general attitude of non-cooperation with authorities when they've attempted to provide you with help, the state's recommendation is an appropriate one.*

Summary

We believe the several examples in this Section, coupled with others elsewhere in this study, show that a sentencing system based on broad judicial (and prosecutorial) discretion can only be effective and accountable if there is a way for the voting public to assess the sentencing decisions that are made in criminal courts.

Notes to Section 7

1 This study does not present or fully develop the arguments in this debate. Our own conclusion is that a system which gives wide discretion to elected judges is preferable to such alternatives as (1) non-elected judges or (2) a system which relies on arbitrary sentencing guidelines (such as Wisconsin had from 1985-1995). However, we emphasize that our preferred system can't work effectively when, as is now the case, public access to information is so limited.

2 Sections 2-4 also explain how a judge's sentencing discretion can be affected by the actions of others in the criminal justice system, e.g., prosecutors, the Parole Commission, and the Department of Corrections.

3 Because confidential information is used in each case, the real names of offenders and victims are not used in this Section.

4 The sentencing judge's name is omitted; a transcript explaining the full basis of his sentence was not in the court file at the time of our research.

5 Stone's "act exposure" could have exceeded 50 years if armed robbery and auto theft and/or carjacking had been charged, with applicable penalty enhancers.

SECTION 8: CONCLUSIONS AND RECOMMENDATIONS

Effective democratic institutions require accessible and understandable information. The absence of such information deprives voters of the opportunity to hold elected officials accountable. Our study of felony sentencing practices demonstrates that this a major issue in Milwaukee County and, probably, statewide.

We have documented, for example, a sentencing and corrections system in which words sometimes are used in ways that defy common sense. We have demonstrated that the rules governing the simple structure of a prison sentence are far too arcane. We have shown that practices such as plea bargaining and concurrent sentencing can mean that some crimes "don't count." Finally, we have shown that it is very difficult for the voting public to learn about the sentencing decisions that judges make and charging policies that prosecutors follow.

In place of accountability to voters, we conclude from our research that a different form of accountability often governs the system of felony sentencing. The participants — defense lawyers, prosecutors, judges — tend to be more accountable to each other than to the general public. To quote from the law school text cited in Section 3, ". . .the importance of maintaining smooth working relationships. . ." often appears to be a dominant concern. Such a system can flourish when the public's access to information and ability to look over the shoulders of the participants is so limited. What tends to emerge is a system where "to get along, you go along."

In place of accountability to voters, prosecutors and judges tend to be more accountable to each other than to the general public.

Truth-in-sentencing legislation

The Wisconsin Legislature is expected to approve truth-in-sentencing legislation this year. Measures pending at the time this study was completed would begin to address some of the serious problems we have identified. For example, such sentencing comments as "10 years doesn't really mean 10 years" would become a thing of the past.

The Legislature also is expected to create a blue-ribbon commission to make recommendations on an overhaul of Wisconsin's sentencing code. This commission's mandate should call for specific recommendations that would improve dramatically the public's access to understandable information about felony charging and sentencing practices.

The Legislature should approve pending legislation that would curb abuses which arise from the current judicial substitution law — which lets defendants effectively disqualify a judge, for no cause, if they fear he or she is a stern sentencer.

Important actions can be taken now, at the local level

In many areas, however, there is no need to wait for legislative action. Many of the major problems we have identified can begin to be addressed now.

Better access to information. The Chief Judge, the Presiding Judge of the Felony Division, and the District Attorney could initiate a series of actions designed to improve public access to information. At a minimum, for example, they could require that public court files contain:

- All guilty plea and sentence transcripts. Plea transcripts should clearly state the terms of plea bargains.

  (The Legislature should amend the law so citizens can obtain copies by paying a nominal per page fee — unlike under current law, under which fees can exceed $1 or $2 a page.)

- Copies of all "offer letters" to the defendant from the District Attorney, and other documents setting forth the basis for recommendations that the prosecution makes to the presiding judge.

- A one-page “case fact sheet” with such information as:

  A list of current offense(s)

  - whether committed while on parole or probation
  - initial charge(s)
  - revised or dismissed charges
  - maximum sentence exposure, initial and revised charges
  - length (years) and type (concurrent, consecutive, etc.) of actual sentence
  - name of prosecutor
  - name of presiding judge

  Offender’s adult record

  - number and type of felony convictions
  - number and type of misdemeanor convictions
  - number of parole or probation revocations
  - number and actual length of adult incarcerations

  Offender’s juvenile record

  - number and type of “felony-type” adjudications
  - number and actual length of juvenile confinements

- A one-page case chronology showing the date and brief description of disposition of all court proceedings, beginning with initial appearance and bail-setting and ending with sentencing.

We believe Milwaukee County criminal justice officials, along with the defense bar, should consider these and similar ideas as part of an overall strategy designed to increase dramatically the public’s access to sentencing information. The strong public support for truth-in-sentencing reflects a level of public cynicism and concern to which judicial system officials at all levels should respond.

The strong public support for truth-in-sentencing reflects a level of public cynicism and concern to which judicial system officials at all levels should respond.

Plea bargaining and concurrent sentencing. We have documented the substantial impact these practices have on sentencing. We believe justice system leaders should adopt formal written policies that enable the general public to understand how these sentencing options are used.

Reactions to this report

We circulated drafts of this report to Chief Judge Patrick Sheedy, Chief Judge-Designate Michael Skwierawski, Judge Jeffrey Kremers, the presiding Felony Division judge, and District Attorney E. Michael McCann. Neither Sheedy, Skwierawski, nor McCann commented.

Judge Kremers provided helpful comments and suggestions regarding an overview set of tables that summarized our main statistical findings. He also reviewed a draft of the final report. He said he believed that in several respects, it was an inaccurate representation of sentencing practices and the factors that influence sentencing.

Four other judges reviewed and provided comments on portions or all of the report. One judge, who reviewed only the overview tables, said a study of this kind was needed, but he also questioned whether it would adequately take into account “all the variables.”

The three judges who critiqued a draft of the entire report provided many clarifying comments on various factual issues. Their view of our subjective conclusions ranged from moderate to strong agreement.

Some reviewers questioned our decision to identify judges in connection with specific cases. They said this could give a misleading impression that the cases are representative. However, we think the report is clear that the cases cited are not necessarily representative of a judge's record. Also, we specifically omitted a table we developed that listed judges in our sample based on average sentence length as a percent of maximum sentence. Finally, the cases we do describe are accurately presented and our subjective judgment of them is clearly just that — our opinion. Judges are elected officials and their decisions most decidedly are fair game for comment.

Several comments from reviewers supported our call for more public discussion and disclosure of sentencing practices. One judge, whose overall comments were neutral to mildly positive, emphasized the importance of this by saying it would help address the question of "what's going on [in courts] when the cameras and reporters aren't there." This same judge said more discussion would increase public awareness of the complex factors affecting sentencing, including many beyond the control of judges.

Summary

The more information voters have, the better.

In preparing this report, we were influenced substantially by how difficult it was to gather and evaluate information about sentencing decisions and practices. It was for this reason that the main theme in our recommendations involves the issues of improved disclosure and ease of affordable access to information. In focusing on these issues we hope to emphasize that what's important about sentencing decisions is not what we think, but rather what the largest possible group of voters might think. The more information they have, the better.

About the Institute

The **Wisconsin Policy Research Institute** is a not-for-profit institute established to study public-policy issues affecting the state of Wisconsin.

Under the new federalism, government policy increasingly is made at the state and local levels. These public-policy decisions affect the life of every citizen in the state. Our goal is to provide nonpartisan research on key issues affecting Wisconsinites, so that their elected representatives can make informed decisions to improve the quality of life and future of the state.

Our major priority is to increase the accountability of Wisconsin's government. State and local governments must be responsive to the citizenry, both in terms of the programs they devise and the tax money they spend. Accountability should apply in every area to which the state devotes the public's funds.

The Institute's agenda encompasses the following issues: education, welfare and social services, criminal justice, taxes and spending, and economic development.

We believe that the views of the citizens of Wisconsin should guide the decisions of government officials. To help accomplish this, we also conduct regular public-opinion polls that are designed to inform public officials about how the citizenry views major statewide issues. These polls are disseminated through the media and are made available to the general public and the legislative and executive branches of state government. It is essential that elected officials remember that all of the programs they create and all of the money they spend comes from the citizens of Wisconsin and is made available through their taxes. Public policy should reflect the real needs and concerns of all of the citizens of the state and not those of specific special-interest groups.