Federal Probation

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Federal Probation

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This Issue in Brief

Structuring the Exercise of Sentencing Discretion in the Federal Courts.—Brian Forst and William Rhodes report results of a major study of Federal sentencing practices, focusing on highlights that have special relevance to the probation community: survey results on the purposes of sentencing, an analysis of recent sentencing decisions, and an analysis of the information contained in the presentence investigation report. The survey revealed that Federal probation officers and judges, on the whole, regard deterrence and incapacitation as more important goals of sentencing than either rehabilitation or just deserts. The judges individually, on the other hand, are divided over the goals of sentencing.

Zero—Sum Enforcement: Some Reflections on Drug Control.—This article reflects upon the dilemmas in drug control efforts and suggests that current policy and practices be reviewed and modified in order to evolve a "more coherent" approach to the problem. The authors critique the methods of evaluating drug enforcement efforts and provide a series of rationales that can be employed in the decisionmaking process.

Inreach Counseling and Advocacy With Veterans in Prison.—A self-help model of direct and indirect services is provided through a Veterans Administration veterans-in-prison (VIP) pilot program. Authors Pentland and Scurfield describe objectives and methodology of the program, including the formation of incarcerated veterans into self-help groups, organization of community-based resources into VIP teams that visit the prisons, serving veteran-related issues and services such as discharge upgrading and Agent Orange, and a diversionary program for veterans in pretrial confinement.

The Probation Officer and the Suicidal Client.—This article by Federal probation officers Casucci and Powell attempts to provide the probation officer with enough information to be able to recognize and deal effectively with the suicidal client. The authors furnish an overview of the problem of suicide, a profile of the suicidal client, and the therapeutic response of the probation officer in this crisis situation.

An Experiential Focus on the Development of Employment for Ex-Offenders.—U.S. Probation Officer Stanley S. Nakamura of the Northern District of California states that a concerted effort

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has been made in his District to establish an employment program that would provide real assistance to those clients interested in working. Integrity, friendship, patience, professionalism, trust, placement, and followthrough are the basis of a successful employment program, he concludes.

Alienation and Desire for Job Enrichment Among Correction Officers.—Responses to a correction officer opinion survey suggest that C.O.'s hold attitudes toward their job that are similar to those of other contemporary workers, report Hans Toch and John Klofas. Like other urban workers, urban C.O.'s tend to be very alienated; like workers generally, most C.O.'s are concerned with job enrichment or job expansion.

BARS in Corrections.—Evaluating the job performance of employees is a perennial problem for most correctional organizations, according to Wiley Hamby and J.E. Baker. The use of Behaviorally Anchored Rating Scales (BARS) appears to be a viable alternative for evaluating the performance of employees in corrections, they maintain.

Redesigning the Criminal Justice System: A Commentary on Selected Potential Strategies.—Selected strategies are highlighted by Attorney Tommy W. Rogers which would appear worthy of consideration in any contemplated alteration of the criminal justice system. Suggestions are made concerning modification of the criminal law detection and apprehension strategies, improving the admininistrative and judicial efficiency of courts, redressing system neglect of victims, and utilization of research in planning and legislation.

Strategies for Maintaining Social Service Programs in Jails.—Social services within jails and community-based alternatives to incarceration are vulnerable to cutbacks, asserts Henry Weiss of the Wharton School in Philadelphia. His article suggests a number of strategies for maintaining the improvements in service delivery that have been so painstakingly won over the past 15 years.

Promises and Realities of Jail Classification.—The process by which jails reach classification decisions has rarely been studied due to the preoccupation of the field with predictive models, assert James Austin and Paul Litsky of the National Council on Crime and Delinquency Research Center. The authors' opinions expressed in this article are based on their findings of a comparative process study of four jail classification systems.

Crime Victim Compensation: A Survey of State Programs.—Compensating crime victims for injuries sustained as a result of their victimization has evolved into a highly complex practice, report Gerard F. Ramker and Martin S. Meagher of Sam Houston State University. Their study showed that the state compensation programs in existence today are subject to similarities in certain organizational characteristics and also appear to share certain disparities.

Probation Officers Do Make a Difference.—This article by Marilyn R. Sánchez of the Hennepin County (Minn.) Probation Department examines the successful interaction between probation officer and client. Her article discusses a three-issue model for feedback from probationers: (1) the "exit interview" with the probationer, (2) presentations in schools, and (3) the postprobation checkoff list.

Structuring the Exercise of Sentencing Discretion in the Federal Courts

BY BRIAN FROST AND WILLIAM M. RHODES
INSLAW, Inc., Washington, D.C.

FEW DECISIONS are as perplexing and important as the selection of a criminal sentence for a particular offender. Its perplexity stems from the fact that there exists no widely agreed upon, single goal of sentencing, and no ready means of translating a fundamental goal or set of goals into a specific sentence for a particular offender. Its importance stems from the substantial consequences of the decision not only for the offender about to be sentenced, but also for the criminal justice system, and for our larger society, which pays for both the crimes and the sanctions.

While the judge selects the sentence, the probation officer is a central figure in the sentencing process. He collects, organizes, and presents the information that is pertinent to sentencing and parole decisions, and often recommends a sentence to the judge. He then supports the postsentencing process by providing a range of supervision and support services both to offenders who have received sentences of probation and to those who have been released on parole.

Acknowledgment of the awesome nature of the sentencing decision recently has become matched by a widespread perception that sentencing is neither rational nor evenhanded. Judge Marvin Frankel, for one, has observed: "We have in our country virtually no legislative declarative of the principles justifying criminal sanctions."[1] And researchers have found that in jurisdiction after jurisdiction sentencing could be described as disparate or, at best, inconsistent.[2]

Both the United States Senate and the House of Representatives have responded to these concerns with proposals for major revision of the Federal criminal code, including changes aimed at making sentences more purposeful and fair.[3] Both chambers of Congress have proposed bills that would institute sentencing guidelines,[4] and both have insisted that these guidelines take into account explicitly enunciated purposes of sentencing.[5]

While specific differences in the Senate and House versions of the criminal code revisions have not been reconciled at the time of this writing, the two houses have nonetheless agreed on the propriety of sentencing guidelines and on the notion that guidelines development will require empirical study of sentencing as it is currently practiced in the Federal courts.[6] With this in mind, the Federal Justice Research Program of the Department of Justice contracted with INSLAW, Inc. (formerly the Institute for Law and Social Research), to conduct research on sentencing in the Federal district courts.[7] This article presents findings from three major aspects of that study that are of special relevance to the Federal probation community: survey results on the purposes of sentencing, analysis of recent sentencing decisions, and analysis of the information contained in the presentence investigation report.

The Goals of Sentencing and Sentencing "Disparity": Survey Results

To provide one important basis for understanding current sentencing practices in the Federal courts, we conducted inperson interviews with 113

1M. Frankel, *Criminal Sentences* (New York: Hill and Wang, 1973), p. 106.
2Studies have repeatedly found evidence of different patterns of decisionmaking from one judge to another, starting at least as early as 1919. Everson, "The Human Element in Justice," *Journal of Criminal Law and Criminology*, vol. 90 (1919); Gaudet, "Individual Differences in Sentencing of Judges," *Archives of Psychology*, vol. 32 (1933); Frank J. Remington and Donald J. Newman, "The Highland Park Institute on Sentencing Disparity," *Federal Probation*, vol. 26, (1962), pp. 4-9; John Hogarth, *Sentencing as a Human Process* (Toronto: Univ. of Toronto Press, 1971); Anthony Partridge and William Eldridge, *The Second Circuit Sentencing Study: A Report to the Judges of the Second Circuit* (Washington, D.C.: Federal Judicial Center, 1974); Shari Seidman Diamond and Hans Zeisel, "Sentencing Councils: A Study of Sentence Disparity and Its Reduction," *University of Chicago Law Review*, vol. 43 (1975), pp. 109-49; Terence Dungworth, *An Empirical Assessment of Sentencing Practices in the Superior Court of the District of Columbia* (Washington, D.C.: Institute for Law and Social Research, 1980); Brian Forst and Charles Wellford, "Punishment and Sentencing: Developing Sentencing Guidelines Empirically from Principles of Punishment," *Rutgers Law Review*, vol. 33 (1981).
3S. 1722, 96th Congress, 1st session; H.R. 6915, 96th Congress, 2nd Session.
4S. 1722, Chapter 58; H.R. 6915, Chapter 43.
5*Ibid.*
6S. 1722, 994(1).
7The design of this project originated in a request, by the Federal Justice Research Program of the Department of Justice, for proposals for a study to support the formulation of Federal sentencing guidelines, and the proposal submitted by the Institute for Law and Social Research in response to that request. A more accessible version of that design is presented in a *Hofstra Law Review* (vol. 7, Winter 1979) sentencing symposium article, "Sentencing and Social Science: Research for the Formulation of Federal Sentencing Guidelines," by Brian Forst, William Rhodes, and Charles Wellford, at pp. 355-78.

probation officers in 28 Federal districts,[8] as well as 264 active Federal judges in all districts.[9] Also interviewed were 103 Federal prosecutors,[10] 110 defense counsel,[11] 1,248 members of the general public,[12] and 550 incarcerated Federal offenders.[13] We attempted first to obtain information about the degree of consensus among Federal judges, probation officers, and others about the goals of sentencing and the efficacy of the system in achieving those goals.

Five goals of sentencing were identified for this aspect of the project: general deterrence, special deterrence, incapacitation, rehabilitation, and just deserts. To ensure that each person interviewed was responding to the same concepts, we provided a definition for each goal (see exhibit 1).

Each respondent was asked questions about both the importance of each goal and the ability of the criminal justice system to achieve each of the goals. With respect to the former, a five-point scale was constructed ranging from "not at all important" to "extremely important." Results are shown in exhibit 2. Not surprisingly, the Federal probation officers, who serve partly as agents of rehabilitation,[14] tended to regard rehabilitation as a more important goal than did the other practitioner populations, with more than two-thirds of all officers interviewed expressing the opinion that rehabilitation is either "very important" or "extremely important." The officers interviewed were inclined nevertheless to regard the utilitarian goals of sentencing—general deterrence, special deterrence, and incapacitation—as very important more often than they did the goal of rehabilitation. They were more inclined than any other group surveyed to regard the incapacitative function of sentencing as very important.

Of particular interest is the extent to which the judges interviewed disagree about the goals of sentencing. Disagreement was greatest for the goals of rehabilitation and just deserts. One-fourth of the judges consider the goal of rehabilitation to be "extremely" important, while another substantial group of judges (19 percent) consider that goal to be no more than "slightly" important. Similarly, nearly one-fourth of the judges regard just deserts to be very important or extremely important, while another 45 percent regard that goal as either slightly important or not important at all.[15]

This disagreement among Federal judges about the importance of various goals of sentencing, taken together with previously reported findings of sentencing irregularity,[16] provides a useful background against which perceptions of sentence disparity among legal practitioners who are familiar with Federal sentencing policy can be examined. We asked Federal probation officers, Federal judges, Federal prosecutors, and defense lawyers who practice in Federal courts about sentence disparity within the Federal system. Results are presented in exhibit 3.

While nearly 90 percent of the Federal prosecutors and defense counsel interviewed acknowledged the occasional existence of sentencing disparity (at least "some of the time"), only half of the Federal judges and 37 percent of the Federal probation officers interviewed saw it that way.

Similarly, while over a third of all Federal prosecutors and defense lawyers perceived the existence of unwarranted sentence disparity all or most of the time, only 9 percent of the Federal judges and *none* of the Federal probation officers perceived such a level of unwarranted disparity.

In view of these perceptions, it should not be surprising that most Federal judges and probation officers express the belief that sentence decisionmaking in the Federal courts is quite satisfactory. Nearly three-fourths of all Federal judges and over half of the Federal probation officers interviewed regard the current sentencing system as being at least "adequate to the task" (see exhibit 4).[17] Federal prosecutors and the defense counsel interviewed, on the other hand, tend to regard the Federal sentencing system as less than adequate.

Sentencing Guidelines Based on Historical Norms

Opinions about sentencing, such as those documented above, constitute one important basis for the continuing development of Federal sentencing policy. Another important basis is provided by the identification and analysis of those factors about offenders and their offenses that seem to explain how judges currently sentence.

In order to develop and institute guidelines, the Senate has called for a sentencing commission that would have responsibility for conducting sentencing studies and developing from those studies a set of guidelines to be used by Federal judges. In general,

> The Commission, in the guidelines promulgated . . . shall, for each category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code. If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range more than 25 percent.[18]

The Senate further indicated factors that might be considered in those guidelines, including the grade of the offense, the nature and degree of harm caused, and so on.[19] It also proscribed some factors as being inappropriate for inclusion, such as the offender's race, sex, and socioeconomic status.[20]

Because the Senate could not be precise in specifying the weight that should be attached to each factor, it called for the use of actual sanctions, instead, as a starting point:

> The Commission, in initially promulgating guidelines for particular categories of cases, shall be guided by the average sentences imposed in such categories of cases prior to the creation of the Commission, and in cases involving sentences to terms of imprisonment, the length of such terms actually served, unless the Commission determines that such a length of term of imprisonment does not adequately reflect a basis for a sentencing range that is consistent with the purposes of sentencing described in subsection 101(b) of title 18, United States Code.[21]

This provision of the revised Federal codes constituted a central aspect of the research agenda for the current sentencing project—the analysis of historical sentencing patterns in the United States district courts.

It is appropriate to regard the analysis of recent sentences as only a first step in the formulation of guidelines for at least two important reasons. First, to the extent that the imposition of sentences has been deficient, statistical analysis of historical patterns would tend to reveal such deficiency and thus provide a basis for developing sentences that correct them. Second, going beyond recent sentencing practices to fashion sentences that account for deterrence, incapacitation, rehabilitation, and so on, may be in order, but such a process should evolve both from analyses of the effectiveness of alternative sentencing strategies and from analysis of recent sentencing patterns. Transition to any new sentencing system is not likely to be orderly without an understanding of historical norms to provide a point of departure from which any modifications could evolve.[22] Thus guidelines can be viewed as dynamic, responding to changing norms, new scientific findings, and informed opinions, such as those discussed in the previous section, but should proceed from a factual understanding of existing sentencing patterns.

To provide an empirical basis for organizing such information, we collected data from presentence investigation (PSI) reports. Prepared by Federal probation officers under the aegis of the Administrative Office of the United States Courts, the PSI is used primarily to provide information needed by the judge in deciding how to sentence a Federal offender.[23] The Federal PSI report typically contains detailed information about the nature and extent of the *offense*, the number of codefendants and nature of the offender's participation with others involved in the

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[8]This sample of 113 Federal probation officers was drawn from the pool of 94 Federal districts as follows: First, the 94 districts were stratified by size into three groups. Then the districts were sorted geographically within each stratum by the nine U.S. Census divisions. Next, every fourth district was selected from these rankings, plus some additional districts to ensure that we included all eight districts from which we sampled PSI reports. The 28 districts thus selected include 6 of the smallest offices (Delaware, Middle Louisiana, Maine, Western Michigan, and Middle Tennessee); 12 medium-size offices (Connecticut, Middle Florida, Kansas, Eastern Kentucky, Maryland, New Mexico, Northern Ohio, Western Oklahoma, Western Pennsylvania, South Carolina, Western Texas, and Western Washington); and 11 of the largest offices (Central California, Northern California, Southern Florida, Northern Illinois, Eastern Michigan, New Jersey, Eastern New York, Southern New York, Eastern Pennsylvania, Southern Texas, and Washington, D.C.). As few as two and as many as six probation officers were interviewed in each district, depending on the size of the district. Of the 117 officers initially contacted, 113 were interviewed.

[9]We canvassed all 374 active Federal district court judges with at least 1 year of service on the Federal bench, were able to contact 354 of these judges, and completed interviews with 264 of them during the fall of 1979. In order to get more questions asked of the judges in an in-person interview averaging 90 minutes, we split the sample randomly in half, asking some questions of both groups and some of only one group. The question on the importance of goals was answered by 117 judges.

[10]Federal prosecutors were drawn from the same 28 districts used for the Federal probation officer sample described in note 8, above. From each of these districts we attempted to interview the U.S. attorney and from two to six assistant U.S. attorneys, depending on office size (assistants were rejected from the sample if they did not spend at least 30 percent of their time on criminal cases). In 16 of the 28 districts, we were able to interview the U.S. attorney. The duration of the interviews with these 16 U.S. attorneys and 87 assistants averaged 80 minutes.

[11]Defense attorneys were sampled from the same 28 districts that Federal probation officers were sampled from, described in note 8. In each of the 28 districts we collected a systematic sample of 100 court dockets for cases closed within the preceding 18 months. (Since some districts have more than one court, we sampled dockets from 45 locations.) The name and address of the defense counsel and type of counsel (i.e., whether court appointed or public defender) were recorded from each docket. The number of attorneys contacted in each of the 28 districts ranged from two to six, depending on the size of the district. Of the 187 defense counsel contacted, interviews were completed with 110 lawyers: 60 retained, 38 CJA, and 12 public defenders. As with Federal prosecutors, the interviews averaged 80 minutes in duration.

[12]The sample of 1,248 members of the general public was drawn from a standard sampling frame used by the survey team of Yankelovich, Skelly, and White, Inc. Persons 16 years or older were sampled from 156 cluster point areas selected from a mix of Standard Metropolitan Statistical Areas (SMSAs) and non-SMSAs in the nine Census regions of the continental United States. Four males and four females were interviewed in person in each cluster point location, with random callbacks to ensure accuracy.

[13]Eight Federal prisons were selected as sites for inmate interviews, with site selection designed to provide regional variety and a mix of prison security levels. The eight institutions are Atlanta, Georgia (very high security); Terre Haute, Indiana (very high security); Oxford, Wisconsin (high security); Englewood, Colorado (medium security); Danbury, Connecticut (light security); Lexington, Kentucky (minimum security); Lompoc, California (minimum security); and Seagoville, Texas (minimum security). Inmate lists for each of these eight institutions were then obtained from the Federal Prison System master file in Washington, D.C., with each list indicating the offender's race, ethnic background, offense, and length of sentence. No women were included in our sample, and white collar offenders, who amounted to 7 percent of the persons on these lists, were oversampled at a rate of three to one (20 percent of the offenders in our sample were white collar offenders).

[14]Daniel Glaser, *The Effectiveness of a Prison and Parole System* (Indianapolis: Bobbs-Merrill, 1969); Lloyd E. Ohlin, Herman Piven, and Donnell Pappenfort, "Major Dilemmas of the Social Worker in Probation and Parole," *National Probation and Parole Association Journal*, vol. 2 (July 1956), pp. 211-25.

[15]It is useful also to examine opinions about the extent to which sentencing goals are actually attained, since those opinions are likely to provide an explanation for beliefs about the importance of sentencing goals, examined above. In fact, the utilitarian goals of sentencing, which rank high in importance, also ranked high in terms of perceived effectiveness. Every population surveyed regarded current sentencing and criminal justice system practices to be more effective in achieving the goals of deterrence and incapacitation than in achieving the goals of rehabilitation and just deserts. Each respondent was asked: "Look at the goals of the criminal justice system and sentencing in particular. . . . How well do you think the system actually achieves each of these goals?" Judges said that the system achieves the goals of deterrence and incapacitation at least moderately well at more than twice the rate as they said that it achieves the goals of rehabilitation at least moderately well. Incapacitation was regarded by Federal probation officers, defense counsel, and Federal prosecutors as the goal most effectively achieved. Interestingly, the judges expressed a substantially stronger belief in the effectiveness of deterrence, both general and special, than did any other group surveyed.

[16]See note 2, above.

[17]These findings are discussed in more detail by John Bartolomeo, *Judicial Reactions to Sentencing Guidelines*, a report on file at INSLAW.

[18]S. 1722, 994(b).

[19]S. 1722, 994.

[20]*Ibid.*

[21]S. 1722, 994(1).

[22]Specific systems of departure from historical norms, based on various philosophies of sentencing, are discussed by the authors, with Charles Wellford, in the article cited at note 7, at pp. 371-77. See also Forst and Wellford, cited at note 2, pp. 818-32.

[23]Under Rule 32(c)(1) of the Federal Rules of Criminal Procedure, a PSI report must be prepared for each convicted Federal offender unless waived by the defendant with the permission of the court. The PSI is used not only to support the sentencing decision, but also to aid probation officers in supervising offenders on probation or parole, to assist the Federal Bureau of Prisons in the process of classifying offenders for assignment to an appropriate institution, and to support the parole release decision process.

crime, and other circumstances that set the stage for the offense; about the *offender* and his or her criminal history, family background, education, psychological characteristics, means of support, and prospects of future criminal involvement; and about the *sentence* eventually selected by the judge.[24] The investigation required to obtain the information about the offense and offender usually takes 3 to 4 weeks, consisting of an indepth interview with the defendant, as well as interviews with law enforcement agents who were involved with the case, the assistant U.S. attorney(s) who prosecuted the case, family members, current or former employers, and others knowledgeable about relevant aspects of the case.[25] The relatively exhaustive nature of this investigation is easily justified by the importance of the information to the judge and the often substantial consequences of the sentencing decision to the defendant.[26]

(1) Collecting and Coding PSI Reports

The richness of the information contained in the PSI report makes it ideally suited to the purpose of assembling data capable of supporting analysis of actual sentencing norms. Hence, as a first order of business, in mid-1978, we set out to obtain a large sample of Federal PSI reports. The Administrative Office of the U.S. Courts agreed to provide those reports.[27] Specifically, we received PSI reports for cases in 11 offense categories to analyze sentences for offenders convicted between 1974 and 1978. The reports were selected from a sampling frame provided on computer tape by the Administrative Office. The sample consisted essentially of several hundred reports drawn randomly from 8 Federal districts (up to 120 per district) for each of 8 offense categories and over 500 reports drawn randomly nationwide for each of three categories.

This sampling design was specifically constructed with several considerations in mind:

(1) The offense categories should cover the full range of Federal severity classes for which PSI reports are available, including cases as serious as Class A felony.

(2) The offenses should include major classes of white collar crime.

(3) The offenses should be defined in such a way as to achieve a balance between homogeneity (i.e., the offense category should not include a variety of fundamentally different crime types) and sufficiency of sample size (i.e., it should not be so narrowly defined as to consist of too few cases).

(4) The sample should be drawn primarily from districts known usually to prepare high quality PSI reports.

(5) The sample should contain a mix of districts in terms of both size (i.e., caseload) and region.

(6) The sample should span at least 2 years in each district to avoid biases associated with seasonality or other short-term phenomena.

The resulting sample of PSI reports by district and offense category is shown in exhibit 5. The numbers indicated represent the numbers of reports received, coded, and then returned to the districts that had provided them.

As these PSI reports were arriving at the Administrative Office from the individual district probation offices, the research staff recruited a team of data coders,[28] developed coding instruments and trained the coders in the process of reading the reports and coding them properly,[29] rented and equipped a room in the Administrative Office with secure files and other needed supplies, and established control procedures to ensure that the data would be coded reliably and efficiently.[30] These procedures in place, the coding operation began. After an initial learning period, the typical PSI report came to require about 1 hour to code and an additional hour to review, record on computer tape, and audit; each crime category required about 3 weeks to complete. These data were then merged with computerized data on case dispositions from the Administrative Office.

(2) Description of Offenses, Offenders, and Their Sentences

The Federal offense categories selected for this project represent a variety of criminal involvements including both assaultive behaviors, such as homicide and bank robbery, and white collar crimes, such as mail fraud, income tax fraud, and false claims.[31] Not surprisingly, we find some differences among the characteristics of persons convicted for the various offenses.

Among the more striking differences is that associated with prior criminal record. Offenders convicted for the more assaultive offenses tend to have more serious criminal records than other offenders, with rates of prior adult incarceration ranging from 55 percent for bank robbers to 3 percent for bank embezzlers (see exhibit 6). Recorded prior criminal involvements are also common among persons convicted of homicide, narcotics, and forgery offenses; prior records are relatively (not absolutely) infrequent among persons convicted of bribery and postal theft.

Like local offenders, convicted Federal offenders are predominantly (85 percent) male and disproportionately, although not predominantly (30 percent), black (see exhibit 7). As noted earlier, they tend also to be older than local offenders; we estimate the mean age of convicted Federal offenders to be over 40. About half are married, only slightly more than half are high school graduates, and nearly four-fifths have legitimate incomes of less than $12,000 annually (exhibit 8).

About half of the Federal offenders convicted during the period studied, 1975-78, were incarcerated for their offenses. (See exhibit 9.) Those imprisoned served an average of about 2 years before parole release. Persons convicted of the most serious offenses, homicide and bank robbery, seldom received sentences of probation and faced actual terms of imprisonment that averaged about 6 years. In contrast, only about one in four of the persons convicted of the least serious offenses studied, bank embezzlement and postal theft, were sentenced to terms of confinement, and those persons usually faced incarceration for terms of less than a year.

Fines were used in only about every seventh case, and for those cases the fines amounted to an average of less than $1,500. While fines were not given to most Federal offenders, persons convicted of certain crimes, notably bribery and tax fraud, usually received sentences that included a fine.

For most Federal offenses, those most likely to be imprisoned were ones who had criminal records, ones whose cases involved large amounts of money or property, and those convicted at trial (exhibit 10).

Some correlates with the decision to incarcerate are more controversial. While race did not emerge as a systematic predictor of the sentence, the factors "male" and "unemployed" did. These latter two factors were systematically related both to the decision to imprison and to the expected term of imprisonment for most Federal offenses analyzed (exhibit 11). Of course, these findings do not necessarily mean that Federal judges single out males and unemployed persons for harsh punishment, consciously or otherwise. These two factors may be standing in for unmeasured determinants of sentencing, such as lack of contrition, nature of violence, degree of intent, specific motive, and so on. With respect to unemployment, the conscious decision to commit crime in the first place could simultaneously elevate the severity of the sentence and explain the offender's unemployment, in which case unemployment would be correlated with, but not causative of, the severity of the sanction.

As a more general and less ambiguous proposition, it is evident that current sentencing patterns in the Federal courts appear for the most part to follow a set of uncontroversial principles. Federal judges give tougher sentences to offenders who: (1) commit more serious crimes; (2) have more extensive criminal histories; and (3) choose to take their chances at being found guilty in trial and then lose, rather than give up their right to trial with a plea of guilty.[32]

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[24] The Probation Division of the Administrative Office of the United States Courts provides guidance for the preparation of presentence reports and some control to ensure that the information is adequate and uniform from one district to another. See Administrative Office of the U.S. Courts, *The Presentence Investigation Report*, Publication No. 105 (1978). Some systematic differences are established from district to district. For example, probation officers in some districts offer sentence recommendations to the judge, and in other districts are not encouraged to do so. Information about the sentence eventually selected by the judge is, of course, not part of the PSI report, per se; rather, that information is attached to the PSI as a cover sheet and maintained in the district probation office files of PSI reports.

[25] We are extremely grateful to members of the Probation Division of the Administrative Office of the U.S. Courts for making available this information about the preparation of PSI reports, and for making possible the transmittal of these reports for data extraction to support this research project.

[26] Indeed, many have argued persuasively for the need for greater disclosure and review of the facts presented to the PSI report. See, for example, Stephen A. Fennell and William N. Hall, "Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts," *Harvard Law Review*, vol. 93 (June 1980), pp. 1613-97.

[27] This agreement followed extensive discussions with representatives of the Administrative Office, Federal judges, and probation officers, and a formal request that included an agreement by the Institute for Law and Social Research to adhere to a carefully developed plan to ensure that all data transfers and data extraction procedures would protect the privacy of individuals referred to in the PSI reports. Thus, it was agreed that all data would be transferred and inventoried through the Administrative Office, and all data coding would take place within the Office or under the supervision of representatives of the Office. Those procedures were strictly adhered to during the project.

[28] Data coders were recruited largely from universities in Washington, D.C. As a result, we experienced substantial turnover in the team in May and September—the end of the spring and summer semesters.

[29] Coding instruments were developed initially from a sample of 23 PSI reports provided by the Federal Judicial Center. These instruments were used in turn to provide initial training of coders. These coding instruments were redrafted as PSI reports started becoming available from the Administrative Office, and subsequently redrafted as necessary.

The coding instruments comprised two distinct parts. The first part consisted of "core" data elements common to all offense categories (e.g., offender's residence, sex, race, criminal history, employment record, education, marital status, whether the case involved codefendants, number of counts in the conviction, pretrial release status, alias, whether rearrested while on pretrial release, whether a drug user, alcoholic, the sentence, and so on). The second part consisted of data elements unique to a particular offense (e.g., amount embezzled, number of persons killed, and so on).

The coding team worked on one crime category at a time, with coding instrument development for one category overlapping with the actual coding of the preceding crime category. The team received training in the coding of each offense category, and coding instruments were redrafted as problems emerged in training for the coding of a given offense.

The procedures for coding instrument development and training are described more fully in the companion report by Janet Davidson and Mary-Laing McKernan, *Data Documentation for the Analysis of Federal Sentencing Decisions* (Washington, D.C.: INSLAW, 1980), on file at INSLAW.

[30] A coding supervisor answered questions of individual coders, sometimes referring the question to a senior staff member. Ten percent of the PSI reports were randomly selected for coding by two different randomly selected coders, to test the reliability of both individual coders and individual data elements. All coding sheets were then keypunched and verified. Procedures for maintaining quality control in the coding of data are described in more detail in Davidson and McKernan, *ibid.*

[31] The information presented in this section is described more fully in the project report by William Rhodes and Catherine Conly, *An Analysis of Federal Sentencing Decisions*. (Washington, D.C.: INSLAW, 1981).

[32] These results are generally consistent with those obtained in previous research on Federal sentencing practices. Paul Sutton, analyzing the Federal sentencing decisions made in 1971, found the sentences "to be a function, first, of the nature of the offense for which an offender is convicted, second, of the prior criminal record of the offender, and third, of the particular method by which the offender was found guilty." L. Paul Sutton, Federal Sentencing Patterns (Washington, D.C.: U.S. Department of Justice, 1978), report no. SD-AR-18, pp. vii, 28.

Analysis of PSI Data Quality

The ability of judges to follow a set of accepted principles in sentencing requires more than understanding of and agreement about principles. It also requires that the information about each offender receiving a sentence be complete and accurate.

The presentence investigation (PSI) report is the standard medium for providing this information.[33] In fact, in the vast majority of cases involving persons convicted in the Federal courts—those in which the defendant pleads guilty[34]—the presentence report provides the only substantive information available to the judge about the offense and offender.[35] The presentence report is influential in supporting not just the sentencing decision; it is used as well by Federal parole authorities in determining parole release.[36] Thus the information contained in the presentence report is central to both the decision whether to incarcerate and the term of incarceration. While the due process standard has not been applied as strongly to the information contained in the presentence report as it has to the evidence presented in trial,[37] due process at sentencing has nonetheless been recognized by both Congress[38] and the Supreme Court.[39]

Obviously, it is important to assess the quality of the information contained in Federal presentence reports, for the sake of both current and future sentencing systems. Part of the current research project involved such an assessment. In extracting data from 5,781 Federal presentence reports for the purpose of analyzing actual sentencing decisions, discussed above, it was possible also to analyze those data for quality. More than 70 common data elements were extracted from each of the reports. Additional data were extracted from those sections of the reports that pertained to the offense; 10 specific offense categories were represented,[40] each requiring a unique set of data elements to be coded from the presentence reports. We assessed the quality of both the general data elements and those that were unique to specific offense categories.

In our sample of 5,781 presentence reports, our data coders were unable to find the information sought after in more than 5 percent of the reports for only 6 of the 73 data elements that were common to all offense categories.[41] These more frequently missing data elements all related essentially to the defendant's socioeconomic stability,[42] which many probation officers and judges are likely to regard as less crucial to the sentencing decision than the current offense and the defendant's criminal record.

Key data elements pertaining to specific offenses tended more frequently to be missing. Information about the estimated dollar value of property stolen in the actual offense was missing from 36 percent of the 144 presentence reports sampled involving mail theft cases, the actual amount of taxes owed was missing from 25 percent of the 525 reports relating to income tax fraud cases, and the value of the drugs involved in the actual offense was missing in 25 percent of the 651 reports describing drug crimes.[43]

Data accuracy is more difficult to assess than data completeness. Testing for completeness requires no external validation; testing for accuracy does. Indeed, the controversy over due process at sentencing has to do largely with the problem of external validation of the factors on which the

[33] Rule 32(c), Federal Rules of Criminal Procedure; Division of Probation of the Administrative Office of the U.S. Courts, *The Presentence Investigation Report*, *op. cit.* (note 24), p. 1; Roy L. Goldman and James W. Mullenix, "A Hidden Issue of Sentencing: Burdens of Proof for Disputed Allegations in Presentence Reports," *Georgetown Law Journal*, vol. 66 (August 1978), p. 1517; Stephen A. Fennell and William N. Hall, *op. cit.* (note 26), at pp. 1615-16. It has been estimated that presentence reports are prepared in about 90 percent of all federal cases. Note, "The Presentence Report: An Empirical Study of Its Use in the Federal Criminal Process," *Georgetown Law Journal*, vol. 58 (1979), pp. 451, 457.

[34] Eighty-three percent of the 32,913 defendants reported convicted and sentenced in U.S. district courts during the 12-month period ending on June 30, 1979, pled guilty or *nolo contendere*. Administrative Office of the United States Courts, *Annual Report of the Director, 1979*, p. A-69.

[35] The Administrative Office of the U.S. Courts provides explicit guidance to Federal probation officers regarding the information that is to be contained in the presentence report: the official description of the offense, the defendant's version of the episode, the defendant's prior criminal record (including both juvenile adjudications and the adult record), personal and family data (including information about marital status, education, employment, physical and mental health, military service, and financial condition), an overall evaluation and statement of sentencing alternatives, and a sentence recommendation. *The Presentence Investigation Report*, *op cit.* (note 24), p. 6.

[36] Federal parole release is determined under a guidelines system, authorized in 28 C.F.R. paragraph 2.20 (1979). Federal parole guidelines are applied on the basis of information about the actual offense rather than the offense of conviction. Information about the actual offense may be obtained from the presentence report, the grand jury indictment, or from other legitimate sources. United States Parole Commission, *Guidelines Application Manual*, appendix 4, at 4.08 (May 1, 1978).

[37] In *Williams* v. *New York* the Supreme Court ruled that the "due process clause should not be treated as a device for freezing the evidential procedure of sentencing in mold of trial procedures." 337 U.S. 241, 251 (1949).

[38] In 1975 Congress amended Rule 32(c)(3) of the Federal Rules of Criminal Procedure so as to require disclosure of the presentence report to the defendant, except under certain conditions, such as those that might clearly endanger the safety of informants. Previously, under *Williams* v. *New York*, the court was not required to verify with the defendant the information used in the sentencing decision. 337 U.S. 241 (1949). It had been argued that disclosure of such information would jeopardize the ability of the court to obtain complete information. Note, "Procedural Due Process at Judicial Sentencing for Felony," *Harvard Law Review*, vol. 81 (1968), p. 838.

[39] *Townsend* v. *Burke*, 334 U.S. 736 (1948); *United States* v. *Tucker*, 404 U.S. 443 (1972).

[40] See exhibit 5 and accompanying discussion about the sample design.

[41] The rate at which data elements were not found in the presentence reports was found to be remarkably constant across the eight Federal districts from which we drew most of our sample: Northern California, Connecticut, Middle Florida, New Jersey, New Mexico, Eastern New York, Northern Ohio, and Western Oklahoma.

[42] Specific information about community stability was missing in 39 percent of the 5,781 presentence reports, information about car ownership was missing in 29 percent of the reports, information about monthly income was missing in 26 percent of the reports, and information about home ownership was absent from 8 percent of the reports, as was information about total assets and total debts.

For further discussion of the analysis of data quality see project report by Davidson and McKernan, *op. cit.* (note 29), chapter 4.

[43] A previous analysis of the completeness of the information contained in presentence reports in a Denver court obtained similar results. More than one-fourth of all the data elements analyzed in that study were missing from at least 10 percent of the reports. Leslie T. Wilkins, Jack M. Kress, Don M. Gottfredson, Joseph C. Calpin, and Arthur Gelman, *Sentencing Guidelines: Structuring Judicial Discretion* (Washington, D.C.: U.S. Department of Justice, 1978), pp. 47-49.

John Coffee has provided one explanation for this finding; different probation officers are likely to systematically place emphasis on different aspects of the case, depending, for example, on whether they have a law enforcement perspective or a social welfare one. Coffee, "Repressed Issues of Sentencing: Accountability, Predictability, and Equality in the Era of the Sentencing Commission," *Georgetown Law Journal*, vol. 66 (1978), p. 1044.

sentence is based.[44] While we were unable to test the accuracy of the information in the presentence report, we were able to assess the clarity of presentation of that information. Obviously, factors that are presented clearly by the probation officer are less likely to produce errors in interpretation by the sentencing judge or parole board than are facts presented in a contradictory or otherwise ambiguous manner.

We did find, in fact, that some data elements were more often interpreted differently by two different data coders than other data elements. Ten percent of the presentence reports, selected randomly, were coded by two different data coders, also selected randomly, to provide a basis for this test of clarity and consistency of information.[45] The two coders agreed about the offender's residence, marital status, military status, sex, and whether the offense involved organized crime in at least 95 percent of the 575 presentence reports that were coded twice. On the other hand, they often interpreted other pertinent information items differently: 12 percent of the reports coded twice were interpreted differently with respect to the number of counts in the conviction, 15 percent with respect to the defendant's recent employment status, 23 percent with respect to the number of prior arrests, 26 percent with respect to an assessment of the defendant's skills (future employability), and 49 percent with respect to monthly income. While judges may be generally more proficient at interpreting presentence reports than our team of trained data coders, it is nonetheless evident that some of the information that is pertinent to the sentencing decision is presented with substantially more clarity and consistency than is other pertinent information.[46]

Conclusion

Attempts to structure the exercise of sentencing discretion in the Nation's courts, by and large, have not produced major sentencing reform in the Federal justice system. While sentences given to those who commit more serious offenses and have longer criminal records tend to be more severe, Federal judges disagree over the fundamental purposes of sentencing, and they continue to have the

Exhibit 1
SENTENCING GOALS: DEFINITIONS GIVEN TO SURVEY RESPONDENTS

General deterrence: To impose a penalty on an offender sufficiently severe to serve as a warning to others from committing similar crimes.

Special deterrence: To impose a penalty on an offender sufficiently severe to discourage him from committing any more crimes.

Rehabilitation: To reform the offender through treatment and correction measures to convert him into a useful and productive citizen.

Incapacitation: The protection of society through the removal of the offender so that he cannot commit further crimes.

Just deserts: To punish the offender in direct proportion to the seriousness of his crime.

[44] See notes 33-38, above, and accompanying text. Fennell and Hall report: "At this time, the probation officer usually confronts the defendant with any information that differs substantially from his original statement, and attempts to resolve the discrepancy. . . . Almost all federal probation offices employ a confrontation technique to verify information in the presentence report." Fennell and Hall, *op. cit.* (note 33), p. 1625.

[45] The 10 percent double-coding procedure was used both to control the accuracy of the data extraction by the individual data coders and to test for data clarity and consistency.

[46] Federal presentence reports may be of generally lower quality than we analyzed, since our sampling design concentrated on districts that were known to produce high-quality reports. See text at notes 27 and 28.

Exhibit 2

SENTENCING GOALS:
IMPORTANCE OF EACH GOAL TO SELECTED POPULATIONS
(Percentage who believe goal is at least very important)

		Sentencing Goals				
	N	General Deterrence	Special Deterrence	Incapacitation	Rehabilitation	Just Deserts
Federal probation officers	113	72%	75%	73%	68%	40%
Judges	117	65%	62%	51%	49%	23%
Federal prosecutors	103	91%	84%	71%	53%	45%
Defense counsel	110	46%	63%	48%	63%	24%
Federal prison inmates	550	16%	23%	18%	65%	37%
General public	1,248	74%	78%	69%	72%	73%

latitude to act out their disagreement in the sentences they hand out to convicted offenders.

The prospect of converting a sentencing system that is largely inscrutable—one that permits idiosyncratic sentencing behavior—into one that is more explicit and evenhanded would seem to warrant little resistance. Sentencing can be made more explicit and consistent in fairly short order by constructing guidelines around recent sentencing norms. A more thoughtful development of sentencing policy based on an assessment of the goals of sentencing and the ability of our Federal corrections and probation system to achieve those goals can proceed in the meantime. Thoughtfulness may be a hallmark of the judges who must ponder individually about the sentences they give under our current system, but it comes at a cost in terms of sentencing irregularity between judges and redundant pondering that defies justification.

Exhibit 3

PERCEPTIONS OF SENTENCE DISPARITY IN THE FEDERAL SYSTEM: PROBATION OFFICERS, JUDGES, PROSECUTORS, AND DEFENSE COUNSEL

N:	Federal Probation Officers (113)	Federal Judges (264)	Federal Prosecutors (103)	Defense Counsel (111)
Unwarranted sentence disparity occurs in the Federal court system:				
All or most of the time	0%	9%	34%	34%
Some of the time	37%	41%	53%	50%
Every once in a while	55%	32%	9%	10%
Never or virtually never	4%	2%	0%	1%
No answer	4%	16%	4%	5%
Total	100%	100%	100%	100%

Exhibit 4

OVERALL EVALUATION OF FEDERAL SENTENCING SYSTEM: PROBATION OFFICERS, JUDGES, PROSECUTORS, AND DEFENSE COUNSEL

N:	Federal Probation Officers (113)	Federal Judges (264)	Federal Prosecutors (103)	Defense Counsel (111)
Current sentence decisionmaking process is:				
Ideal	2%	1%	1%	0%
About the best that can be achieved	19%	37%	12%	5%
Adequate to the task	33%	35%	22%	34%
Falls short of what I think it should be	43%	20%	46%	42%
Very unsatisfactory	2%	3%	18%	15%
No answer	1%	4%	1%	4%
Total	100%	100%	100%	100%

Exhibit 5

NUMBERS OF PRESENTENCE INVESTIGATION REPORTS CODED FOR ANALYSIS, BY FEDERAL DISTRICT AND OFFENSE CATEGORY, 1975-1978

	Calif. (No.)	Conn.	Fla. (Mid.)	New Jersey	New Mexico	N.Y. (Ea.)	Ohio (No.)	Okla. (West.)	National Sample	Total
Homicide		–							527	527
Bank robbery	111	49	104	105	28	110	112	37		656
Drugs	105	40	105	110	39	110	102	40		651
Postal theft	11	17	26	12	5	36	29	8		144
Forgery	104	48	119	110	18	111	116	47		673
Bribery									541	541
Bank embezzlement	92	35	89	88	23	53	87	27		494
False claims									514	514
Tax fraud	66	57	78	98	10	96	99	21		525
Mail fraud	57	25	88	101	8	88	57	20		444
Random other	96	37	104	95	35	96	110	39		612
Total	642	308	713	719	166	700	712	239	1582	5781

Exhibit 6

PRIOR RECORDS OF CONVICTED FEDERAL OFFENDERS, BY OFFENSE, 1975-78

	N	Percent With Prior Conviction(s)	Percent with Reported Prior Juvenile Commitment(s)	Percent with Prior Adult Incarceration(s)
Homicide	527	65%	3.4%	39%
Bank robbery	656	80%	6.2%	55%
Drugs	651	59%	1.2%	26%
Postal theft	144	27%	1.4%	4%
Forgery	673	73%	2.1%	46%
Bribery	541	17%	0.4%	5%
Bank embezzlement	494	14%	0.4%	3%
False claims	514	40%	0.2%	18%
Tax fraud	525	35%	0.4%	13%
Mail fraud	444	55%	1.6%	27%
Random other	612	67%	1.1%	36%
Total	5781	63%	1.4%	33%

(Source: Federal presentence investigation reports and computerized case disposition data provided by the Administrative Office of United States Courts.)

Exhibit 7

CHARACTERISTICS OF CONVICTED FEDERAL OFFENDERS, BY OFFENSE, 1975-78

	N	Percent Male	Percent Black	Median Age*
Homicide	527	88%	46%	28
Bank robbery	656	94%	52%	26
Drugs	651	86%	19%	48
Postal theft	144	90%	27%	45
Forgery	673	75%	49%	28
Bribery	541	90%	8%	31
Bank embezzlement	494	53%	21%	28
False claims	514	74%	40%	40
Tax fraud	525	92%	9%	49
Mail fraud	444	85%	19%	36
Random other	612	88%	29%	46
Total	5781	85%	30%	43

*At the time of conviction.

(Source: Federal presentence investigation reports and computerized case disposition data provided by the Administrative Office of United States Courts.)

Exhibit 8

SOCIOECONOMIC CHARACTERISTICS OF CONVICTED FEDERAL OFFENDERS, BY OFFENSE, 1975-78

	N	Percent High School Graduates	Percent Married*	Percent At Least $1000 Monthly Income
Homicide	527	31%	30%	3%
Bank robbery	656	45%	29%	5%
Drugs	651	61%	40%	18%
Postal theft	144	76%	65%	34%
Forgery	673	39%	32%	6%
Bribery	541	72%	80%	60%
Bank embezzlement	494	90%	56%	13%
False claims	514	67%	53%	32%
Tax fraud	525	65%	78%	65%
Mail fraud	444	62%	58%	23%
Random other	612	51%	47%	20%
Total	5781	54%	46%	20%

*Includes common-law marriages.

(Source: Federal presentence investigation reports and computerized case disposition data provided by the Administrative Office of U.S. Courts.)

Exhibit 9

SANCTIONS APPLIED TO CONVICTED FEDERAL OFFENDERS, BY OFFENSE, 1975-78

	N	Percent Incarcerated	Mean Term of Imprisonment Among Those Incarcerated (months)*	Percent Fined	Mean Fine Among Those Fined
Homicide	527	79%	70.0	1%	$ 300
Bank robbery	656	91%	78.0	1%	$2500
Drugs	651	69%	26.2	9%	$3000
Postal theft	144	26%	6.8	15%	$ 500
Forgery	673	50%	18.1	5%	$ 500
Bribery	541	41%	7.4	65%	$2500
Bank embezzlement	494	24%	9.5	9%	$ 500
False claims	514	39%	12.0	23%	$1500
Tax fraud	525	39%	6.3	65%	$3000
Mail fraud	444	47%	17.6	21%	$1000
Random other	612	53%	32.1**	16%	$1125
Total+	5781	50%	23.3	14%	$1475

*Mean length of time served was estimated from the sentence, release guidelines used by the U.S. Parole Commission, good time provisions of the Bureau of Prisons, and Federal statutes.

**Linear regression estimate based on the relationship between incarceration rate and mean prison term for the other ten offense categories. ("Real" time could not be readily calculated for this offense category in the manner used for the other categories.)

+Aggregate proportions and means are calculated using numbers of Federal convictions (reported in the *Annual Report of the Administrative Office of the U.S. Courts*) as weights.

(Source: Federal presentence investigation report face sheets—Probation Form 2.)

Exhibit 10

PREDICTORS OF THE JUDGE'S DECISION TO INCARCERATE FEDERAL OFFENDERS, BY OFFENSE, 1975-1978*

	N	Amount of money or property involved	Criminal history	Trial rather than plea	Sex (male)	Race (black)	Unemployed	Other
Homicide	527				+		+	✓
Bank robbery	656	+	+				+	✓
Drugs	651	+	+		+	–	+	✓
Postal theft	144							✓
Forgery	673	+	+	+	+		+	✓
Bribery	541			+	+			✓
Bank embezzlement	494	+	+		+			✓
False claims	514	+	+	+		+		✓
Tax fraud	525	+		+	+		+	✓
Mail fraud	444		+	+	+		+	✓
Random other	612	+	+	+	+	+	+	✓

*A "+" (or "–") signifies that a factor was found to be positively (or negatively) related to the decision to incarcerate at the .05 level of statistical significance, based on a multivariate probit analysis. A "✓" indicates that one or more other variables were also statistically significant.

Exhibit 11

PREDICTORS OF THE EXPECTED TERM OF INCARCERATION ("REAL" TIME) FOR THOSE SENTENCED TO FEDERAL INSTITUTIONS, BY OFFENSE, 1975-1978*

	N	Amount of money or property involved	Criminal history	Trial rather than plea	Sex (male)	Race (black)	Unemployed	Other
Homicide	527		+		+		+	
Bank robbery	656	+	+				+	✓
Drugs	651	+	+	+	+		+	✓
Postal theft	144	+						✓
Forgery	673	+	+	+	+		+	✓
Bribery	541		+	+				✓
Bank embezzlement	494	+	+		+			✓
False claims	514	+	+			+		✓
Tax fraud	525	+	+	+	+		+	✓
Mail fraud	444	+	+	+	+		+	✓
Random other	612	+	+	+	+		+	✓

*A "+" signifies that a factor was found to be positively related to the expected term of imprisonment at the .05 level of statistical significance, based on a multivariate tobit analysis. A "✓" indicates that one or more other variables were also statistically significant.

END