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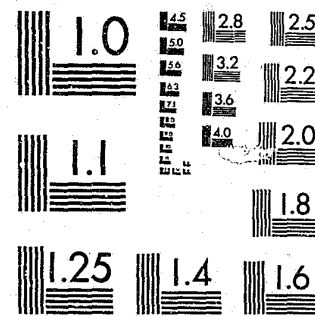

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EVALUATION
OF
HAWAII'S INDETERMINATE SENTENCING LAW

Statewide Sentencing Project

March 1981

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U.S. Department of Justice
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Statewide Sentencing Project
Office of the Administrative Director
of the Courts

State of Hawaii

PREFACE

The Statewide Sentencing Project was established by the award of a grant from the Hawaii State Law Enforcement and Juvenile Delinquency Planning Agency to the Office of the Administrative Director of the Courts, State of Hawaii.

Judge Masato Doi (retired) was the project director, and Alvin T. Ito, former Deputy Public Defender, was the reporter. In addition, an eighteen member Advisory Committee was named to assist the project. The members of the committee were:

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The sentencing provisions of the Hawaii Penal Code are based on the concept of indeterminate sentencing. Indeterminate sentencing, once hailed as a major reform to promote the goals of rehabilitation, has in recent years come under severe challenge, and the project purpose was to re-assess it in the light of the current controversy.

Several related and important segments within the general area of sentencing are outside the scope of this project. Juvenile adjudications as well as misdemeanor sentences which are fixed do not involve indeterminate sentencing concepts, nor does the death penalty. Thus, the project focus is on adult felony sentencing (excluding the death penalty) and, more particularly, the sentence of imprisonment (as distinguished from sentences of fine, probation, restitution, etc.).

The project engaged in several methods in examining the concepts related to determinate and indeterminate sentencing: research was done on the extensive literature on the subject; a sentencing simulation study was conducted; correctional facilities on the island of Oahu were inspected; persons involved in the corrections area were interviewed; advisory committee input was obtained; and sentencing data from the judiciary was obtained.

The staff wishes to thank all of those persons who assisted the project in its efforts.

It should be expressly noted that the observations, conclusions and recommendations contained in this report are those of the project staff and no necessarily of those of the Advisory Committee or its members.

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INTRODUCTION

Crime, and more particularly street crime, is of overriding public concern today. The incidence of crime has been on the increase in the last decade[1] and this fact, together with the latest in murders, rapes, and robberies, has been more prominently publicized in the media in recent years. Evidence of mounting frustration with the crime problem is reflected in the almost daily letters-to-the-editor decrying criminal activity, the numerous anti-crime bills introduced in recent legislative sessions, the campaign rhetoric and election results, and the overall attitudes and opinions held by the people in our community.[2]

In fact, there is no question but that there has been a marked shift in community outlook on the balancing of interests between the offender and the victim. From what was once a popular view (indeed, the surge towards the rehabilitative approach was buttressed by it) that the "poor offender" was a product made defective by the demeaning societal environment in which he grew up and, therefore, was an individual to be helped by society towards reformation, the increase in the crime rate has put a premium on the right of society to be free from the fear of being victimized. The value of peace of mind--the good old days of the unlocked residence--has appreciated at a rate greater than inflation.

The perceived villains are "lenient" judges and parole boards, "plea bargaining" prosecutors, and "clever" defense lawyers. More basic causes of crime do not attract the

public fancy: the more simplistic the solution to crime, the better--and the highly visible and directly involved segments of the criminal justice system become the popular targets. In particular, sentencing of street crime offenders takes over center stage with the media and triggers a public outcry for harsh sentences as the key to crime control--even though only a minimal fraction of offenders end up facing a court for sentencing.

However, the purpose of this project was not to explore the causes of crime and to provide answers on crime reduction. The project was initiated because of the nation-wide controversy which errupted in the 1970's among the experts in the field of criminology, and more specifically, the students in the field of criminal sentencing, as to the validity of the indeterminate sentencing philosophy which had dominated the correctional field for a century. Of course, to the extent that alternative sentencing policies may have an impact on the incidence of crime, their impact on crime reduction is considered. But an inquiry into the causes of crime and crime reduction would entail a study of factors far beyond mere sentencing considerations: factors such as urbanization, unemployment and the health of the economy, poverty and the opportunities for advancement, immigration rates, the influence of socialization such as the schools, the media, the family, and the societal values which these institutions encourage, the frustrations of the disadvantaged, and many others all far removed from the criminal justice system.[3]

The current widespread debate on indeterminate versus determinate sentencing is particularly relevant to Hawaii because of the sentencing structure embodied in the Hawaii Penal Code enacted in 1972. Hawaii had adopted the indeterminate sentencing approach prior to the Penal Code, and this sentencing philosophy was further stressed and fleshed out in the Code. It is indeterminate sentencing that became the focus of severe criticism in the 1970's, and it is this attack which induced an assessment of Hawaii's sentencing structure.

(a) Historical Background

In colonial days, sentencing as we know it today was non-existent. Jails were used only to house those awaiting trial, not to imprison those found guilty of crime. Instead of prison, sentences consisted of fines, floggings or brandings, the stocks or the pillory to humiliate, banishment, and, the linchpin of the penal law of those time, the gallows. Hanging was the primary deterrent against crime and was prescribed for over 200 offenses, even for a petty offense like pick-pocketing. These draconian sentencing laws were mitigated by the lesser likelihood of a culprit being caught because of inadequate apprehending machinery, by devices such as "benefit of clergy" (release of a first-time offender who could recite a Bible verse), and by jury nullification (refusal of the jury to convict or conviction of a lesser offense).[4]

Prisons, invented by the Quakers of Pennsylvania, took over from the gallows and the floggings as the appropriate punishment for the criminal. The crude and bloody system of colonial times had failed to meet the crime problem of those days. The Quakers were for rehabilitating the criminal instead of hanging or flogging him; and the penitentiary was the answer. The offender was to be punished by imprisonment for fixed terms and be reborn by strict discipline, hard work, and silent meditation.

But in time the brutal realities of prison life and the crimogenic nature of the prisons gave birth to a new

outlook in the latter part of the 19th century: rehabilitation in prison should take place not through coerced discipline during fixed terms of imprisonment but through organized persuasion and indefinite terms. The new thinking was to permit a long period of confinement with the prison managers given discretion to release the offender earlier if "reformed." This was the beginning of the indeterminate sentence structure.

"Indeterminate sentencing" simply refers to a sentencing scheme in which generally long periods of imprisonment are imposed by the courts, but the actual term of confinement is made dependent on a determination, usually by a parole board, that the prisoner has been "reformed" and "is ready to take his place in society as a law-abiding member." Thus, the period of actual confinement becomes indeterminate. And the underlying philosophy behind an indeterminate sentencing policy is that the primary goal of sentencing is rehabilitation of the offender with the offender being released as soon as he is rehabilitated.

As noted, indeterminate sentencing has its roots in the late 1800's. Zebulon Brockway, superintendent of the Detroit House of Corrections was its leading proponent, travelling around the country in support of a reformed prison system under which release would be based on the progress of the prisoner.[5] Brockway's ideas were ripe for acceptance, and in 1870 the National Congress of the American Prison Association adopted the principle that "peremptory sentences ought to be replaced by those of

indeterminate length. Sentences limited only by satisfactory proof of reformation should be substituted for those measured by mere lapse of time."[6]

New York was the first state to adopt a general indeterminate sentencing law[7] and by 1922, 38 states had adopted this sentencing structure. By the time the current widespread attack began in the early 1970's, rehabilitation as the prime goal of sentencing was firmly enshrined, and all of the states had adopted the indeterminacy approach.[8]

The indeterminate scheme assumes that the criminal is a pathological offender, that we can treat his problem and that we can determine when he is cured. Its functioning has been analogized to the treatment of a sick patient by a doctor, and it is sometimes referred to as a "medical model." If the doctor (the judge) finds that the patient (defendant) is ill enough (needs to be rehabilitated because of some deficiency in his character), he orders the patient hospitalized (imprisoned). While hospitalized, the patient (now inmate) is diagnosed (evaluated by the parole board) to determine the nature of his illness and to plot the manner and method of treatment (placement and programming in prison). He receives this treatment until he is cured or well enough to leave the hospital (parole). Since the date of his discharge can only be determined by his progress while institutionalized, he is constantly monitored until the doctor (parole board has taken over this position from the judge) proclaims him well enough to

be discharged. Even though released, the patient (now parolee) needs follow-up treatment (assigned to a parole officer) to prevent a relapse (violation of parole), and if such occurs, the patient may be returned to the hospital for further treatment (parole revocation). The analogy may not be perfect in all respects (the prisoner has greater ability than the sick patient over his release date by being able to deliberately control his "progress" while institutionalized), but it does convey the basic idea behind the functioning of the indeterminate sentencing system.

(b) Indeterminate sentencing in Hawaii

Hawaii adopted the indeterminate sentencing approach in 1909.[9] The sentencing court was allowed to set both a maximum and a minimum term of imprisonment. The prisoner could be released prior to serving out the maximum term upon being paroled by the Governor, who acted upon recommendation of the Board of Prison Inspectors. The possibility of earlier release upon determination by the Board and the Governor that the prisoner was "cured" (sufficiently rehabilitated for safe release into the community) comprised the core of the indeterminate system.

This basic structure was modified from time to time by the legislature but the central theme of the indeterminate approach with rehabilitation as its objective was never challenged. Then in 1972, after several years of review, the legislature enacted a comprehensive codification of all of the substantive criminal law by the passage of the Hawaii Penal Code.[10]

The Hawaii Penal Code was patterned after the Model Penal Code of the American Law Institute. The latter embraced the indeterminate approach and its rehabilitative objective. As originally enacted in 1972, Hawaii's basic sentencing pattern took the following form:

1. The murderer is mandatorily imprisoned. Depending on the type of murder committed, he is committed either for 20 years to life with possibility of being paroled at any time, or for life without possibility of

parole until 20 years have elapsed.[11] The aggravated types of murders listed are those where the victim is a peace officer or witness, where a hired killing is involved, and where the defendant was imprisoned at the time of the killing.

2. As to all other convicted felons, the judge has one significant sentencing decision to make: whether or not to impose a sentence of imprisonment--the IN/OUT decision.[12] Imprisonment is on one side of the fence; probation, suspension of sentence, and monetary penalty (fine and restitution) are on the other. The judge's discretion dictates on which side of the fence the offender lands, but the statute has a stated bias against imprisonment.[13]

3. If the judge decides in favor of imprisonment, he has no alternative other than to pronounce a statutorily fixed maximum period of incarceration attached to the particular offense of which the felon is convicted.[14] In other words, although the judge has discretion in making the IN/OUT decision, he has no discretion in determining the length of the term of imprisonment: the judge is mandated to impose the maximum term set by statute for the offense involved.

4. After commitment of the offender, the paroling authority takes over and controls the actual length of imprisonment. It evaluates the prisoner and within six months after commitment, it sets a "minimum term" upon the expiration of which the prisoner becomes eligible for parole.

Parole hearings are to be held at the time of parole eligibility and from time to time thereafter. The paroling authority is to "determine the time at which parole shall be granted to any eligible individual as that time at which maximum benefits of the correctional institutions to the individual have been reached and the element of risk to the community is minimal,"[15] and no parole is to be granted unless it appears "that there is a reasonable probability that the prisoner concerned will live and remain at liberty without violating the law and that his release is not incompatible with the welfare and safety of society."[15a] If paroled, the parolee is monitored and supervised, and is subject to "retake" (re-imprisonment under the prior sentence) upon any violation of the parole conditions.[16]

The foregoing describes Hawaii's sentencing structure as adopted in 1972 and reflects how thoroughly it embraced the indeterminate approach based on rehabilitation as the measure for confinement. There has been no challenge raised against it, although every so often a particular judicial sentence has been subjected to public criticism as being too lenient or some public outcry has been directed against the paroling authority when an offender on parole committed a crime.

With the passage of time, as was to be expected the legislature made amendments to the Penal Code in the area of sentencing. Some were "pro-offender": prisoners who were imprisoned prior to the enactment of the Penal Code

were permitted to petition to have their sentences reduced to the lesser terms which would be applicable to their offenses under the Penal Code[17]; a procedure known as "deferred acceptance of guilty plea" was statutorily created to permit the courts to give an offender the opportunity to have the charge against him dismissed if the court found that the defendant was not likely to engage in criminal conduct in the future and that "the ends of justice and the welfare of society" justified such disposition.[18]

However, legislation directly related to the sentences to be imposed on future defendants was, as was to be expected in the face of the rising crime rate and media publicity, in the mold of "law and order" and against "lenient" sentences by the courts and "lenient" early parole by the paroling authority:

1. The 1976 legislature gave the sentencing judge discretion to prescribe imprisonment with mandatory five- and ten-year minimum terms for first-time offenders convicted of a felony in which firearms were used. As to second and subsequent felony-firearms offenders, the judge was mandated to impose imprisonment with ten-year minimums.[19] The judge's discretion on the IN/OUT decision on repeat felony-firearms offenders and the parole authority's discretion in the setting of the minimum terms were curbed by this legislative action.

2. The 1976 legislature also enacted what may be called the "repeat offender" statute.[20] In substance, repeat

offenders of certain enumerated felonies must be given prison sentences with prescribed minimum terms. This repeat offender statute originally applied to offenders who repeated an offense identical to the one previously committed; but in 1979, its coverage was broadened to include the repeat commission of any of the enumerated offenses,[21] and in 1980, its coverage was still further broadened by greatly increasing the types of offenses which fell within its scope and mandatory minimum terms were added.[22] Thus, for repeat offenders of the enumerated offenses, judicial discretion on the IN/OUT decision was abolished and paroling authority discretion in the setting of minimum terms was restricted.

3. Finally, in 1980 the legislature mandated that all class A felons without exception be sentenced to prison.[23] Probation was not a permissible disposition even for the first-time offender; judicial discretion became non-existent on the IN/OUT decision on a class A felony conviction. However, the sentence of imprisonment under this statute remains fully subject to early release by the paroling authority in its discretion. Additionally, the 1980 session extended the prison terms for youthful offenders from a flat four years to varying terms between four and eight years, depending on the class of felony.[24]

In spite of the various amendments making substantial inroads into the discretion of the courts and the paroling authority, the basic skeleton of the indeterminate approach

remains in the Penal Code:

(a) Subject to the legislatively prescribed mandatory minimum terms previously discussed (felony-firearms offenders and repeat offenders) and the special category of murderers not eligible for parole for twenty years, all offenders who are sent to prison are given indeterminate terms.[25]

(b) When an offender is given an indeterminate term, the paroling authority takes over and determines the minimum term at which time the prisoner becomes eligible for parole and also makes the early release (parole) decision.[26] Supervision while on early parole and the possibility of a retake with further imprisonment exist.

Thus, although somewhat battered by recent legislation the basic sentencing structure of the Hawaii Penal Code remains the indeterminate approach with rehabilitation as the primary sentencing objective.

(c) The Hawaii State Correctional Master Plan

The Hawaii State Correctional Master Plan ("CMP") had its beginning in 1970 when the legislature directed the State Law Enforcement and Juvenile Delinquency Planning Agency ("SLEPA") to develop a "master plan for Hawaii State correctional facilities, including organization and manpower requirements, in accordance with the recommendations for future correctional programs by the National Council on Crime and Delinquency."[27]

The result was a comprehensive study reflected in a five volume document titled "Correctional Master Plan" published in 1972. This document surveyed existing facilities in the state, assessed the nature of criminal justice in Hawaii, expanded upon its basic concepts, designed correctional facilities, and proposed a new agency (Intake Services Center) to coordinate the delivery of services to offenders.

In formulating the CMP, SLEPA adopted a fundamental proposition which shaped the final product: that "the objective of modern correctional programs is to rehabilitate offenders and to seek their return to productive community life..."[28] That the rehabilitation concept should assume primacy in the CMP was hardly surprising in the light of almost a century of unchallenged dominance nationally and its firm entrenchment in the Hawaii statutes ever since 1909. The rehabilitative philosophy in Hawaii is capsulized in the use of the word "correctional" in the title of the CMP itself, the reference to prisons as "correctional centers", and the labeling of prison guards as "correctional officers."

In 1973, the legislature began the implementation of the CMP.[29] Conditional release centers for inmates (a half-way house concept, intended to pave the way for the integration of the prisoner back into the community) were established; furloughs for inmates were authorized; "Community Correction Centers" for medium and low-risk prisoners were authorized for each of the counties, with one high security facility for the high-risk offenders on the island of Oahu. The most significant provision in the statute was the creation of an "Intake Services Center," a nerve center to service all persons entering the criminal justice system from the time of the initial entry (arrest) to the time of departure from the system (parole). Included among the duties of the Intake Services Center were: pre-trial evaluation and services for the arrested person, short-term residential detention while awaiting trial or other disposition, pre-sentence investigations for the courts, and post-sentence correctional evaluation and programming for offenders.[30]

Approximately $27 million for physical facilities has been expended in the implementation of the CMP. New community correctional centers have been constructed in all four counties, replacing the old jail facilities and the Oahu Prison. Other housing for prisoners consist of the Kulani Honor Camp on the island of Hawaii for lower security

inmates, the Keehi Annex (next to the Oahu Community Correctional Center) which serves as a temporary pre-trial detention facility, and two conditional release centers (Laumaka and Kamehameha) that serve as live-in training and work within the community. When completed, the capacities of the various facilities in the CMP are reflected in Table I.

The CMP is still not fully implemented. Construction of the correctional centers in Hawaii, Maui, and Kauai counties is finished, and the Intake Services Center on each of those islands is operational. On Oahu, the correctional center is still in the construction stage, although almost complete. The Oahu High Security Facility (formerly the Halawa Jail) is also nearing completion.

An important concept in the CMP is that of placing corrections facilities within the various communities, as opposed to placement in segregated prison sites. This would fit in with the rehabilitative approach. But the idea of community-based correctional facilities has never gotten off the ground, primarily because of community resistance. Understandably, each separate community vigorously opposes the placement of such centers in the neighborhood (although it may be a good idea "in some other place"). As a result, there are no immediate plans to establish other conditional release centers other than the two now existing.

TABLE I

FACILITY BEDSPACE CAPACITY (When Construction completed: January 1981)

Facility	Capacity
Hawaii Community Correctional Center	24
Maui Community Correctional Center	22
Kauai Community Correctional Center	15
Conditional Release	23
Oahu High Security Facility	72
Kulani Honor Camp	75
Oahu Community Correctional Center	546
	777

Because of this and other problems,[31] as well as the swing in public and legislative sentiment away from the rehabilitative ideal towards punishment, the 1979 legislature requested SLEPA to reassess the CMP and the function of the Intake Services Center.[32] The SLEPA report, while not directly addressing the soundness of the concept of rehabilitation contained in the CMP, finds it to be a viable one:[33]

> "The basic rationale and policy determinants that were developed initially are still sound and required very little change regarding the Correctional Master Plan.
> ....
> There is considerable conjecture among many individuals in the criminal justice system that the Correctional Master Plan concepts have changed, and, therefore, the treatment of the offender who is incarcerated would likewise change. Regardless whether community attitute changes and the offender is being incarcerated more frequently and must remain confined for a longer period of time, treatment and how it is achieved must occur within the confines of the facilities designed for that particular purpose. The only difference is that treatment as a process is now extended from a previously short period of time to a longer period. As long as our original premise holds true that eventually the majority of all offenders incarcerated are released into the community, then this reality must be faced and dealt with as the statistics now show."

The SLEPA report thus supports the primary focus of the existing CMP: that "the objective of modern correctional programs is to rehabilitate offenders..."

(d) The Movement to Determinate Sentencing

Criticisms of the indeterminate sentencing system is not unique to the past ten years. Various criminologists and others had earlier published studies that essentially reflected the dissatisfaction now being leveled against it.[34] However, it was not until the early 1970's that the attack on the indeterminate approach gained sufficient momentum and recognition so as to spark a nationwide debate, eventually leading to sentencing reforms in at least fifteen states.[35]

Probably the first book of significant impact was "Struggle for Justice," authored in 1971 by the American Friends Service Committee. It was a broad-based attack on the treatment of convicts in America, focusing on the repression, inequities, and hypocrisy of the indeterminate sentencing system. Permitting discretion in the police, prosecutors, judges, parole boards, and prison officials was denounced as a major cause of disparate treatment of offenders, causing the Committee to conclude that "we ought to fit the punishment to the crime, not to the person."[36] By tailoring the punishment to fit the crime, all persons found guilty of the same criminal act under the same circumstances would be dealt with uniformly. Emphasis on the offender under the indeterminate sentencing scheme (with rehabilitation as its goal) seemed only an excuse to incarcerate the poor and disadvantaged, the group that always appeared to be the hardest to "rehabilitate",

resulting in their being incarcerated for long periods of time. The offered solution was a determinate sentencing approach: fixed terms attached to the offenses, so that disparity of sentences among offenders based on the rehabilitation rationale would be abolished.

"Struggle for Justice" was followed by several other books of significant impact.[37] These writings attacked its basic assumptions and the problems engendered.

The proponents of the movement towards the determinate sentencing approach comprised a spectrum of interests which could be termed surprising. The prison reformer looking for justice for the prisoner saw it as ending the frustrations of inmates suffering at the hands of capricious correctional staff and parole boards, and as curing the discriminatory practices against the disadvantaged. The police and prosecutor supported it as a counter to "soft and lenient" judges and parole boards which freely granted probation and parole. Philosophers found determinate sentencing more attractive because it avoided coercive rehabilitation. And social scientists believed that determinate sentencing more properly complemented the present state of our inability and unwillingness to rehabilitate offenders.

II. CRITICISMS OF INDETERMINATE SENTENCING

A. Prisons do not rehabilitate

The basic premise of indeterminate sentencing is that programs and treatment in prison can "cure" the offender, thus making it a logical proposition for the period of incarceration to be left flexible and dependent on when the cure occurs. An evaluation published in 1970[38] which surveyed one hundred studies of correctional treatment outcomes concluded:

> Therefore, it seems quite clear that, on the basis of this sample of outcome reports with all of its limitations, evidence supporting the efficacy of correctional treatment is slight, inconsistent, and of questionable reliability.

Studies comparing the recidivism rate of offenders placed on probation with those sent to prison and later paroled, indicate that whether an offender will commit further crimes depends not so much on the treatment he receives but rather on the characteristics of the offender himself.[39]

An exhaustive survey accomplished for the state of New York covering the period 1945-1967 to evaluate the importance of treatment programs resulted in a book, "The Effectiveness of Correctional Treatment" by D. Lipton, R. Martinson, and J. Wilks (1975) which was given wide prominence because of Martinson's conclusion that "With few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on

recidivism."[40] Martinson felt that "...the personal characteristics of offenders--first offender status, or age, or type of offense--were more important than the form of treatment determining future recidivism. An offender with a favorable prognosis will do better than one without, it seems, no matter how you distribute 'good' or 'bad', 'enlightened' or 'regressive' treatments among them."[41]

Media pronouncement of Martinson's findings took the form of the sensational and attention-getting slogan: "Nothing Works!" It gave a strong push to get off the indeterminate sentencing bandwagon on which all the states had been for about a century.[42]

Sweden's criminal justice system is viewed by many as one of the most advanced in the world. Compared to the United States, the incarceration rate and the average length of stay is low. The prisons are small, modern, and well-staffed; inmates retain all civil rights; they are able to communicate almost uncensored with their friends, relatives, and attorneys; they have the opportunity to leave the prison for work, training, or furloughs; they may receive unsupervised visits in prison. Inmates have the privilege of spending "vacations" at prison resorts in the mountains, of furthering their education in prison or at local educational institutions, and of working for pay which in some instances is comparable to that received in the private sector. And because most of the inmates are Swedish, their prisons do not suffer from the racial tension and violence that pervade many of America's facilities.[43]

Yet the results of such a modern correctional system are far from than ideal. A follow-up study of 273 youths admitted to prison in 1968 found that 85% had been reported for new offenses within two years. A review of 25% of the inmates released from prison in 1973 showed that two-thirds of them had committed new crimes within 30 months following release on parole.[44]

A review of eleven studies on the efficacy of correctional treatment resulted in the following conclusion by a Swedish sociologist:[45]

> Irrespective of the interpretations given, the results seem clear enough. Despite shorter terms of confinement, more open institutions, and more treatment resources given both during and after institutionalization, the Swedish correctional institutions seem to produce recidivism rates as high as the American.

The Swedish experience is especially enlightening since the rehabilitative effort is much more advanced than that obtaining in the United States. Many of the conditions present in the Swedish system would be politically unacceptable or too costly for implementation in our country. Yet the bottom-line analysis appears to be: the studies raise serious doubt about the ability of any prison system, no matter how humane, to reduce significantly the negative aspects of imprisonment and to bring about an offender's "cure."

The foregoing is not to say that the argument is all one-sided. There are those who attribute the failure of rehabilitation to the lack of a concentrated effort by the

states to implement effective policies. In defense of the indeterminate system, it has been said:[46]

> The assumption is that treatment has failed. There is little empirical evidence to support that statement. To the contrary, it can be argued that treatment has not really been tried.

There can be little dispute that most states have not placed a high priority in providing adequate treatment programs for inmates, and that in some instances, such programs are non-existent. In spite of the rehabilitative ideal, money has always been a scarce commodity with incessant community demands on it. In the competition for the tax dollar, the correctional system has not been a favored child.

A review of Hawaii's programming for inmates presents the following picture. Until recently the women's facility (Maluhia Correctional Facility) was located in Kaneohe in a single antiquated building. At Maluhia, only minimal effort was made to provide the residents with training, counselling, and other support services. The inmates spent most of their time sleeping, and in some instances, exercising. Recreational facilities consisted of a small yard, and there were no rooms for conducting any kind of training. Instruction was available in only very limited areas and could scarcely be considered given at a level that would help the inmate adjust once released.

Although the women prisoners have been recently transferred to the Oahu Community Correctional Center in

Honolulu, there has not been any dramatic increase in the availability of programming. Present programming available to them is limited to participation in worklines that involve the maintenance of the prison facilities. No other vocational training exists.

A look at the overall situation at the Oahu Correctional Center (formerly Hawaii State Prison) shows that it presently houses approximately 530 male and female inmates. The normal capacity is 425. Most of the education and training in the facility is administered by the Hoomana School, which is attached to the community college system of the University of Hawaii. Hoomana School has a paid staff of six persons: two academic instructors, two vocational instructors, an administrator, and an accounts clerk. Additional training is provided by four volunteer instructors and graduates of Hoomana School. Skeletal classes are offered in basic education (GED), liberal arts, and clerical and vocational support. Vocational classes with a total capacity of only 31 participants, are limited to auto mechanics and welding. Classes are held two or three times a week, with completion of a course being dependent on the progress of the individual inmate-student. Additionally, workline employment is available to the prisoners in the operation and maintenance of the prison. Although these worklines do provide some vocational training as an incidental result, the primary function of worklines is to keep the inmates occupied and to provide an economical and

available source of labor. Occupational training should provide a critical role in attempting to rehabilitate and reintegrate the offender into society. Yet, at present, the two vocational classes offered have a capacity to train a total of about 30 inmates, or only about 6% of the prison population.

Insufficient space is a primary cause of inadequate programs at the Oahu Correctional Center and is the result of several factors. The Correctional Master Plan (CMP) contemplated that most if not all of the programming and treatment of the inmates at the Oahu Correctional Center (as distinguished from inmates confined in the Halawa Correctional Facility for high-risk prisoners) would occur outside of the institution by using resources available in the community. The "residents" of the Center were contemplated to be of the low- and medium-risk caliber permitting this kind of community-related programming. In line with this thinking, community-based halfway houses were to be established.[47] Vociferous opposition by the affected communities whenever proposals are made to build new halfway facilities has effectively put a stop to implementation of that concept. The present climate of public opinion is such that indulging in further thoughts along those lines would appear futile.

The original plans under the 1972 CMP for the Center projected a prison population of about 300. This number was soon exceeded, and public pressure in recent years for

more offenders to be sent to prison has resulted in an increasing rate of incarceration. This development required that the initial plans be altered, so that additional modules were planned and the original main cellblock which had been scheduled to be demolished was retained and renovated in order to increase the holding capacity. However, no plans were made for additional programming facilities to service the larger population, and in fact, some of the new modules were placed in areas previously reserved for training and recreational purposes.

The foregoing indicates the lack of any meaningful treatment programs for the rehabilitation of the prisoners. But even with more adequate facilities and programming, it should be recognized that the subject is a convicted felon, often placed in prison as a last resort because probation and other methods of treatment have failed. The offender lacks many of the traits and skills necessary for societal existence. Learning defeciencies are not uncommon, and the majority of inmates have not completed the tenth grade, with actual achievement levels equal to that of a sixth-grader or less. Imprisoned, the offender is separated from family and friends; he is often bitter and hostile. The average prisoner lacks self-discipline, motivation, responsibility, and self-confidence. Often, an inmate has a drug or alcohol problem. He is trapped in an environment that can be violent, and survival is a constant worry. Further, the pressure to rehabilitate takes on a coercive posture. It is

no wonder that the results of a number of well-funded experimental programs conducted recently indicate no significant decrease in recidivism among prisoners who had participated in prison programs.[48]

The efficacy of our rehabilitative system, or lack of it, is reflected in the recidivism rates for persons paroled. Table II, derived from the records of the Hawaii Paroling Authority, gives the average violation rates for all parolees placed on parole for fiscal years 1975 through 1979. The figures represent yearly averages over the five-year period. Thus, there was a yearly average of 304.4 persons on parole during the 1975-79 period, with 55.8 revocation hearings each year (representing 18.3% of the number on parole).

Table II lists various indications of parole violations, depending upon what is considered to be a violation. The "official" violation rate is 10.2%, the rate of actual revocations out of which 2.8% were for new convictions and 7.4% were for technical violations. (Technical violations frequently are the basis for revocations for new crimes on which convictions have not been obtained.) Line 6 represents the total number of paroles suspended in cases in which the whereabouts of the offenders were unknown. This figure is included because it may be assumed that a parolee commits a violation by losing contact with his parole officer. On this assumption, line 7 represents the highest potential revocation rate, and line 8 represents the actual revocations plus the violators who "disappeared."

TABLE II: Average Violation Rates for Fiscal Years 1975-1979.*

(1)	Net parole population	304.4
(2)	Total number of revocation hearings	55.8 (18.3%)
(3)	Number of paroles revoked	31.0 (10.2%)
(4)	Revocations for new convictions	8.6 (2.8%)
(5)	Revocations for technical violations	22.4 (7.4%)
(6)	Paroles suspended because whereabouts unknown	17.0 (5.6%)
(7)	Revocation hearings plus suspensions ("2" plus "6")	72.8 (23.9%)
(8)	Revocations plus suspensions ("3" plus "6")	48.0 (15.8%)

*The data contained in this table is derived from the Hawaii Paroling Authority's Annual Reports for fiscal years 1975 through 1979.

There were an average of 55.8 hearings per year, with 31 revocations or a rate of 56%, indicating that a substantial number were continued on parole after the hearing without a revocation being ordered. The reason for no revocation could be several: the technical nature of the violation, the presence of mitigating circumstances, the short time left on parole, or no violation found. Perhaps the best indication of the violation rate as reflected in Table II is the 15.8% shown in line 8. It represents the addition of the actual revocations plus those who violated their parole conditions by "disappearing."

It may be noted that the actual number of violations may be understated to the extent that they are not detected by the parole officer, the police, or other agencies, or even if detected, are not proceeded against.

The rehabilitative capacity of prisons is an illusory one:

> Increasing numbers of citizens are disenchanted with the unproductive bureaucracy known as "criminal corrections," whose claim to "cure" a captive population of offenders remains manifestly unfulfilled. Many observers have reluctantly reached the conclusion that such promises were hollow from the beginning: Whatever else prisons might do, they do not--because inherently they cannot--make their inhabitants better.[49]

Showing much greater parolee recidivism than the averages worked out in Table II is a study which traced the history of 359 persons arrested for violent crimes (the index crimes excluding burglary and theft-larceny) in 1973 for

a period of 5 years. Of that number, 43 ended up being given prison sentences; and of the 43, 15 were paroled after having served an average of 30 months. Within the short time that they were on parole, 12 had been rearrested (7 for new violent crimes). This would indicate (assuming that "arrest" equals an actual commission of a crime) recidivism at an 80% level, and led the study to conclude: "...the high rearrest rate for the parolees indicates that while prison tends to keep the criminally-prone out of circulation for a time, it does little to change their lifestyles."[49a]

Prisons are not conducive towards and are ineffective in achieving rehabilitation. Moreover, Hawaii's present correctional facilities do not have any effective programs to rehabilitate its prisoners. The lack of resources to rehabilitate and the seeming inability to rehabilitate even if given those resources led Judge Marvin Frankel to conclude: "Unless or until we have some reasonable hope of effective treatment, it is a cruel fraud to have parole boards solemnly order men back to their cages because cures that do not exist are found not to have been achieved."[50]

B. Dangerousness of Offender Cannot Be Predicted

The concept of rehabilitation assumes that the offender enters an institution where he is diagnosed and an appropriate plan of treatment is programmed. The offender then undergoes this treatment until he has progressed to the point that the risk of the offender recidivating ("dangerousness") is minimal and he is released into the community. It may be noted that it is not necessary for rehabilitation programs to be effective for the indeterminate sentencing system to function. The dangerousness of an offender can be reduced by factors apart from rehabilitative programs, such as passage of time, aging of the offender, or the deterrent impact of incarceration. However, it is critical that the ability to predict dangerousness or non-dangerousness in order to make an effective release decision.

Thus, one of the basic underpinnings of the indeterminate approach is the assumption that we have the capability to ascertain when the inmate is "cured" or reformed and no longer prone to commit offenses. Unfortunately, our ability to predict the dangerousness of offenders is extremely primitive to the point that it is of not much use in guiding the release decision.

Errors in prediction fall into two categories. A person who is classified as dangerous but who would not in fact commit a dangerous act is termed "false positive": the examiner finds the individual to be positive for dangerousness, which prediction turns out to be false. The

other error is represented by the "false negative": the individual is predicted to be safe but in fact later commits a crime. It is the large number of false positives and false negatives that causes difficulty in designing a penal policy based on the predicted dangerousness of an offender. And the weakness of predictions gives rise to criticism from opposite ends: obviously, false negatives produce real victims who suffer injury and loud public outcry for not having kept the criminal "in prison where he belongs"; and false positives claim to be arbitrarily and capriciously incarcerated because of the lack of confidence in making accurate predictions.

Two methods are used to predict the dangerousness of offenders: the clinical method and the actuarial method. The clinical methods involves the "clinician" (usually a psychiatrist, psychologist, or a parole board) determining what factors to consider and how much weight to give to each in evaluating the offender's dangerousness. The actuarial method uses statistics relating to the offender's characteristics (age, prior record, type of offense, etc.) to predict his propensity towards recidivism, much as insurance companies use individual characteristics to determine life expectancies.

The clinical methods is frequently used by psychiatrists and psychologists, the professionals who are presumably best able to predict the dangerousness of an offender. Yet, most of the literature indicates that they are unable to

predict future dangerousness within an acceptable degree of accuracy.[51] Apparently human behavior is so complex and so little is known about the causes of abnormal behavior that even the experts are simply unable to predict with any reliable degree of accuracy what an individual will do in the future.

A ten-year study conducted in Massachusetts attempted to predict the dangerousness of 592 males who had been convicted of sexual offenses.[52] They were referred to a diagnostic center for treatment of dangerous persons and were extensively interviewed and tested to determine dangerousness. Each diagnostic study was based on clinical examinations, psychological tests, and a meticulous reconstruction of the life history elicited from multiple sources--the patient himself; neighbors, teachers, and employers; and court, correctional, and mental hospital records. The clinical examinations were made independently by at least two psychiatrists, two psychologists, a social worker, and others. Most of the persons examined were found to be non-dangerous and referred to the court for release; others were treated and then released; some remained in custody.

Of the 592 inmates diagnosed, 435 were eventually released and followed up: 386 were released upon the advice of the Center; 49 were released against its advice. Of those released with the Center's advice, 8% recidivated (a person was considered to have recidivated if he committed

a "serious assaultive crime") while 34.7% of those released against the Center's advice recidivated. The Center's prediction was accurate to the extent that the "dangerous" group was four times more likely to commit new offenses than the "non-dangerous" group (34.7% vs. 8.0%). However, it should be noted that even for the "dangerous" group, the experts were wrong 65% of the time in their prediction of future recidivism.

The clinical method requires substantial expenditures of money to hire sufficient personnel and to provide adequate facilities to evaluate the offenders. Yet the results of such prediction are of limited value.

The actuarial method has not proven any more satisfactory. In 1965, the California Department of Corrections developed a violence prediction scale that attempted to predict the future violence of offenders by analyzing objective factors in the offender's background.[53] This method enabled examiners to segregate a group of high-risk offenders, 14% of whom were expected to violate parole by the commission of a violent or potentially violent act. The expected violation rate for all offenders was anticipated to be 5%, roughly one-third the rate of the high-risk offenders. Although the system identified a group of high-risk offenders who posed a risk that was three times greater than the risk presented by the general parole population (14% vs. 5%), it did so at the expense of identifying falsely 86% of the high-risk group (false positives). Further, the violent

and potentially violent acts prevented by the incapacitation of the high-risk offenders amounted to only 8% of the total number of such acts committed by all parolees, so that the system missed 92% of the violent and potentially violent acts. If a policy were followed of incarcerating the high-risk group and releasing the low-risk group based on California's prediction scale, it would have resulted in six high-risk offenders being incarcerated to prevent one from committing a violent act, while at the same time permitting 92% of the violent acts to be committed by the released low-risk group.

The National Academy of Sciences recently commissioned an assessment by John Monahan of the current state of prediction research.[54] He surveyed eight studies that used both the clinical and actuarial methods to predict dangerousness and found no study that could make predictions of dangerousness with true positives equalling or exceeding 50%. The relative abilities of each study to predict dangerousness is summarized in Table III. What is striking is the number of false positives that result from these sophisticated tests. "Of those predicted to be dangerous, between 54 and 99 percent are false positives--people who will not in fact be found to have committed a dangerous act. Violence, it would appear, is vastly overpredicted, whether simple behavioral indicators or sophisticated multivariate analyses are employed and whether psychological tests or throrough psychiatric examinations are performed."[55]

TABLE III

Research Studies on the Prediction of Violence

	% True Positives	% False Positives	N Predicted Violent	Follow-up Years
Wenk et al. (1972) Study 1	14.0	86.0	?	?
Wenk et al. (1972) Study 2	0.3	99.7	1630	1
Wenk et al. (1972) Study 3	6.2	93.8	104	1
Kozol et al. (1972)	34.7	65.3	49	5
State of Maryland (1973)	46.0	54.0	221	3
Steadman (1973)	20.0	80.0	967	4
Thornberry and Jacoby (1974)	14.0	86.0	438	4
Cocozza and Steadman (1976)	14.0	86.0	96	3

One of the reasons for over-prediction of dangerousness and the resulting large number of false positives is that the experts understandably tend to be conservative in order to avoid possible lawsuits and the usually sensationalized publicity surrounding the commission of a crime by a false negative. Public concern focuses on the one violent act by a parolee or probationer, and the non-recidivist is generally ignored.

Given the primitive state of our predictive capacities, there are two alternatives if dangerousness is to be used as a determinant. One is to keep imprisoned all of the potential recidivists by releasing only those who show the smallest potential for failure. Not only would this result in a great number of non-recidivists being kept imprisoned, but such a policy would entail high social costs in terms of its effect on those impacted by the mass incarceration as well as a great financial burden to the community. At present, it takes about $50,000 to construct one prison bed space and about $16,000 per year to keep one prisoner in it.

The other alternative would be to keep incarcerated only those persons whose possibilities of recidivating is extremely high. Such a policy would unfortunately result in a greater number of prisoners being paroled and recidivating, while, ironically because of our poor predictive abilities, at the same time capturing only a very few of the offenders who would actually recidivate. The undeniable

conclusion is that prediction is an unreliable basis on which to base a sentencing policy.

There are problems in addition to the inability to predict dangerousness that make the use of behavior prediction difficult in the implementation of an indeterminate sentencing system. The Hawaii Paroling Authority is composed of one full-time member and two part-time members, none of whom has any expertise on the subject of predicting recidivism. Members are selected "on the basis of their qualifications to make decisions that are compatible with the welfare of the community and of individual offenders, including their background and ability for appraisal of offenders and the circumstances under which offenses were committed. It is not surprising that in the light of the unreliability of predictive capabilities the minimum terms are not set solely by the Authority's perception of the length of time that it would take to "rehabilitate" an offender but also by a chart that is primarily based on a punitive philosophy.

Actually, even though minimum terms and release decisions were theoretically supposed to be guided by predictive technology, the fact is that historically the decision-makers (parole board members) did not release prisoners solely or even largely based upon their perception of the offender's predicted recidivism.[56] Violent offenders often display characteristics that make them good candidates for relatively early release from prison; however, such a

disposition would hardly comport with concepts of punishment, and the latter generally prevailed. This apparent unwillingness of paroling authorities to utilize predicted recidivism as the major guide for release is a reflection of public and political attitudes and supports the premise that the rehabilitative concept is basically not an acceptable principle no matter how much the experts may espouse it. The truth is that parole and sentencing policies reflect "a variety of competing purposes, prominently including 'just deserts,' public protection against crime, and the regulation of prison population. Classification systems designed for use in such decisions must take into account a variety of competing factors if they are to be effective and useful."[57] And to the extent that factors other than rehabilitation enter into the picture, the workings of the indeterminate sentencing system become skewed and the inmates exposed to it become frustrated because there is no reward for progress made by the prisoners.

It may be pointed out that the inability to accurately predict dangerousness has caused some to raise moral concerns about the indeterminate system. Predictions made will be more often wrong than right. Is it fair to keep imprisoned an individual for possible future criminal activity,[58] especially when the determination of such possibility is more guesswork than not?[59]

The ability to accurately predict the future dangerousness of an offender is a tool that is vital to the proper

functioning of the indeterminate sentencing system. Yet the most advanced and sophisticated clinical and actuarial predictive techniques administered under ideal conditions are still inadequate for proper prediction. At a recent international conference of psychiatrists and other behavioral scientists, the consensus was that the current state of the art in the social sciences was such that future violent behavior could not be predicted.[60] And a task force of the American Psychological Association recently concluded:[61]

> It does appear from reading the research that the validity of psychological predictions of violent situations we are considering, is extremely poor, so poor that one could oppose their use on the strictly emprical grounds that psychologists are not professionally competent to make such judgments.

C. Disparity

Disparity refers to unequal or different sentences being given to similar offenders who commit similar crimes. Where there is a basis for differing dispositions based on justifiable differences in offender characteristics or the circumstances of the offense, the results should not be considered disparate. Disparity is the major criticism raised against indeterminate sentencing.

Under indeterminate sentencing geared to rehabilitation, basically there are two levels at which the disposition of an offender is subject to a large amount of discretion and resulting disparity. Terms such as "unbridled," "capricious," "arbitrary," and worse, have been applied to the discretion exercised, but at the least it is fair to say that it is "unstructured."

The first level is that of the court, at the time of imposing sentence. Of course, the judge has broad discretion to choose from among many alternative dispostions: imprisonment, fine, probation, restitution, etc. However, as far as impact on the defendant personally and perception by the public generally are concerned, the only significant distinction among the various alternatives is that between a sentence of imprisonment on the one hand and that of non-imprisonment (probation, fine, restitution, etc.) on the other. The judge's decision on whether to imprison or not may be referred to as the IN/OUT decision.

In the indeterminate system, each individual offender is viewed as unique and his "illness" is separately diagnosed. Since judges differ in sentencing philosophies and in individual prejudices and predilictions, consciously or subconsciously, disparate sentences are a foregone conclusion where unguided discretion obtains.

As early as 1919, a study of the sentences imposed in the New York Magistrates' Courts between 1914 and 1916 pointed out the differences in the sentences being given.[62] Some magistrates were severe on certain types of offenses and not on others; other magistrates were uniformly lenient or uniformly severe for all classes of offenses. The study concluded that "they show us so clearly to how great an extent justice resolves itself into the personality of the judge."[63]

A survey of sentencing practices in California for the offense of petty theft found that the percentage of cases in which jail was imposed varied greatly from county to county and even between districts within a given county. In San Francisco County, more than two-thirds of the defendants were given jail time; in Marin County, one-half were given jail time; and in San Mateo County, slightly more than one-third were jailed. Within San Mateo County itself, the percentage of persons given jail time varied from 15.6 percent for the Central District to 85.0 percent for the Northern District. The percentage of defendants sentenced to incarceration also differed from judge to judge, from

13.9 percent of 36 defendants sentenced, to 95.3 percent of 64 defendants sentenced. While recognizing that other factors may have a significant bearing on the type of sentence imposed, the study concluded:

> Whether a person is sentenced to a fine or to a jail term largely depends on factors that may have absolutely nothing to do with the degree of his or her culpability. The county or district of sentencing, as well as the sentencing judge, strongly correlate with jail time. We can assume from this that the determination of jail time is at least somewhat arbitrary because of the lack of intrinsic differences among the group.[64]

A survey of sentencing practices for the federal District Courts done in 1979 found disparity among the sentencing practices of the different districts.[65] Table IV indicates the extremes in the rates of incarceration and the average sentence length imposed. For the offense of theft and larceny, the imprisonment rate ranged from a low of 8% incarcerated to a high of 84% incarcerated. The average sentence imposed for drug abuse ranged from a low of one-half year to a high of 7.5 years. Again these figures do not reflect possible differences in circumstances that could account for the variation; nonetheless, where one district averages ten times more persons incarcerated than another, and another district imposes sentences that are fifteen times longer than the low, it is difficult to escape the conclusion that disparity in sentencing exists.

A sentencing simulation study was conducted in 1980 with the cooperation of some Hawaii judges to test the

Table IV - Range of Rate of Imprisonment and Average Sentence Length Imposed in U. S. District Courts for Year Ending June 30, 1977.*

	Imprisonment Rate		Average Sentence Length (Years)	
	Low	High	Low	High
Bank Embezzlement	8%	30%	0.5	2.0
Fraud	8%	69%	0.5	4.4
Weapons and Firearms	15%	86%	0.5	5.2
Forgery and Counterfeiting	21%	76%	0.5	4.6
Auto Theft	58%	100%	2.0	4.0
Bank Robbery	78%	100%	7.0	17.9
Drug Abuse	22%	97%	0.5	7.5
Theft and Larceny	8%	84%	1.3	4.6

*COMPTROLLER GENERAL, REDUCING FEDERAL JUDICIAL SENTENCING AND PROSECUTING DISPARITIES: A SYSTEMWIDE APPROACH NEEDED 7.19 (1979). This chart includes districts in which there were at least 25 sentences in each category.

potential for sentencing disparity. The simulation involved sending out the same six presentence reports on convicted defendants to nine circuit judges who were on the criminal bench at the time of the simulation. Each judge was asked to sentence each of the six offenders. Differences in the sentences imposed could not be attributable to different fact situations. Eight judges responded, resulting in the following IN/OUT dispositions. (A detailed report on the simulation is contained in Appendix A.)

Disposition	Defendant					
	U	V	W	X	Y	Z
Probation	2	3	7	5	8	3
Imprisonment	6	5	1	3	0	5
Total	8	8	8	8	8	8

There was only one instance (Defendant Y) in which all the judges agreed on the IN/OUT decision; in all other cases, there was at least one judge who disagreed with the disposition imposed by the other judges. In three instances (Defendants V, X, and Z), the split was almost down the middle. The results demonstrate that identical offenders will receive different sentences, depending upon the particular judge who imposes the sentence.

From a legal standpoint, there is nothing wrong with different sentences being imposed on identical offenders even if it offends our individual sense of justice. The law grants discretion to judges, and so long as the discretion is not abused, each sentence will withstand legal attack.

The sentencing simulation merely confirms what all of the other studies have consistently concluded: sentencing is not a science; sentencing is not even an art; sentencing is extremely subjective. Some judges may hate drug pushers the worst, others may go hardest on rapists, and still others abhor gun crimes the most. And there is no question but that as a general proposition some judges are harsher and others are more lenient. A research project into the sentencing practices of five judges on the criminal bench on Oahu in 1977 indicates that the rate of imposing a prison sentence varied among them from 9.1% to 30.5%.[66]

On the IN/OUT decision, the Hawaii Penal Code gives ambiguous guidance to the judge. It provides[67]

> The court shall deal with a person who has been convicted of a crime without imposing sentence of imprisonment unless, having regard to the nature and circumstances of the crime and the history, character, and condition of the defendant, it is of the opinion that:
>
> (1) There is undue risk that during the period of a suspended sentence or probation the defendant will commit another crime; or

(2) The defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution; or

(3) A lesser sentence will depreciate the seriousness of the defendant's crime.

In substance, the Penal Code states a presumption or bias against imprisonment by telling the judge not to incarcerate unless he affirmatively comes to the belief that one or more of the three grounds set forth is applicable. The statute further points the judge towards probation by listing various factors which he may consider that are in favor of such a disposition.[68] The leaning toward probation is the result of embracing rehabilitation as the primary goal of sentencing. Probation is favored because, in the language of the President's Crime Commission in 1967:

> The correctional strategy that presently seems to hold the greatest promise based on social science theory and limited research, is that of reintegrating the offender into the community. A key element in this strategy is to deal with problems in their social context, which means in the interaction of the offender and the community. It also means avoiding as much as possible the isolating and labeling effects of commitment to an institution. There is little doubt that the goals of reintegration are furthered much more readily by working with an offender in the community than by incarcerating him.[69]

The three grounds justifying incarceration exemplify principles which are commonly discussed as being among the basic objectives of sentencing. But there is nothing in the Penal Code to tell the judge how and on what basis to

apply any one of the three sentencing objectives. He may pick and choose from among them in making the IN/OUT decision.

The first ground justifying a sentence of imprisonment requires a belief by the judge that there is an undue risk that the offender will commit future crimes. The sentencing purpose reflected is "incapacitation": to reduce crime by incarcerating the offender and thus preventing him from committing further offenses.

The second ground requires that the judge find that prison is the appropriate environment for administering correctional treatment. This sentencing goal involved is "rehabilitation." Incarceration is ordered for the purpose of rehabilitating the offender, prison being the best setting in which to achieve it.

The final ground is the judge's opinion that anything less than a prison sentence would depreciate the seriousness of the crime. It would not be appropriate to have the offender himself, and probably more so, others in the community, treat the crime which was committed too lightly. In common parlance, the nature of the offense involved is such that unless the offender is punished by being sent to prison, the crime would be "taken too cheaply" by the offender and others. The objective here may be said to be a "deterrence" through punishment.

All three grounds have one basic utilitarian purpose: protection of society against future crime. The fact of

incarceration is certainly "punishment," but punishment *per se* is not the primary purpose of the sentencing scheme reflected in the Penal Code. The defendant who poses future danger to the community is incapacitated; rehabilitation of the defendant in prison will accomplish the ultimate in societal protection--the prisoner comes out reformed; showing the world that crimes like that committed by the defendant will not be treated lightly and will be punished by a prison sentence as a warning to refrain from such lawless conduct. These utilitarian objectives are to be contrasted with another sentencing purpose which will be discussed later: that which has been labeled "retribution," or more euphemistically, "just desert."

How does a judge arrive at an opinion that any of the three grounds for imposing a sentence of imprisonment is present in a particular case? As to the first (undue risk of recidivism), he is given no expert opinion or advice predicting the probability of future criminal conduct by the defendant, and even if he were, the value of such predictive opinion would be gravely suspect, given the present state of the art (as will be discussed later). The judge principally relies on the prior criminal history of the offender to make a prediction as to future conduct; and in general, the "repeat offender" is the one who is incapacitated.

As to the second ground (prison being the best place for rehabilitation of the offender), on what criteria is a judge to make a determination that it is a valid proposition? As a matter of fact, judges seldom find this a satisfactory proposition. Given the level of programming available and the inevitable association in prison with other criminals, it is difficult to justify a sentence on the reasoning that prison will be a positive influence in rehabilitating an offender. Prison may well be just the opposite--crimogenic.

The third reason justifying imprisonment is that the offense is so serious that not punishing the offender by incarcerating him would be treating the crime involved too lightly so that deterrence would be lost. There are no express standards by which to assess the "seriousness of the crime," and each judge exercises his individual discretion in making the determination. The subjective prejudices of the judges easily come into play: homicide, rape, drug dealing, robbery, gun crimes, etc., are often viewed differently by different judges--the pet hate of a particular judge may not be that of another.

With rehabilitation stated as the basic goal of sentencing (as evidenced by the bias towards probation), and with incapaciation, rehabilitation in prison, and deterrence through punishment also stated as justifications for imprisonment (and, therefore, valid sentencing goals), disparity in the IN/OUT decisions of the judges is insured

unless specific guidelines exist to discipline those determinations. Emphasis by a judge on one objective would lead to a result different from that of another judge who chose a different objective: defendant A, convicted of manslaughter may be given probation by a judge who stresses the incapacitative objective because he finds that the defendant does not present any danger of committing crimes in the future; that same defendant may be sent to prison by a second judge who felt that the taking of human life is too serious an offense not to be punished for deterrent purposes; a third judge, emphasizing rehabilitation as the primary objective of sentencing, may give probation because he does not believe prison to be a rehabilitative ambience and finds the defendant to be good probation material.

Add to the lack of guidance in the application of objectives the influence on some judges of impertinent factors such as whether or not a jury trial was demanded, or whether or not the defendant was represented by retained counsel,[70] or even racial considerations,[71] and it is no wonder that sentencing may become what has been described as a "random lottery."

It is undeniable that "the evidence is conclusive that judges of widely varying attitudes on sentencing, administering statutes that confer huge measures of discretion, mete out widely divergent sentences where the differences are explainable only by the variations among

the judges, not by material differences in the defendants or their crimes."[72]

Disparate sentences do not merely offend an abstract concern for uniformity; they deny the principle of equal justice under the law and has considerable impact on the inmates, especially when confined together and placed in a position to compare themselves.

Upon a defendant being given a prison sentence, the second level at which unstructured discretion is exercised with resulting disparity comes into play: the paroling authority's setting of minimum terms and granting of parole (early release). In some jurisdictions, the judge is given the power of setting the term of imprisonment when an IN decision is made, but in Hawaii, once the judge decides to put the offender into prison, the judge is mandated by statute to impose the statutorily prescribed maximum term attached to the particular offense involved.[73] However, whether the term of imprisonment is set by the judge or prescribed by statute, the actual length of time to be served in prison is left open for the paroling authority to determine after the prisoner enters the facility. Early release by the paroling authority upon rehabilitation of the offender is the essence of indeterminate sentencing.

Under the Penal Code, the Hawaii Paroling Authority sets the minimum term (at which time the offender becomes eligible for parole) within six months after commitment. The Authority must obtain a report on the offender's

pre-commitment life and his progress after he came into prison and hold a hearing at which the prisoner has a right to be heard. The only mention in the statutes which inferentially appears to be a guide in the setting of the minimum term is the statement that the "report shall be a complete personality evaluation for the purpose of determining his degree of propensity toward criminal activity."[74] Dangerousness is the only factor statutorily suggested as a guide to the setting of the minimum.

When the offender's minimum term is reached, the Penal Code provides that "full power...to grant, or revoke parole is conferred upon the paroling authority."[75] In making this parole decision, the Authority is directed to grant release when the "maximum benefits of the correctional institutions to the individual have been reached and the element of risk to the community is minimal,"[76] and when "there is a reasonable probability that the prisoner concerned will live and remain at liberty without violating the law and that his release is not incompatible with the welfare and safety of society."[77]

Several observations may be made on these statutory provisions. First, they constitute a broad grant of power to the Authority. Next, they contain a goal of public protection with rehabilitation of the prisoner being the benchmark for determining whether that protection is reasonable assured. And finally, they represent general policy statements which are easily subject to disparate

results upon application because they are not accompanied by specific guidelines to implement them.

Commendably, the Authority has attempted to structure its decision-making to achieve some consistency and fairness. Its "Rules and Regulations Governing the Practices and Procedures of the Hawaii Paroling Authority" sets forth principles and goals and the various factors which it considers in arriving at decisions. Additionally, the Authority has devised a rough "Sentencing Chart" (Table V), which is in fact a guide for the setting of minimum terms and not for the determining of sentences. Within the body of the chart, the term "sentence" means "prison commitment." The chart essentially states that:

1. the first time an offender goes to prison, his minimum is set at 1/3 of the maximum term attached to the crime;
2. the second time, his minimum is set at 1/2 of the maximum;
3. the third time, his minimum is set at 3/4 of the maximum; and
4. In the discretion of the Authority, the foregoing minimums may be decreased by 3 years or increased by 5 years because of mitigating or aggravating considerations.

The chart has not been formally adopted by the Authority and has not been published or widely distributed.

The Authority's Rules and Regulations contains several significant provisions. It states that its "philosophical base" consists of (1) safety to the public, so that parole will be granted only if compatible with

TABLE V: SENTENCING CHART

FELON	1st Sentence 1/3 of Maximum	2nd Sentence 1/2 of Maximum	3rd Sentence 3/4 of Maximum
Discretion of Authority	-3 Yrs. Mitigation +5 Yrs. Aggravation	-3 Yrs. Mitigation +5 Yrs. Aggravation	-3 Yrs. Mitigation +5 Yrs. Aggravation
CLASS A	6 Yrs. 8 Mos.	10 Yrs.	15 Yrs.
CLASS B	3 Yrs. 4 Mos.	5 Yrs.	7 Yrs. 6 Mos.
CLASS C	1 Yr. 8 Mos.	2 Yrs. 6 Mos.	3 Yrs. 9 Mos.
YOUTHFUL OFFENDER	1 Yr. 4 Mos.	2 Yrs.	3 Yrs.

public safety and where there is a reasonable probability that the prisoner will not recidivate, and (2) punishment of an offender, so that immediate and certain punishment "on an individual and professional basis" will be meted out for past, present, and future acts of the prisoner. As a "goal," it states that the Authority "will reasonably assist in all efforts toward rehabilitation" of the prisoner and support the efforts of other agencies as long as public safety and prisoner reintegration into society are not jeopardized. As for the mitigating and aggravating factors which the Authority may consider in its decision-making process, it lists circumstances attendant in the commission of the offense, the prisoner's criminal history, and various factors relating to the prisoner's potential for rehabilitation. The minimum term is defined as "the vehicle by which public safety is maintained through incarceration and the period during which the prisoner should prepare himself for parole by assuming responsibility for his conduct, development of self-control, and resolution of the problems which led him to commit the criminal act(s) for which he was incarcerated" and may be set at the same level as the maximum term given by the judge "if in the professional judgment of the Authority that term would be in the best interests of society and/or the prisoner."

What is apparent on the level of the paroling authority is that its discretion is extremely broad and that in the setting of minimum terms, although various principles

(public safety, punishment), goals (protection of society, rehabilitation), and considerations in decision-making (offender characteristics, circumstances of the offense, potentials for rehabilitation) are listed in the Rules and Regulations, they hardly add up to an organized set of specific guidelines by which the Authority can structure its decision-making to effectively achieve uniformity and equity. The Sentence Chart itself is an informal one, which may or may not be used by the members of the Authority. No primacy is given to any one of the various principles (rehabilitation, punishment, incapacitation) suggested in the Rules and Regulations so that in any given case, any of them can be applied with resulting disparity in the minimums.

Table VI gives the ranges of minimum terms that have been imposed by the Authority between 1975 and 1980. The terms imposed vary widely for each offense category. For example, for the offense of attempted murder, the range was between 6 years 8 months and 20 years; for first degree burglary, between 1 year and 10 years; for first degree rape, between 5 years and 20 years.

The variations in the minimums imposed do not necessarily mean that the Authority is dealing inequitably with the offenders. Inquiring into unequal treatment of offenders would require a much more sophisticated statistical analysis than a superficial listing of offenses and the minimum terms imposed. A particular offense

TABLE VI

RANGES OF MINIMUM TERMS IMPOSED BY THE HAWAII PAROLING AUTHORITY, 1975-1980.*

Offense	Maximum Term	Highest Minimum	Lowest Minimum	No. of Cases
Assault 1	10	10	5	12
Assault 2	5	5	2	19
Attempted Murder	20	20	06.08.00	17
Burglary 1st	10	10	1	157
	4	4	01.06.00	52
Burglary 2nd	5	5	1	115
	4	4	01.06.00	36
Credit Card Offenses	5	5	2	12
Escape 2nd	5	5	00.03.02	33
	4	4	02.06.00	11
Firearms/Ammo. Offense	5	5	3	11
Forgery 2nd	5	5	1	50
Kidnapping	10	10	6	18
Manslaughter	10	10	01.02.03	42
Murder	life with parole	50	10	16
	20	20	5	15
Poss Firearm b/Fug	5	5	01.06.00	35
Promo Dang Drug 2nd	10	10	3	42
Promo Dang Drug 3rd	5	5	01.08.09	10
Rape 1	20	20	5	37
Robbery 1st	20	20	04.01.09	113
	4	4	02.06.00	48
Robbery 2nd	10	10	01.04.25	49
	4	4	01.02.20	23

Offense	Maximum Term	Highest Minimum	Lowest Minimum	No. of Cases
Sexual Abuse 1	5	5	02.08.00	23
Sodomy 1st	20	20	6	12
Theft 1 Larc in Auto	5	5	01.08.00	89
	4	4	01.06.00	22
Theft 1 Stolen Prop	5	5	2	61
Unatz Opr Propl Vehc	5	5	2	48
	4	4	2	21

*Only offense categories where ten or more minimums were imposed are included. The maximum term represents the sentence of the court. The four years maximums are imposed for young adult defendants.

(for example, first degree robbery) can be committed under varying attendant circumstances (from a midnight shotgun entry into a residence to a teenager robbing his acquaintance of a dollar by threatening him with a knife) and by offenders with greatly dissimilar backgrounds (first time offender versus a repeater in prison for the fifth time).

However, the table does show that the Authority is imposing minimums that represent extremely wide ranges which appear to be disparate and can hardly be expected to be understood by those receiving them without explanation. This wide range is to be expected under the indeterminate approach which contemplates that each offender is to be dealt with on an individual basis by assessing his dangerousness and his potential for rehabilitation, an assessment which the present state of the art cannot credibly accomplish.

Actually, the Authority has attempted to discipline its setting of the minimums and promote uniformity by the use of its Sentence Chart which is basically premised not on any rehabilitative principle but on a punitive one. The number of past incarcerations is the prime consideration which influences the minimum term under the chart. However, the rehabilitative concept is not entirely abandoned but is included in the factors (mentioned in the Rules and Regulations of the Authority) which are to be considered in mitigation or aggravation, such as mental health reports,

skills and aptitude, adjustment while in prison, motivation to participate in available programs, potential danger, efforts to better himself, and employment and educational history. It should be noted that the more weight that is given to the factors related to rehabilitation, the greater will become the disparity among the minimum terms imposed.

As to the other significant decision made by the Authority, that of granting parole, the Authority assesses the offender to determine whether he has been "cured." Following the principles stated in the statutes, the Authority's Rules and Regulations are geared to an assessment of the offender's state of rehabilitation to determine whether he is no longer dangerous to society. Factors which are considered are the prisoner's parole plan, his institutional adjustment, mental health evaluations, and information relaing to self-control and dangerousness. The bottom line is that no parole is to be granted unless it is determined that there is a reasonable probability that the release is compatible with public safety. A release decision based on the foregoing assessment of whether a cure has taken place is subject to the criticism previously discussed that no credible prediction can be made as to dangerousness so that parole becomes a subjective determination with resulting disparity. However, the record of the Hawaii Paroling Authority reflects a consistent release of the offender when he reaches his eligibility for parole.

D. Inmate Frustrations

As has been previously noted, the indeterminate approach is premised on a capability to diagnose the offender, to rehabilitate him in prison, and to determine when the cure has been achieved, none of which seems to be done sucessfully at the present time. The resulting disparate treatment and uncertainty as to the period of confinement leads to prisoner frustration, dissatisfaction and violence.

Sentencing disparity has been said to be the cause of "...rioting and disorder and...other crimes" committed and for ex-convicts harboring a feeling of having been treated unfairly.[78] Unequal treatment not only diminishes the prisoner's respect for the law, thus hindering the rehabilitative process itself, but also gives rise to prison disturbances. James V. Bennett, former director of the Federal Bureau of Prisons, writes:

> "The prisoner who must serve his excessively long sentence with other prisoners who receive relatively mild sentences under the same circumstances cannot be expected to accept his situation with equanimity. The more fortunate prisoners do not attribute their luck to a sense of fairness on the part of the law but to its whimsies. The existence of such disparities is among the major causes of prison riots, and it is one of the reasons why prisons so often fail to bring about an improvement in the social attitudes of their charges."[79]

It is obvious that a paroling authority's determination of the minimum term, as well as its final release decision will be based substantially on the conduct and attitude of

the prisoner while in prison. Uncertainty as to exactly what is expected of them in order to achieve early release and uncertainty as to how long they must actually remain in prison are the cause of considerable frustration. Where such determinations remain largely subjective and discretionary, a tremendous amount of gamesmanship takes place to create the image of a rehabilitated offender. The attempt to satisfy the wishes of the paroling authority has been characterized as a giant con game.

> "Attempts to con the parole board are rampant inside our prison setting, and they demoralize both the persons conducting the programs and the prisoners. Prisoners are encouraged to undertake to manipulate the system, and the parole board is encouraged to look with heavy skepticism, cynicism, and disbelief upon all those who come before it. This cynicism reflects back upon the prison setting itself and increases discontent. Thus, one reason for rejecting the indeterminate sentence and the massive discretion which rehabilitation and individualization of sentence require is that we will avoid in the future the gross kinds of sham we see in prisons today."[80]

The indeterminate sentence and its attendant processes were found to be a major factor of discontent which contributed to the riots at Attica in 1971 in which 43 persons lost their lives.[81]

III. PURPOSES OF SENTENCING

There are four goals of sentencing generally recognized by penologists: deterrence, rehabilitation, incapacitation and retribution. Deterrence refers to the principle that future criminal conduct is deterred through the threat of sanctions. Rehabilitation contemplates the reform of offenders so that they become law-abiding members of society. Incapacitation involves the incarceration of offenders to prevent them from committing further crimes. Retribution is the imposition of punishment on the moral proposition that offenders who commit wrongs justy deserve to be punished. In theory, the first three are based on a utilitarian philosophy having crime reduction as the objective while the last is not.

The contention is made that in order to establish a meaningful sentencing structure, we "...must establish a coherent penal purpose, and our statutory enactment must reflect, and offer promise of achieving, that purpose."[82] The proposition is that without a singleness of purpose, the sentencing structure becomes ambiguous and will operate inequitably as different purposes are applied in the sentencing of different individuals. It could be argued that a disparity problem is inevitably caused by a sentencing structure such as that contained in the Hawaii Penal Code which incorporates rehabilitation as its goal and at the same time justifies incarceration to achieve the objectives of incapacitation as well as deterrence through punishment.

However, doctrinaire adherence to a single sentencing goal would have its shortcomings in meeting the gamut of criminal behavior and society's expectations. For example, the compulsive check-forger should be kept in prison indefinitely and the homicide defendant who is a leading light in the community be released quickly if rehabilitation or incapacitation is the sentencing goal because the former may be incurable while the latter may be a reformed individual even before he enters the prison compound. Retribution as a sole sentencing purpose may be an acceptable proposition (if agreement could be reached as to the just penalty for each crime) from the standpoint of straight logic because it disavows any utilitarian goals, but utility (crime control) is precisely what society demands of its penal laws.

A. Deterrence

One of the commonly accepted goals of sentencing is deterrence. The proposition is a simple one: that a penalty which is threatened will deter the commission of future crimes because of the unpleasantness of the threatened consequences. The premise is that the potential offender is a rational individual who will balance the perceived risks of punishment against the potential benefits to be gained by committing the offense and control his conduct accordingly. The philosophy underlying this thinking is that espoused by Jeremy Bentham: the rational balancing of pleasure against pain in human activity. Calls for increased sentence lengths, mandatory imprisonment, and reinstatement of the death penalty are often the by-product of deterrence thinking. The ultimate objective of the deterrence principle is, of course, crime control.

In recent years, computers and sophisticated analyses have been used to determine the impact of criminal sanctions on the crime rate. Generally, two methods of research are used: comparing the crime rate and sanctional level of two similar geographic areas (cross-sectional analysis) or comparing the differenct sanction levels and crime rates of one geographic area over two time periods (time-series analysis).

Since 1970, dozens of studies have attempted to estimate the deterrent effect of criminal sanctions. And many reviews have critiqued them.[83]

An extensive review of the literature was done by Daniel Nagin in a study commissioned by the Panel on Research on Deterrent and Incapacitative Effects.[84] He evaluated 24 studies that were based on nine separate data sets and concluded that "analyses that have examined the association of clearance rates, arrest probabilities, or police expenditure per capital with crime rates find consistently negative and nearly always significant associations."[85] This is consistent with the deterrence theory.

Nagin, however, points out methodological problems that affect the validity of his conclusions. First, crimes are under-reported. It is widely recognized that there is a growing reluctance by victims to report offenses because of personal fear of retaliation, disillusionment with the criminal justice system, and a desire "not to become involved." The effect of under-reporting is to create automatically a negative association between the sanction level and the crime rate even without any change in the actual incidence of offenses committed.[87]

Second is the problem of "simultaneity." Simultaneity considers not only the effect of the sanction level on the crime rate but also the effect of the crime rate on the sanction level and the possibility of both occurring contemporaneously.[88] With law enforcement, judicial and correctional resources fixed and subject only to slow change, an increase in the actual crime rate may overburden the resources of the criminal justice system, resulting in decreases

in the sanction levels. Thus, given constant resources, a smaller percentage of offenders will be incarcerated as the crime rate increases simply because there are not enough police to arrest, courts to process, and bedspaces in prison to house the offenders. Under these conditions, the negative association between the sanction level and the crime rate (that is, the indication that harsher penalties will act as a deterrent) is due not to any deterrent effect of the sanctions but rather to the limited resources available to process the increasing number of offenders.

The third problem that Nagin points out is the failure of the studies to adequately account for the incapacitative effect of the criminal sanctions.[89] Offenders who are imprisoned are also incapacitated from committing further offenses. This will obviously tend to bring about an association between the crime rate and the sanction level apart from any deterrent effect.

These data-related problems caused Nagin to question whether the observed deterrent effect is not the result of "spurious artifacts" contained in the data.[90] Although most persons recognize that increased penalties have some deterrent effect, the critical question of how much an effect they have remains largely unanswered. Nagin concludes:[91]

> Although more punitive sanctioning practice might legitimately be argued as a responsible ethical response to a truly significant crime problem, arguing such a policy on the basis of the empirical evidence is not

yet justified because it offers a misleading impression of scientific validity. Policy makers in the criminal justice system are done a disservice if they are left with the impression that the empirical evidence which they themselves are frequently unable to evaluate, strongly supports the deterrence hypothesis. Furthermore, such distortions ultimately undermine the credibility of scientific evidence as inputs to public policy choices. A more critical assessment of the evidence is needed if we are to see progress in the development of knowledge about deterrent effectiveness and its application to effective public policy.

Questioning the deterrence approach, Pugsley contends[92]

> ...serious empirical questions exist regarding the ability of deterrence to achieve its purpose. Is severity, or certain, of punishment the more relevant consideration in fashioning either an individual sentence or an entire scheme of punishment? The answer to this question, first offered by the criminologist Cesare Beccaria, and supported by recent findings, appears to be certainty...If the actual imposition of punishment is what gives force and meaning to a deterrent theory's threat, then what credibility can an overloaded, inefficient criminal justice system that fails to capture and convict most offenders actually provide? What types of crime are simply not deterrable? Is it valid to accept statements couched in terms of how different a particular offense rate would have been if there had, or had not, been X penalty statutorily available or actually imposed during N span of time in Y jurisdiction? How can one identify and empirically measure the deterrent effect of a particular kind of penalty from among the complex, interrelated set of individual and environmental influences on behavior likely to be at work in any real-life situation?

Although our state of knowledge on the deterrent impact of criminal sanctions may not have progressed to the point of scientific acceptability and even if critics argue that the deterrent impact of sanctions are nonexistent for some types of crimes and criminals, [93]

deterrence as an objective should not be discarded. As was put so well by the New York Report:[94]

> There has been much debate over whether deterrence "works". In our view, this controversy is far too abstract to be of any interest. We know from daily life that the threat of unpleasant consequences tends to deflect us from certain forms of behavior; similarly, it is too clear for argument that <u>some</u> punishment deters <u>some</u> potential offenders in <u>some</u> circumstances from committing <u>some</u> crimes.

On the issue of whether severity or certainty of punishment was the more effective in achieving deterrence, the New York Report was in agreement with Pugsley that it is certainty which constitutes the more significant factor. The concrete examples it had were New York's experience with its 1926 Baumes Laws (mandatory 15-year minimum term for first degree robbery and burglary, extra penalties for firearms crimes, lengthy mandatory minimum term for a repeat offender, etc.) and the more recent 1973 New York drug law (the sanctions contained in it earned it the title "The Nation's Toughest Drug Law"). Both the 1926 and the 1973 laws were found to be dismal failures, the former by New York's Lewisohn Commission in 1932 and the latter by the New York Bar Association and Drug Abuse Council in 1977.

With regard to certainty of punishment being the key to effective deterrence, it should be noted that sentencing occurs towards the end of the line in the criminal justice system (from police to prosecutor to court to corrections). The report on the New York drug law concluded that it failed

because the criminal justice system as a whole did not increase the threat to the offender despite the increase in statutory penalties.[95]

Table VII shows the offenses known to the Honolulu Police Department during the five-year period from 1975 through 1979. The percentages shown in the table are derived by dividing the number of each of the events subsequent to the report of an offense ("cleared by arrest or otherwise", "total arrested", "total charged", "guilty as charged", "jail") by the number of offenses reported ("actual offenses") as if the statistics of each of the subsequent events for a given year related to the offenses reported in that same year. As a matter of fact, there is a definite time lag involved between the time an offense is reported and each of the subsequent events. However, averaging the percentages over the five-year period gives an approximate indication of the certainty of an offender having to account for his crime. What it shows is that the chances of an offender being found guilty and subject to sentence is about 2%.[96] The rest are not caught by the police; if caught they are not charged by the prosecutor; if caught and charged, they are not convicted. So that any sentence which is meted out affects only the tip of the iceberg.

Deterrence by threat of punishment, even if harsh, is vitiated by such lack of certainty that the offender will ever get to the sentencing stage.

TABLE VII

NUMBER OF REPORTED PART I OFFENSES AND DISPOSITIONS
City and County of Honolulu, 1975 to 1979[1]

	Average	1979	1978
1. Actual offenses[2]		53,310	51,273
2. Cleared by arrest or otherwise[2]	(19.8 %)	8,840 (16.5%)	9,450 (18.4%)
3. Total arrested[3]	(7.9 %)	3,995 (7.5%)	3,948 (7.6%)
4. Total charged[3]	(5.8 %)	2,935 (5.0%)	3,032 (5.9%)
5. Guilty as charged[3]	(1.8 %)	927 (1.7%)	888 (1.7%)
6. Jail[3]	(.28%)	152 (.2%)	222 (.4%)

	1977	1976	1975
1. Actual offenses[2]	46,388	45,307	43,612
2. Cleared by arrest or otherwise[2]	9,388 (20.2%)	10,367 (22.8%)	7,860 (18.0%)
3. Total arrested[3]	3,816 (8.2%)	3,952 (8.7%)	3,376 (7.7%)
4. Total charged[3]	2,856 (6.1%)	3,021 (6.6%)	2,476 (5.6%)
5. Guilty as charged[3]	919 (1.9%)	663 (1.5%)	1,035 (2.3%)
6. Jail[3]	188 (.4%)	94 (.2%)	107 (.2%)

Source: HONOLULU POLICE DEPARTMENT, 1975-1979 ANNUAL STATISTICAL REPORTS.

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[1]Part I offenses include: murder, non-negligent manslaughter, negligent manslaughter, rape, robbery, aggravated assault, burglary, larceny I over $200, larceny II $50-200, larceny III $5-50, larceny III under $5, and auto theft.

[2]Includes adults and juveniles.

[3]Includes only adults.

B. Incapacitation

Incapacitation refers to incarceration of an offender to prevent that particular offender from committing further crimes. Like deterrence, its objective is crime control.

Of course, there is no doubt that whatever else it may or may not achieve incapacitation will at least prevent the offender from committing new crimes so long as he remains imprisoned (except for the few committed within the confines of the facility). But no one has proposed that every felon be imprisoned for life or be totally incapacitated by being put to death. Reasons of fiscal solvency and simple humanity militate against such a concept. The issue boils down to a question of balancing the effectiveness of an incapacitation sentencing policy in controlling crime against the costs involved, not only in terms of financing prisons but also in terms of its total impact on the criminal justice system, in implementing such a policy.

A distinction should be made between "collective" and "selective" incapacitation. The former refers to "crime reduction acc omplished through physical restraint no matter what the goal of confinement happens to be", while the latter refers to "the prevention of crime through physical restraint of persons selected for confinement on the basis of a prediction that they, and not others, will engage in forbidden behavior in the absence of confinement."[97]

As is immediately evident, collective incapacitation is a much more indiscriminate method of achieving crime

reduction. It frequently takes the form of mandating the incarceration of categories of offenders, for example, all those who are convicted of specified offenses or all those who are repeat offenders.

Various studies have attempted to estimate the amount of crime that can be prevented by a policy of collective incapacitation. Some studies conclude that a substantial reduction in the crime rate is possible while others find that there will be only a minimal effect on the incidence of crime.

Shlomo and Reuel Shinnar estimated the effects of different sentencing policies on the crime rate in New York and concluded that large reductions in "safety" crimes (murder, rape, robbery, assault and burglary) would be possible under a policy of collective incapacitation:[99]

> We submit that a policy of uniform prison sentences for convicted criminals could under present conditions reduce safety crimes by a factor of four to five. This would require net prison stays of five years for muggers and robbers and other violent crimes, and three years for burglars.

D. Greenberg estimated that the amount of index crimes (the "safety" crimes plus larceny-theft and motor vehicle theft) prevented by incarceration of all inmates nationwide amounted to no more than 8% of the total and that if the incapacitative effect were to remain constant for increased prison terms, a 50% increase in the average sentence length (from two years to three years) would decrease the crime rate by only 4%.[99]

Other researchers have contended that adding one additional year of incarceration for all robbers would reduce the incidence of robbery between 35% - 48% while still others predict that incarcerating all convicted felons for a period of 5 years would reduce violent crime by only 4%, and that a 50% reduction in the average time served by offenders would result in only a 5.6% increase in all index crimes.[100]

In a recent study commissioned by the National Academy of Sciences, J. Cohen reviewed various studies on incapacitation, including the Shinnar and Greenberg projects, and, despite the differences in their results, concluded:[101]

> ...(A) closer examination of the estimates and their underlying assumptions reveals many points in common and few fundamental disagreements. For example, there is general agreement among the authors reviewed that the incapacitative effect of current CJS policies is not very large. The crimes averted do not account for a very significant portion of the crimes committed. The authors disagree only about the magnitude of the effect, and this disagreement is almost entirely due to their use of different estimates of (individual crime rates).[102]
>
> All the authors considered would generally agree that the present incapacitative effect of prison is minimal. Their disagreement on the magnitude of that effect (4 percent or 8 percent or 20 percent) can be attributed almost entirely to their different estimates of the average crime rate while free...[103]

Obviously, any policy of incapacitation will result in an increased prison population. According to Cohen, the Shinnars' contention that "safety" crimes could be reduced by a factor of 4 to 5 if muggers and robbers were confined for 5 years and burglars for 3 years would mean

that the prison population in New York would be increased by 355% to 567%.[104] Greenberg's crime rate reduction of 4% presumably would increase the prison population by 50%. Cohen concluded in her review of the several studies on incapacitation that increases from a low of 33.7% to a high of 310.5% were necessary to effect a 10% reduction in the index crime rate.[105]

These and other estimates have led many experts to the conclusion that collective incapacitation is likely to make only a small dent in crime rates even as large public expenditures are required in terms of prison facilities. This may be especially true for states like Hawaii with relatively high crime rates and low apprehension and incarceration rates[106] because "...the expected percentage increase in prison population to achieve a percentage reduction in crime is large when the imprisonment sanction levels are already low. There is some empirical evidence that jurisdictions with low imprisonment probabilities or low expected times served in prison per crime also tend to be the ones with the highest crime rates. Thus, the high-crime rate jurisdictions that are most likely to be anxiously looking to incapacitation to relieve their crime problems can expect to have to pay the highest price for this relief."[107]

Assuming a doubling of the prison population through adoption of a collective incapacitation policy in order to achieve any significant reduction in the number of crimes

committed, Hawaii would have to increase its present prison capacity by approximately 750 bed spaces. At the present cost of $50,000 per bed space, this would represent a capital outlay of $37.5 million and an increase in annual expenditures of $16 thousand per prisoner or $12 million yearly. [108]

Cohen states that incapacitation may prove a more viable proposition if applied only to violent crimes:[109]

> The cost of an incapacitative strategy, however, varies considerably with the crime types that are chosen as targets...(T)he values of (arrest, conviction, imprisonment, and sentence served) for all index crimes are generally much lower than the same values for the subset of violent crimes. Thus, incapacitation is a more viable alternative to reduce violent crimes.

Hawaii has recently adopted laws which may be said to embrace the incapacitative concept. All class A felons and repeat felony offenders falling within certain categories are mandated to be imprisoned. In that all offenders within the defined classes are incarcerated without any distinction being made between those predicted as having large recidivist tendencies and those who have no, the statutes represent the collective incapacitation approach. However, it may be said that to a degree a selective approach is taken in that the class A felonies are almost all violent crimes and the repeat offender s constitute a greater risk of future recidivism as evidence by their prior record.

In theory, selective incapacitation (restricting incapacitation only to those offenders identified as being

likely to recidivate) may give greater returns for less cost, that is, a higher percentage of crime reduction with a lesser increase in prison population. [110] However, selective incapacitation is dependent on a capability to make a reliable prediction as to each offender's future actions. And projects which have attempted to predict future violent conduct on the part of inmates analyzed to be dangerous have shown the expert to miss their mark by 80% - 85%. California devised a "violence prediction scale" based on certain objective factors to identify the dangerous offenders, and this also proved inaccurate for 86% of the offenders.[111]

This inability to predict makes incapacitation a costly strategy. It requires the incarceration of all offenders in order to prevent some from committing crimes upon release. Further, if the prime reason for confinement is the estimated dangerousness of the offender, then the length of confinement should be geared to the likelihood of future criminal activity; and with the demonstrated inability to predict reliably, the incapacitation principle would vest tremendous discretionary power in those controlling the prison terms. Also, the moral objection has been raised that it is unjust to penalize an individual on the basis of a prediction (whether reliable or not) of criminal conduct in the future which may or may or may not occur.[112]

The effectiveness of the incapacitative approach

to crime reduction depends upon not only the imposition of a prison sentence (court) but also, like the deterrent approach, upon the other agencies within the total criminal justice system: the offender must be apprehended (police) and convicted (prosecutor), and the prison capacity must be adequate to receive him (corrections). "There is no hope of significantly reducing crime through incapacitation if most criminals go undetected for long periods of time."[113] Also, after intensive research, a project concluded:

> "If I could get just 200 guys off my streets and keep them off," a metropolitan police chief once said, "I could cut the crime rate in half!"...It has become an article of faith that there exists a small, hard core group of chronic criminals who are responsible for a vastly disproportionate share of the serious felonies committed in our cities. However, while this notion may be plausible, it has never been proved.....
>
> The (hypothetical mandatory sentences, e.g., one or more prior felony convictions = mandatory 5 years imprisonment) on which the effectiveness of incapacitation was tested is extreme and intended to catch as many recidivists as possible. The return is modest. The economic costs of its application--to say nothing of the social upheaval attendant on such a radical change in our system of criminal justice--are so great that we must conclude that incapacitation is not a reasonable course to adopt for the achievement of violent crime.[114]

Finally, it may be noted that to the extent that prisons are criminogenic,[115] a policy of incapacitation is counter-productive in that it may result in a short-term reduction in the crime rate with adverse long-term results. The New York Report stated:[116]

> That exposure to prison may actually harm,

> rather than help, the reformation of offenders is indicated by several studies exploring the relationship between the length of an inmate's prison term and his future criminal conduct. In Florida, for example, when a large number of inmates were ordered released before the expiration of their terms because of Gideon v. Wainright, researchers "matched" them with similar offenders who remained to serve out their full sentences. The results were startling: those serving shorter terms were found to have a significantly lower recidivism rate. Other studies have found that "success rates decrease or remain fairly consistent with increased time served in prison." In short, the evidence indicates that inmates serving briefer sentences will tend to do better upon release, or at least no worse, than similar offenders serving more extended terms.
>
> These findings raise the possibility that far from providing a "cure" for crime, prisons themselves may be criminogenic--they may breed crime. As researchers have stated:
>
> > "It is difficult to escape the conclusion that the act of incarcerating a person at all will impair whatever potential he has for crime-free future adjustment and that, regardless of which 'treatments' are administered while he is in prison, the longer he is kept there the more likely will he deteriorate and the more likely it is that he will recidivate. In any event, it seems almost certain that releasing men from prison earlier than is now customary in California would not increase recidivism."

C. Rehabilitation

As previously discussed, rehabilitation as a goal of sentencing has been at the forefront for at least the past half-century and has been the underpinning on which the indeterminate sentencing approach is founded. In concept, rehabilitation refers to reforming or curing the offender through treatment and training programs so that he refrains from further criminal conduct. Reform because of the passage of time (maturation or aging) or because of the deterrent effect of imprisonment or other penalty would not be considered a result of rehabilitation.

As defined, an offender need not be incarcerated for rehabilitation to occur. In fact, one of the arguments in favor of probation is that rehabilitation is more successfully accomplished under that disposition than in prison, and the Hawaii Penal Code adopts a bias towards probation on that basis. Also, the concept of rehabilitation does not necessarily require the adoption of indeterminate sentencing since it can take place even in a determinate sentencing scheme. Treatment and training programs can be delivered to prisoners with fixed terms. For example, California has made "punishment" the primary determinant of its sentencing policy but has retained its efforts to rehabilitate the prisoners by continuing to provide them with programs and training to assist their re-entry into society.

The concept of rehabilitation has a deterministic

view of the individual. It impliedly assumes that the criminal behavior engaged in is a result of social, economic and other environmental forces that shaped his personality. Thus, society is largely to blame so that a non-moral sanction should be imposed: treat the offender and release him when cured.

The indeterminate sentencing system based on rehabilitation which has been predominant in this century is the previously described "medical model" which embraces the following assumptions: (a) offenders are defective and can be cured; (b) for some offenders, rehabilitation is most effectively achieved within a closed setting (prison); (c) offenders can be induced or coerced into rehabilitating themselves by making their terms indeterminate; and (d) an offender's future dangerousness can be predicted so that his release can be timed to his cure.

The distinction between rehabilitation as a goal and the medical model as the structure within which to achieve it is significant. It is not the efforts at rehabilitation *per se* which is the target of much of the recent criticism; rather, it is the medical model based on assumptions about our capabilities to rehabilitate in prison and to ascertain when rehabilitation has taken place that is the focus of controversy. These assumptions, largely seen to be unfounded, are pointed to as giving rise to the problem of disparity previously discussed.

Ideally, if rehabilitation can be successfully

accomplished, then society will be fully protected from further criminal activity on the part of the offender. This would represent an ideal sentencing goal as far as that particular offender is concerned. Whether sentencing practices geared only to achieve that limited objective is a satisfactory one is a separate question: will they sufficiently deter other potential offenders from committing crimes? will they satisfy a community desire for retribution? does it mean that an incurable check-forger should remain incarcerated indefinitely while the murderer who killed in a fit of passion gets an early release, or even probation, because he presents no further risk of danger?

Some have questioned the morality of coercing rehabilitation: "...I am impelled to ask whether a theory of punishment that requires acquiescence in compelled personality change can ever be squared with long cherished ideals of human autonomy."[117] And the American Friends Service Committee took an even stronger stand:[118]

> More important, even if scientifically feasible, we would object to it on moral grounds. The goal of imposing manipulative routines for the purposes of effecting basic changes in "personalities" offends us. In fact, the whole deterministic view of man that underpins these strategies contradicts the values of free choice, individual autonomy, and self-determination that we embrace.

But when the free choice and autonomy asserted amount to a right to remain a reprobate victimizing society, the argument that society has no justification for attempting to redirect the individual is questionable.

It has been fairly conclusively demonstrated that rehabilitation does not occur within the prison setting. Neither has non-incarcerative treatment methods been effective in reducing recidivism. "Treatment" methods, such as the more community-oriented and less costly half-way house approach, also appear to be relatively ineffective in rehabilitating offenders.[118a] Studies of the effectiveness of probation have consistently shown that while probation may result in a lower recidivism rate than imprisonment, the rate is still unacceptably high. [118b] And one review of probationers placed on programs (treatment) indicated that those probationers committed more new crimes than those who were not in the programs.[118c]

Rehabilitation as a sentencing concept influences the IN/OUT decision (the bias towards probation is undeniably present in the Hawaii Penal Code although it also lists the need to institutionalize for rehabilitative purposes) and also determines the length of a prison stay. The New York Report emphatically concluded "that rehabilitation should not be a justification for imposing a prison sentence."[119] Its reasoning was simple and direct: First, to think of the prison environment as being conducive to rehabilitation is misguided--evidence indicates that prisons may be criminnogenic.[120] Second, "(O)ur lack of knowledge concerning how to rehabilitate offenders through imprisonment is matched only by our inability to predict when or if the offender has in fact been reformed."[121]

However, rejection of rehabilitation as a consideration in imposing a prison sentence or as a determinant as to the length of a prison sentence is not inconsistent with rehabilitative attempts by the correctional authoritties. "...(A) primary task of prison officials is to enhance the inmate's possibilities for re-integration into society as a law-abiding citizen. We do not reject rehabilitation; we reject attempts to coerce rehabilitation through sentencing."[122] Of course, if rehabilitative efforts should be continued in prison, all the more so should it be attempted through probation which does show a slightly better record of success. And if nothing else, it should be remembered that probation is a much less expensive alternative than incarceration, the probationer costing in Hawaii an estimated $360 per year against $16,000 annually for the prisoner.

D. Retribution

Retribution as a goal simply means: punish the criminal because he committed a wrong against society, with the amount of punishment being made to fit the crime on a "just" basis. In the retributive concept, there is no objective in meting out the punishment other than to punish; that is, there is no utilitarian purpose, such as deterring others or rehabilitating or incapacitating the offender in order to reduce crime (although such result may stem from punishment). This sentencing principle is sometimes derogated as "vengeance" by its opponents and euphemistically labeled "just deserts" by its proponents.

The writings of Immanuel Kant form the basis for the criminal sanctions based on the concept of retribution as their justification.[123] Briefly stated, Kant believed that people in a free society have reciprocal rights as well as obligations in their relations with each other. One gains the right not to have his freedom interefered with by respecting the rights of others. An individual has free will, and criminal conduct is not viewed deterministically as the result of societal influences which produce a sick individual. When a person commits a criminal offense, he has broken a law and has thereby gained an unfair advantage over the others. Society's moral equilibrium has been disturbed and the offender then owes a debt to society that must be repaid. The extent of repayment is governed by the law of retribution (repayment) under which the punishment imposed

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should equal the injury inflicted and the culpability of the perpetrator. Once the punishment is inflicted, the offender will have been deprived of any unfair advantage he had gained, society will have been repaid, and there will be "equality in the movement of the pointer in the scale of justice "[124]--the moral equilibrium which obtained prior to the transgression is restored. "Justice" is the only criterion by which the amount of punishment is measured.

The punishment imposed is the end intended and there are no other goals that society seeks to achieve in imposing punishment:

> Judicial punishment can never be merely a means of furthering some extraneous good for the criminal himself or for civil society, but must always be imposed on the criminal simply because he has committed a crime. For a human being can never be manipulated just as a means of realizing someone else's intentions, and is not to be confused with the objects of the law of kind. He must be first found worthy of punishment before any thought is given to the possible utility which he or his fellow citizens might derive from the punishment. The penal law is a categorical imperative, and woe betide anyone who winds his way through the labyrinth of the theory of happiness in search of some possible advantage to be gained by releasing the criminal from his punishment or from any part of it, or who acts in the spirit of the pharisaical saying: "It is better that one man should die than that the whole people should go to ruin." For if justice perishes, there is no further point in men living on earth.[125]

The glaring difference between retribution based on the Kantian principle and the other sentencing goals previously discussed (deterrence, incapacitation, rehabilitation) is the rejection of any utilitarian purpose. To

impose penal sanctions for crime control purposes is to put a utility value on the dispensation of justice, and "justice ceases to be justice if it can be bought at a price."[126]

Pugsley, a leading proponent of retribution, has defined it as follows:[127]

> Retribution may be briefly defined as follows: It is a moral theory of criminal culpability that seeks, through the assessment and imposition of deserved punishment, to rectify the injustice caused by the unjustified or unexcused commission of a proscribed act, or omission of a required act. The principle of retribution "stems from a view that because man is responsible for his actions and for the behavior he chooses, he should receive punishment for his wrongdoing proportionate to that which he has inflicted upon society." Thus, under retribution theory, the offender is assumed to possess the capacity and freedom to make a meaningful choice. He or she is not depicted as either psychologically or socially predetermined to engage in criminal conduct. Such conduct alone forms the predicate on which a punishment, in proportion to the harm of the offense and culpability of the offender, may be imposed...

Whereas quantitative measurements are made in an attempt to determine the amount of crime reduction which is achieved through the deterrent, rehabilitative or incapacitative approaches in order to justify in utilitarian terms the penalties imposed, the retributive principle in theory only seeks "justice", which cannot be quantified. The primary determinant of the success of the retributive theory lies not in statistical variations in the crime rate, but with society's sense of justice and fairness which cannot be measured in numerical terms.

The impossibility of quantifying the success or failure

of the retributive principle makes it less vulnerable to criticism. While other sentencing policies are subjected to analytical research which may point out their inability to translate into effective systems which attain their utilitarian goals, retributivism does not lend itself to such evaluation. But this same characteristic makes the setting of appropriate penalties extremely difficult. One cannot "prove" that one offense should be punished by twice or three time or four times the prison term imposed for another offense.

Pugsley writes [128] that "...punishment may only be prescribed according to the offense's seriousness (harm caused and offender's fault), not with reference to the virtually limitless claims of deterrence or individual rehabilitation...", that "retributivism provides a principled framework within which to articulate these standards (the evolving standards of decency that mark the progress of a maturing society) and suggest their content at any given point in time", and that the question on punishment is whether it is "just in the light of the requirements of desert and proportionality." These guidelines are vague indeed,

> But our inability to attain such finely calibrated, metaphysical congruence (of penalties to fit each crime and each offender) hardly constitutes grounds for abandoning either desert as the basis of punishment or the goal of obtaining roughly equal punishments for roughly equal offenses. Energy must simply be channeled in those directions most likely to produce a result which,

> although it may fall short of Kant's sensitive balancing scales, is still essentially just--and certainly more just than the unprincipled chaos that passes for sentencing practice in many jurisdictions today.[129]

The bottom line on just punishment seems to be that that penalty is just which is believed to be just by the majority at any given time, with some limiting considerations. For example, just because the retributive principle may be said to stand for the proposition that the punishment should "fit" the crime, it does not follow that the penalty for rape or pederasty would be punishable by mutilation because:

> The retributive obligation to treat the offender as an end precludes mutilation as a form of punishment. The same consideration precludes subjecting even a convicted murderer to any (gratuitous) maltreatment that would degrade his or her character as a human being. Modern retributivists have expanded Kant's approach, some arguing that the overriding aims of retribution prohibit certain types of punishment --for example, the death penalty--that might otherwise be justly deserved.[130]

These limiting considerations appear to resemble constitutional concepts of due process and cruel punishment.

Compared to deterrence, incapacitation and rehabilitation, retributivism is distinguished not only by its disavowal of any utilitarian purpose but also by its morally reprobative function. It expresses moral condemnation of the criminal act and actor and reaffirms for society the shared values of its members. It may be that society needs this to be done--condemnation of wrongdoing just because the deed was wrong by society's standards.

Of course, although the theoretical objective of retributivism is simply the achievement of moral justice, this does not mean that punishment will not have a deterrent, incapacitative or even rehabilitative impact. As a practical matter, except to those dealing strictly in philosophical concepts, the utilitarian ramifications of a punishment-oriented sentencing policy loom more important than notions of achieving "justice." (There are, of course, instances in which "justice", i.e., punishment, will be the public outcry and at the forefront overriding utilitarian concerns, for example where insanity defendants are involved.) And retributivism will be subjected to assessment in terms of crime prevention and costs involved, no matter how much the purists may argue that such an assessment is irrelevant to the principle involved.

E. Conclusions about sentencing goals

Criminal laws proscribe certain acts as impermissible to regulate human conduct and are enacted on the proposition that society is victiminzed by the commission of those acts, not on the thinking that the offender gains a benefit which must be taken back. The criminal justice system's reason for being is to give credence to those proscriptions.

It follows that sentencing should have crime control as its goal (although its impact on the incidence of crime is not very significant because of the small percentage of offenders who reach that stage). Deterrence, incapacitation and rehabilitation are appropriate goals. However, retribution does add a necessary dimension (a feeling that "justice was done") to the utilitarian approaches and it is obvious that punishment has crime control effects.

Basically, the utilitarian approach uses a cost-benefit analysis in its decision-making process. If the benefit obtained under a given course of action exceeds the cost involved, then that course of action should be chosen.

In a sentencing context, the costs of incarcerating an offender are represented by the direct outlay necessary to feed, clothe, house and otherwise maintain him. Indirect costs are incurred where the state may have to support the offender's dependents. Social costs are incurred by the intangible detriments suffered by the incarceration of the offender: the spouse and children may be deprived of

the love and affection of the absent parent.

The benefits of incarceration are represented by the direct economic savings that result from the prevention of future offenses. In the case of burglary, money is saved because there is no theft; there is no damage to the residence; police and prosecutorial burdens are decreased; court and correctional expenses are avoided. Social benefits accrue through the prevention of emotional trauma and also in the form of the greater peace of mind in the community.

The problems encounted in applying this approach may be illustrated by using the following example, employing the incapacitation principle to arrive at the sentencing decision.

Assume that a burglar is convicted at age 18; that his future criminal behavior can be reliably predicted; that if allowed to remain free, he will commit 6 burglaries every year from ages 18 to 22, 4 burglaries per year between ages 22 to 26, 2 burglaries per year between ages 26 to 30, and no burglaries thereafter. Assume also that it costs $15,000 to incapacitate this offender for one year and that society benefits by $4,000 for each burglary which is prevented.

A cost-benefit analysis on that burglar would show that for the first 4 years of incarceration, society profits by $9,000 each year (6 burglaries x $4,000 = $24,000 - $15,000 = $9,000); that for the next 4 years, the profit reduces to $1,000 per year; that for the third 4 years, society loses $7,000 per year; and that thereafter society suffers a total

loss of $15,000 for every year of incarceration with no benefit at all. Imprisonment would be imposed accordingly.

Actually, the factors that affect the utilitarian calculation are not as simple as the example presented. The following are some of the considerations which must be factored in: the extent to which the offender himself is deterred from further burglary; the extent to which others may be deterred from committing burglaries; the extent to which aging or maturation contributes to the offender's reduced activity; the extent to which prison rehabilitation may affect the offender; the extent to which prison may be criminogenic and contribute to more burglaries, etc. Further, the example made two significant assumptions: that accurate predictions can be made about the future criminal activity of the offender (which present evidence belies), and that a monetary value can be placed on the social costs incurred by the offender's incarceration and the social benefits that result from crime prevention (subjective and speculative).[130a]

Apart from the methodological difficulties in applying a cost-benefit analysis in measuring the efficacy of sentencing goals, a further objection arises, as seen in the following situations. Taking the example of the burglar, suppose that the prediction is that he would commit only one burglary each year for the rest of his life. Because the benefit derived from his incarceration would at all times be less than the cost of incarceration, he would never be

imprisoned at any time even as he commits a burglary year after year. On the other hand, if the prediction is that he will commit 4 burglaries per year for the rest of his life, he must be imprisoned for life beginning at age 18. This disposition may be compared to that to be given a murderer who is predicted never to commit another crime--he may be given a light sentence.

These dispositions leave a feeling that something is wrong--certainly, the once-a-year burglar "deserves" some prison time, the burglar who is predicted to commit burglaries 4 times a year in the future "does not deserve" to be imprisoned for life on his first and only conviction, and the murderer "deserves" to be imprisoned.

The retributive principle (fitting the punishment to the harm caused and the offender's culpability) would provide the necessary adjustment: a prison sentence for the constant repeater, no life sentence for the first-time offender, and no light sentence for the murderer. Of course, the difficult posed by retribution is the calculation of "roughly equal punishment (for) roughly equal offenses."

None of the four general goals of sentencing escapes problems, and no one of them has gained general acceptance as a sole goal in the structuring of a sentencing system. The reasonable approach is to accept all as legitimate goals to be considered in sentencing, with perhaps an emphasis on that which is believed to be the most significant.

The emphasis in the Hawaii Penal Code has been on rehabilitation. This emphasis should be shifted to punishment--retribution. However, the following should be stressed:

1. The goal of rehabilitation should not be abandoned and attempts to rehabilitate should still be pursued outside the prison (probation) as well as within (prison programs). It is only the proposition that rehabilitation should be the basis for parole which should be abandoned.

2. "Punishment" is the infliction of "pain" and refers to all of the sentencing alternatives, including probation. There is a difference in the degree of restrictions (pain) between probation and imprisonment but both represent punishment. Thus, punishment is not necessarily to be equated with mandatory imprisonment (nor with the death penalty).

IV. ALTERNATIVE SENTENCING SCHEMES (DETERMINATE)

Various types of sentences are imposed: imprisonment, fines, restitution, community service, probation, suspension of sentence with or without conditions, and combinations of the foregoing. Although the other forms of sentence may be significant to certain offenders, the sentence of imprisonment represents what is considered the most meaningful punishment which is imposed under the law (aside from the death penalty which has been abrogated in Hawaii since 1957), especially where the crimes which result in the largest public outcry are concerned (the "safety" or "street" crimes). To the destitute offender (which is the usual case), monetary penalties are meaningless, and only imprisonment impacts with any force upon his thinking. The general public likewise is impressed only by a prison sentence. And the controversy among the experts over the indeterminate approach focuses on the prison sentence and not the other forms. Therefore, consideration of alternative sentencing schemes will center on the sentence of imprisonment.

The various models which penologists discuss as options other than the indeterminate scheme fall within what is labeled as the "determinate" sentence. The significant and central proposition embodied in the determinate sentence is that the actual period of incarceration of an offender is relatively fixed (hence "determinate") at the time that the sentence is imposed--that is, the term imposed by the sentence will be the term actually served, unlike the indeterminate model which permits an early release or an extended detention depending on an assessment of whether or not a cure has taken place subsequent to the time of sentencing. Abolition of the paroling function is a basic ingredient in the determinate scheme.

The determinate sentence has several approaches: flat sentencing, mandatory sentencing, presumptive sentencing and the guidelines system are the concepts which are generally considered, often with variations or combinations involved.

A. Flat sentencing

The term "flat sentencing" refers to a sentencing scheme in which the upper limits of the sentences are prescribed by the legislature with the actual sentence within those limits being determined by the judge in his discretion at the time of sentencing. The judge also has discretion to grant probation. Once imprisonment is ordered and the term is set, the prisoner serves out the full term, except for possible "good time" credits. The paroling authority and the parole release function are abolished. Generally, other than broad legislative policy statements, there are no standards to guide the judge's IN/OUT decision nor his decision as to how long the offender is to serve.

Flat sentencing may be said to accord to the judiciary its traditional independence in the setting of sentences. Within the legislatively prescribed maximum, the judge has full discretion to fix the actual term or to grant probation. With no standards to restrict or guide the judge's discretion, the disparity problem becomes accentuated. Under the indeterminate system, there is at least the paroling authority to cushion the impact of unevenness in the sentencing decisions made by judges.[131]

In 1976, Maine became the first state to adopt a system of flat sentencing. It came about as part of a comprehensive recodification of its 200-year old penal code and included the revision of the substantive criminal offenses as well as provisions relating to sentencing.

Although this makes pre- and post-code comparison difficult, preliminary analysis indicates that with unguided judicial discretion, disparity in sentences has increased.[132] There has been a substantial increase in the average sentence length and as a result, its prison population increased from 580 in 1976 to 970 in 1979.[133] The situation became so bad that Maine has considered reinstituting the parole board system to relieve overcrowding.[134]

B. Mandatory sentencing

A true mandatory sentencing scheme would by statute require the judge to impose a legislatively established term of imprisonment which the offender must serve in full. No jurisdiction has adopted this approach. The only sentence in the Hawaii Penal Code that approaches this definition is the sentence for certain types of aggravated murder which call for life imprisonment without possibility of parole.[135]

The Penal Code has variants of the mandatory scheme which require that a sentence of imprisonment be imposed by the judge but which leaves the actual time to be served flexible: certain repeat offenders and firearms users must be imprisoned with certain minimum terms set by statute; class A felons must be sent to prison but are eligible for parole. These variants may be said to be mandatory in that they require the judge to impose a prison sentence. However, once in prison the offender's term is indeterminate.

Different approaches to the mandatory scheme are possible. One would be where the legislature sets a specific term of imprisonment for each offense, and another would be where the legislature sets a base term for each offense with an allowable deviation range stated for aggravating and mitigating factors. Under either approach, once the judge has set the term the offender would serve the entire period, with "good time" credits the only possibility for reduction.

Mandatory sentences are a rigid and inflexible

approach to criminal sentencing, theoretically concentrating all sentencing power in the legislature. The criminal justice agencies are not given any power or discretion to alter the statutory penalty, and they would only administer the previously fixed sentence.

There are positive aspects to this system. It would largely eliminate most of the disparity in the treatment of offenders who commit the same crime. Also, the sentencing process would become more visible--the general public can see the judge following the statutory scheme and the prisoner serving out his full term (in sharp contrast to the indeterminate system in which, although the offender is sent to prison for 20 years, the actual length of incarceration is determined by the paroling authority in a closed session). Finally, mandatory sentencing makes it certain that if convicted, punishment (to the public, punishment means imprisonment) will be imposed, thus enhancing the deterrent effect.[136]

Mandatory sentences, however, suffers several drawbacks. Even though guilty of committing the same crime, offenders and the circumstances surround the offense are not fungible. The identical penalty for murder would be unjustifiable when applied to a mercy killing where the victim suffered from a terminal illness and asked the defendant to end his life and to the situation where a felon with a period record tortured and killed an innocent child.[137]

Legislation could attempt to provide for various aggravating and mitigating circumstances relating to the offense and offender and attach a given penalty or bonus to each. But attempts to codify the infinite variations for each crime would create a massive and unworkable code. And even then, it would be impossible to legislatively anticipate the greater number of the variations:

> It is unlikely that any legislature will be able to specify in advance and in sufficient detail all the factors and combinations of factors necessary to eliminate judicial discretion while ensuring a system congruent with present notions of equity and justice in sentencing...As Professor Franklin Zimring has pointed out, our ability to define criminal acts in the context of legislation is limited: "The problem is not simply that any such penal code will make our present statutes look like Reader's Digest Condensed Books; we lack the capacity to define into formal law the nuances of situation, intent, and social harm that condition the seriousness of particular criminal acts."[138]

Although in theory, the legislature may be viewed as setting the sentences for all offenders under the mandatory sentencing scheme, experience demonstrates that what results is a shift of the power over sentence determination from the judges to the prosecutors who will select which crimes to charge and control plea bargaining, thus determining what kind of sentences defendants will get.

> While disparity might appear to be reduced by a mandatory or presumptive penalty scheme, the problem would actually be masked: discretion would merely be shifted and hidden. In fact, the disparity problem is likely to become exacerbated; when the exercise of discretion becomes less visible, it becomes less subject to control.[139]

Finally, mandatory sentencing leaves no "play" in

the system. Prison populations become primarily a function of the number of convictions, which is ultimately a result of numerous social and economic forces that affect the crime rate. If overcrowding does occur, the nature of the legislative process and the long construction time for new facilities will preclude effective adjustment. Forces within the system will deal with the overcrowding problem in a number of undesirable ways, such as prison disturbances, petitions for release, judicial orders to improve prison conditions, or, most likely, <u>sub rosa</u> methods to reduce the number of convictions--fewer arrests and prosecutions, more plea bargaining, jury and judicial nullification of charges, and diversion of offenders.

New York's experience with its variant of mandatory sentencing is enlightening. Some of the New York provisions are very similar to Hawaii's mandatory sentencing variants.

In the early 1970's New York faced a major drug problem. Previously, the state had attempted to treat it by diverting the low level users into drug treatment programs and prosecuting the dealers. This approach failed, with statistics showing that about half of the total number of narcotics users in the United States living in New York City.

The legislative response in 1973 was to enact statutes providing for very harsh mandatory sentences on drug users and drug dealers. Additionally, mandatory penalties were enacted for repeat offenders. The hope was that New York's "nation's toughest drug laws" would have a strong deterrent

effect, and that if drug usage could be reduced, the types of criminal offenses generally associated with drug usage would also be reduced.

The New York Bar Association and the Drug Abuse Council conducted a joint study to evaluate the 1973 laws, the results of which were published in 1977.[140] Basically, the conclusions were:

1. The 1973 laws were ineffective. Three years after the law was enacted, heroin usage was as widespread as it had been before and there were ample supplies of drug available. Serious property offenses which are often associated with heroin usage increased sharply between 1973 and 1975, at a rate similar to that of the neighboring states.

2. The effective threat of punishment for drug offenders reamined about the same despite enactment of the mandatory imprisonment provisions. Although a higher percentage of those convicted ended up in prison, a lower percentage of those arrested were indicted and a lower percentage of those indicted were convicted. These changes offset each other, resulting in an identical percentage of those arrested for drug offenses who were incarcerated.

3. The number of drug cases that were disposed of by the courts in New York City decreased despite the fact that there were 31 new courts established within the city specifically to handle the new drug offenses. The reason was that with the harsher penalties, offenders had nothing

to lose by demanding jury trials and more time-consuming pretrial motions were made. Court calendars became clogged with about one year's back-up of cases. An unexpected result was that a fewer number of offenders were being sent to prison than would have been expected under the pre-1973 laws.

4. Erie County was able to handle its increased caseloads and there was a five-fold increase in the number of drug offenders sentenced to prison. However, Erie County experienced only a short-run decrease in heroin usage following implementation of the law, and in the long run there was no evidence to indicate any sustained or permanent decrease in the use or availability of heroin in the county.

5. The repeat offender (predicate felony) provisions did not have any significant deterrent effect. Previously convicted felons were arrested with the same frequency after the 1973 laws as before. Furthermore, the imprisonment of repeat offenders was the opposite of what had been anticipated: of those ex-convicts who were arrested, a smaller percentage was incarcerated under the repeat offender statute than under the prior law where the judge had discretion in sentencing the offender. The reason for this decrease was that of those arrested, a lesser percentage was indicted as repeat offenders; and of those indicted as such, a lesser percentage was convicted. The study did not go into the reasons for these lower percentages.

The New York experience does not necessarily mean that mandatory laws are ineffective and have no deterrent effect. It does indicate that implementation of the law must take place at all levels of the criminal justice system before any fair evaluation can be made.

C. Presumptive sentencing

In presumptive sentencing, the legislature sets a "presumptive" term or range of terms for each offense. It may also provide for increases or decreases in the terms to take into consideration any aggravating and mitigating circumstances surrounding the offense and the offender's background, including such things as use of a weapon, prior record and other offenses for which the defendant is simultaneously being sentenced. The model is presumptive in that a sentence which is imposed within the legislatively set range is presumed to be a proper one for the given offense, while any sentence outside of such range (higher or lower) requires the judge to give written reasons for the deviation. Probation remains within the discretion of the judge, but must generally be justified by written reasons. The prison sentence which is imposed is determinate, so that the offender is not subject to early release, except for possible "good time" credits. The parole board is abolished.[141]

Presumptive sentencing has been adopted in more states than any other form of determinate sentencing. California was the first to adopt presumptive sentencing, followed by Indiana, Arizona, Colorado, New Mexico, New Jersey, Alaska and North Carolina.[142]

In concept, presumptive sentencing offers many positive features. The nature and extent of the penalty is fixed by legislators who are elected and are directly

accountable to the voters. Sentence lengths are sufficiently certain so that disparity is minimized. The deterrent effect of the law is enhanced by the increased certainty that the stated punishment will be imposed because it is presumed to be proper. There remains sufficient flexibility for judge to lower or raise the terms or even grant probation in exceptional cases, so long as reasons for such actions are given. Differences in the circumstances of the offense or offender can be taken into consideration. Judges would no longer impose a "symbolic sentence", which seems to be the case in indeterminate sentencing. Instead the term set would more closely comport with the actual time to be served by the offender. The sentencing process becomes more visible as it occurs in the courtroom and not at parole hearings.

Despite these positive factors, presumptive sentencing is also subject to criticism. The judge's IN/OUT decision is not structured: defendants are subject to the same arbitrary decision-making process that characterizes the indeterminate system, the result of which is disparity of treatment. Presumptive sentencing suffers the same deficiency which mandatory sentencing has in terms of lumping the infinite number of possible circumstances that surround the commission of a given offense into one category. Multiple gradations of offenses would alleviate this problem but would result in a long and unwieldy penal code. For example, one proposal[142] called for the offense of armed robbery to be divided into six different degrees.

California's experience with presumptive sentencing is enlightening. Its statute, which includes numerous aggravating and mitigating circumstances, is so complex that calculation of the appropriate sentence becomes a difficult and time-consuming task. Factors to be considered include the possession and use of a firearm, the infliction of great bodily injury, excessive taking or damage to property, prior violent felonies, prior incarcerations, and the number and type of present convictions. Additionally, there are limitations on the imposition of consecutive terms, enhancements and the total prison term. Whether aggravating or mitigating circumstances should be considered by the court has become the subject matter of extensive plea bargaining between the prosecution and defense.[143] The result is that the discretion to affect the sentence rests in the prosecutor, who will now be the source of disparate treatment.

California has experienced an increased rate of incarceration and a rising prison population since the adoption of presumptive sentencing. The percentage of offenders imprisoned has increased as well as the rate of commitment per 100,000 population. The increased prison population is probably attributable to several factors. First, there is the legislatively expressed statement that punishment is the goal of sentencing and the requirement that the presumptive prison (versus probation) sentence be imposed unless reasons can be stated for non-imprisonment (just the opposite

"presumption" from that which is found in the Hawaii Penal Code). Next, the legislature has, since the initial adoption of the presumptive model, twice increased the length of prison terms for the various offenses. Also, there has been a tendency for judges to incarcerate more felons when the judge is certain of the shorter times which the offenders are to serve. Judges are no longer faced with having to impose the relatively high maximum terms mandated under the indeterminate sentencing system; instead, his sentence is for a period that more closely coincides with the average term that has historically been given offenders by the California paroling authority. Of course, it may be that factors other than the presumptive sentencing approach, such as public and media alarm over rising crime and the consequent pressure to incarcerate more offenders, may have contributed to the increased commitments.

An increased prison population obviously entails greater costs of housing the prisoners. California projects substantial increases in both annual operating costs and needed capital improvements.[144] But quick and adequate legislative response to these needs is seldom forthcoming. The result is overcrowding.

When overcrowding occurs, forces in the criminal justice system react to alleviate the problem: prisoner habeas corpus suits, early release by parole boards, furlough programs by the corrections division, fewer sentences of imprisonment,[145] and even prison disturbances. With the

public and the media, fewer sentences of imprisonment and the isolated violations of furlough privileges or parole gain immediate attention, but the overcrowded conditions which may be the root cause gain hardly any protest.

One of the major "escape valves" in the criminal justice system for theovercrowding problem is the paroling authority. Under the determinate sentencing approach (and presumptive sentencing is one of the determinate models) a central proposition is the elimination of the paroling authority and its early release decisions. Thus, any jurisdiction which adopts determinate sentencing will have to face the overcrowding issue by putting up the money to house and maintain the increased prison population or by acquiescing to a situation in which the criminal justice agencies alleviate the problem by self-help (police and prosecutors charge less and give better plea bargains, judges imprison fewer offenders, prison administrators furlough more prisoners).

D. Guidelines

Under the guidelines system, the legislature sets the maximum penalties for each offense, promulgates broad policy statements relating to sentencing principles, and establishes a sentencing commission to implement those policies. The commission classifies the offenses according to seriousness and selects and attributes point values to the factors that are to be considered in aggravation and mitigation of the sentence. All of the factors are divided into two categories: those that relate to the severity of the offense and those that relate to the offender's background. The commission then sets up a grid chart[146] that displays the appropriate penalty for each combination of offender score and offense score. The judge and the parties are given the presentence report which includes a calculation of the offense and offender scores and the appropriate penalty according to the chart. The judge reviews the presentence report and makes the final determination on the sentence to be imposed. If the sentence is within the parameters indicated in the chart, the judge is not required to state any reasons for his decision. If the judge decides that the penalty in the chart is inappropriate so that a greater or a lesser sentence is imposed, he is required to justify the sentence by written reasons. The prisoner serves out the full term imposed less any "good time" credits. Appellate review by either party is permitted.

The foregoing is a basic description of the guidelines

system. Of course, there may be variations to it, but the main feature is the promulgation of guidelines to structure the sentence which is to be imposed. The guidelines concept was originally developed by the United States Board of Parole as a tool to structure its discretion in determining when an offender was suitable for release because disparity in federal sentencing was a major concern.

The guidelines system is flexible enough to permit consideration of the facts unique to each sentencing decision and to provide the sentencing judge with adequate guidance in making his decision. Because a commission rather than the legislature sets the penalties, there is a built-in flexibility that permits constant and continuing monitoring and expeditious adjustments in sentencing patterns in response to overcrowding, changes in public attitudes and varying crime rates.[147]

The guidelines system also has its negative aspects. Adjustments made from time to time in sentence lengths to compensate for overcrowding could cause disparity over time. The complexity of the calculation of the appropriate penalties may make the sentencing process largely incomprehensible to all but those intimate with the system. Plea bargaining over aggravating and mitigating circumstances may result in disparity due to prosecutorial discretion.

Guidelines would also suffer the same effect that

all determinate sentencing systems face: judges will incarcerate a higher percentage of offenders because, unlike the indeterminate system in which a long period of imprisonment is imposed, the grid charts generally call for terms which reflect shorter periods that are in line with the actual terms served by prisoners (that is, the grid charts will probably reflect the actual periods served by prisoners under the early release decisions made by the parole boards). Thus, a judge, considering the circumstances of the offense and offender, may be reluctant to impose a 20-year term in a first degree robbery case but will pronounce an 8-year term in the same case without hesitation.

The approach taken by Oregon is a hybrid one. Oregon has retained the sentencing structure in which the sentencing judge decides whether the defendant is to be incarceration as well as the maximum length of incarceration, and the parole board determines the actual length of imprisonment. This system has been modified in two respects: first, the legislature has changed the primary emphasis of sentencing from rehabilitation to punishment.[148] Second, the system has been modified by the creation of a sentencing guidelines commission for the parole board.

The commission is composed of 5 judges, 5 parole board members, and the governor's legal counsel, with the prison administrator serving in an advisory capacity. The commission's primary responsibility is to propose to the parole board rules that establish guidelines for the release

decision. The proposed rules are considered by the board which is required to "adopt rules establishing ranges of duration of imprisonment to be served for felony offenses prior to release on parole."[149]

Thus, Oregon has enacted what is essentially a guidelines systems to apply to the parole board but not to the sentencing judge. It has the appearance of the indeterminate system with the modification that release decisions by the parole board be structured and also with one significant difference which makes it depart from the rehabilitation concept: the factors which the guidelines commission considers in making its decision on eligibility for parole do not center on rehabilitation or cure but on circumstances surrounding the offense and the offender which make for more consistency in the actual periods of imprisonment served.

The Oregon approach is a relatively simple approach to the major problems that underlie the indeterminate sentencing system. It allows for the retention of all of the agencies that presently affect the sentences of offenders, yet provides a mechanism that structures the release decision to minimize the disparate treatment of offenders. The commission can monitor the workings of the criminal justice system and respond to changes that may affect the treatment of offenders. Because the criminal justice system remains intact, there are only minimal problems encountered in increased prison population over and above current trends.

The Oregon system, however, suffers from a major drawback: it does not structure the IN/OUT decision of the judge. Thus, disparity caused by judicial discretion would continue. However, it may be possible that such disparity may be minimized by interaction between the sentencing commission and the judiciary, resulting in both levels arriving at a consensus on the factors which (for the judiciary) justify incarceration, which would generally be the same factors which (for the commission) justify the length of minimum terms.

E. Conclusions about determinate sentencing models

Flat sentencing offers few advantages when compared to other types of detrminate schemes. The major problem with flat sentencing is that it does not structure the sentencing decisions of judges and would, therefore, leave the amount of punishment to be imposed within the complete discretion of each individual judge. Experience demonstrates that judges vary greatly in their individual interpretation of the same statutory policy statements and will impose widely disparate sentences. If anything, it is anticipated that a flat sentencing scheme will result in greater disparity and unfairness than under the indeterminate system which at least has the parole board to act as a rough check on judicial inconsistency.

Mandatory sentencing has a certain appeal to it. It seems to promise total even-handedness in its treatment of like offenders in that judges must impose a previously determined, fixed sentence on every individual convicted of the same offense. Additionally, it offers to assure the certain of punishment, thus increasing whatever deterrent effect the penal sanction may have. Unfortunately, offenses and offenders are not fungible, and there are bound to be many cases that do not fit within the offense categories defined by the law, resulting in obvious injustice. It is impossible for a code to cover all the different circumstances which may surround the commission of a particular offense. Also, those with decision-making powers

in the criminal justice system (police, prosecutors, jurors, judges, parole board members) will have different standards as to what is considered to be a just and fair penalty and react accordingly to a mandatory system. Thus, lenient actors will permit certain offenders to receive a lesser punishment while harsh actors will do the opposite. There are many levels in the criminal justice system that allow for discretionary decisions that will cushion or reduce the impact of sentencing provisions that are deemed too harsh. Elimination of visible discretion in sentencing may simply transfer it to the other decision-makers, thus giving the appearance of fairness, impartiality and certainty, while actually promoting a largely invisible, unstructured and unaccountable system that fosters the disparate treatment of individuals.

Presumptive sentencing is a viable means of attempting to ensure that there is the least amount of disparity in sentencing decisions. California's experience with presumptive sentencing has demonstrated that such a scheme can be politically acceptable and workable from the administrative standpoint and can achieve a net reduction in disparity. However, presumptive sentencing has a significant flaw: it fails to structure the IN/OUT decision. It may be argued that the decision is structure in that there is a presumption that a particular sentence is correct. Yet it should be recognized that this presumption in effect gives judges discretion in the decision to imprison or place on

probation. Additionally, in attempting to set forth the presumptively correct sentence for the various crimes the problem of accommodating all the differing circumstances in the commission of a particular offense remains.

The guidelines system offers several advantages. The legislature retains its traditional jurisdiction over the definition of criminal conduct and the maximum penalties. A sentencing guidelines commission sets up standards to structure sentencing decisions within the framework determined by the legislature. Overall as well as relative severity of criminal sanctions can be modified relatively quickly and apart from the many pressures that affect the legislative decision-making process. The guidelines approach can more readily handle the problem of defining discretely the criteria which impact on differing circumstances which may surround a particular crime. On balance the guidelines system appears to offer the best promise of ensuring fair treatment. It has been adopted in the federal parole system and in other jurisdictions and appears to be the most intelligent approach to sentencing.

A word about overcrowding. Immediate increase in prison population, although not an <u>a priori</u> necessary result, has been the consequence of determinate sentencing. The inability of existing facilities to absorb such increase and the slowness of the legislative process to remedy the situation has resulted in severe overcrowding.

That overcrowding is a relevant and legitimate factor

to be considered in developing sentencing practices, both at the level of the courts (IN/OUT decision) as well as at the parole board level (minimum term setting and parole release decision) has been recognized. Jurisdictions and proposals recently adopting new sentencing procedures have recognized this. The Minnesota sentencing commission is directed to "take into substantial consideration...the capacities of local and state correctional facilities."[150] A bill being considered by Congress provides that the sentencing commission shall take into account "the nature and capacity of the penal, correctional, and other facilities and services available in order not only to assure that the most appropriate facilities and services are utilized to fulfill the applicable purposes but also to assure that the available capacities of such facilities and services will not be exceeded."[151] The Uniform Sentencing and Corrections Act[152] as well as the New York Report[153] also recognize overcrowding as a valid and relevant concern in determining sentencing practices.

V. SUMMARY AND RECOMMENDATIONS

For the past century, the dominant concept in American criminal jurisprudence in sentencing has been the indeterminate model. Hawaii adopted the indeterminate approach in 1909 and fleshed it out in 1972 when it enacted the sentencing provisions patterned after the American Law Institute's Model Penal Code. Under the indeterminate model, the judge imposes a generally long maximum term of imprisonment and the paroling authority determines the prisoner's actual length of confinement by setting a minimum term at the expiration of which he becomes eligible for and is usually granted parole on the basis that he has been rehabilitated.

In recent years, the indeterminate system has come under severe criticism. The attack is by penologists who look on it as invalid in its basic assumptions resulting in capricious and unfair imposition of widely disparate penalties, and by laymen who view it as unwarrantedly lenient in the face of rising criminal activity bordering on an epidemic.

The vulnerability of the indeterminate structure lies in its focus on rehabilitation as the goal of sentencing. The model assumes an ability in the criminal justice agencies to diagnose the offender's "illness," treat and cure him, and predict when he is ready for re-entry into society as a law-abiding member. It seems irrefutable that predictive capability to any degree of reliability

is non-existent. It also is generally conceded that participation in prison programs shows no significant results in reducing recidivism, at least not under the indeterminate model where an element of coercion is involved. Non-incarcerative programs (probation with treatment conditions) do not show much better results.

With the lack of predicitive capability, the selection of those who are to receive probation and those who should be imprisoned becomes suspect as a scientific proposition and disparate as a matter of fact. Incapacitative and deterrent objectives are stated in the Penal Code as added grounds for incarceration, but no guidelines are given the judge to structure his determination. Each judge is left to his own conscious or subconscious prejudices as to offenders and offenses.

Also, with the lack of predictive capability, added to the inability to rehabilitate in the first instance, the proposition that the paroling authority can implement a model based on curing an offender and releasing him when it is determined that he is cured is substantially vitiated.

The rehabilitative model is thus vulnerable to attack by the experts on the basis of the insupportable assumptions on which it is premised. The invalidity of the assumptions manifests itself to the laymen in a way that arouses his visceral emotion: sensational media reports of the parolee and the probationer who turn up as repeat offenders.

The disillusionment with indeterminancy began long before the present national and local concern over crime reached present-day crisis proportions. The objections are framed not so much in terms of crime control as in terms of fairness in the criminal justice system--the focus is on disparity. The disparate dispositions, both in the decision to imprison as well as in the actual length of incarceration, under indeterminate sentencing become, as is to be expected under a system that looks to rehabilitation and the potential for rehabilitation, strongly weighted against the poor and disadvantaged. Prisoner disturbances venting frustrations against unjust treatment and uncertainty, as well as con games to outwit the paroling authorities are by-products of the system.

The recent trend has been away from indeterminancy towards a determinate approach. Under determinate sentencing the prisoner serves the entire term which is given at the time of sentencing: parole is eliminated. Determinate sentencing's major objective is to attain fairness in sentencing practices by eliminating disparity; it is not to reduce or control crime.

Disparity in sentencing appears at two points: the judge's IN/OUT (imprison or not) decision and the paroling authority's decisions on parole. In general, determinate sentencing models propose to structure and limit the judge's decision and abolish the paroling function. Although other methods of controlling disparity, such as sentencing councils

and appellate review, have been proposed and tested, none appear to be able to reduce disparity to acceptable levels.

Of the four determinate approaches generally considered, the guidelines model is the most intelligent. Flat sentencing does not structure the judge's decision at all. Mandatory sentencing in its strict sense has never been adopted in any jurisdiction and is unworkable because offenses and offenders are not fungible. It is impossible to legislate the countless gradations of penalties necessary to achieve fair dispositions for all crimes. Presumptive sentencing is a reasonable approach, but like mandatory sentencing, calls for bulky legislative gradations of penalties. It also does not structure the judge's discretionary IN/OUT decision. The guidelines model, which sets up a sentencing commission to formulate guidelines for the judge's IN/OUT decision or the paroling authority's parole decisions, or both, and also to constantly monitor the sentencing machinery, offers the most promise.

Determinate sentencing will probably create a prison overcrowding problem. To maintain reasonable control over prison populations, the paroling authority should be given express authority to consider facility capacity in arriving at its decisions.

Hawaii has recently made substantial inroads into its indeterminate sentencing laws. By "mandatory" legislation adopted only a year ago, it has greatly restricted judicial discretion on the IN/OUT decision: all class A felons

must be sent to prison, as must most of the repeat offenders. What is left for the exercise of the judge's discretion are the first-time offenders of the lesser crimes who are almost uniformly given probation. Because of the resulting uniformity in disposition (certain offenders all go to prison and the others are given probation), there is no need for any further structuring of judicial discretion.

(The conclusion that substantial uniformity has been obtained and no further structuring of judicial discretion is needed does not mean that such mandatory provisions are the recommended solution to the disparity problem on the IN/OUT decision. In fact, it is not a recommended alternative because true disparity is not eliminated where offenses and offenders are not fungible. But it is unrealistic to expect a change in laws so recently adopted.)

Hawaii's "mandatory" sentencing provisions are not mandatory in the strict sense. The offender who is mandated to be sent to prison is also subject to the indeterminate sentencing provisions of the law--that is, he is eligible for parole. Although it may be said that there is a conflict between the "mandatory" feature of the law (which connotes incapacitative, deterrent, and punitive aspects) and the indeterminate feature of the law (which connotes rehabilitation), it is necessary to retain the latter. The reason is that the mandatory provisions have been foisted upon penalties (terms of imprisonment) which are geared to the rehabilitative concept and which are,

therefore, very long. The paroling function is needed to inject just and reasonable limits to the period of incarceration as well as to help in adjusting the prison population.

Although disparity on the judicial level has been minimized by legislation, that on the parole level has not. Commendably, the Hawaii Paroling Authority has attempted to structure its decision-making. However, its procedures are informal and insufficiently structured. Therefore, it is recommended that express statutory discretion be given to the Authority to promulgate guidelines for determining the length of a prisoner's stay. Appendix C contains suggested statutory provisions that accomplish this result and Appendix B sets forth a guidelines format.

The following should be noted with regard to Appendix B and Appendix C:

1. They do not represent any change in the overall sentencing structure in Hawaii: the judge will continue to set a maximum term and the Paroling Authority will continue to set minimum terms and parole prisoners.

2. There is a significant change in emphasis on the goal of sentencing. (This is further discussed below.) The retributive ("punishment") principle replaces the rehabilitative and is emphasized over all the others (rehabilitation, deterrence, incapacitation.)

3. Overcrowding is recognized as a factor which should enter into parole decisons.

The change in emphasis to punishment as the goal of sentencing is extremely significant. Rehabilitation as a goal has not been shown to work and has resulted in widely disparate treatment of offenders. The effectiveness of incapacitation and deterrence is highly questionable, and implementation of these goals as the primary ones in any model would be extremely costly. Also, applying the cost-benefit ratio formula to make sentencing decisions is not satisfactory. Punishment as a moral proposition is sound, and using objective considerations related to the punishment concept provides a rational process for arriving at non-disparate dispositions.

Several points should be made in adopting the retributive (punishment) goal. First, the change to punishment is not put forth as a crime control measure. No claim is made that it will result in a reduction of crime. (It does not appear that anyone has the answer to rising crime.) Indeed, sentencing impacts on an almost significant number of actual offenders, and its crime control aspect is minimal. What the change is intended to accomplish is to inject fairness into sentencing by structuring the discretion of the Paroling Authority.

Second, retribution, in theory, has no utilitarian purpose and cannot be measured for success or failure. It merely stands for the moral proposition that the sentence should proportionately fit the crime and the criminal. However, it is clear that punishment results

in incapacitation, deterrence, and even in rehabilitation to some degree. And these other goals of sentencing should also be secondarily considered in appropriate context. It must be specifically stressed that rehabilitative efforts in prison and probation should be continued, but within the terms fixed under objective considerations related to the punishment concept.

Third, punishment is not to be equated with "long prison terms" nor with "harsher sentencing." The punishment should be proportionate to the crime. Hawaii's penalties are already high, and adoption of punishment criteria in the guidelines of the Paroling Authority may well call for shorter prison terms. A comparison with California, whose presumptive sentencing model expressly adopts "punishment" as the purpose of imprisonment, shows that its average sentences are much lower than even the minimum terms imposed in Hawaii; for example, 4.6 years versus 9.5 years for robbery, and 4.9 years versus 15.6 for rape, and 3.6 years versus 6.3 for assault with a deadly weapon.

Finally, to make the statutes consistent with this change in emphasis, changes are recommended to de-emphasize the rehabilitative concept. In substance, statutory references to rehabilitative considerations are deleted and an express legislative policy statement is made that punishment is the goal of sentencing.

In short, the indeterminate model with rehabilitation as its primary goal on which Hawaii's sentencing laws are patterned is premised on insupportable assumptions, resulting in unfair and disparate dispositions on the levels of the court and paroling authority. Hawaii has modified its model in recent years by enacting "mandatory" laws which substantially determine judicial IN/OUT decisions, achieving some uniformity on that level. It is recommended that steps be taken to promote uniformity on the level of the paroling authority by formally structuring its decision-making process. It is also recommended that punishment be expressly adopted as the principal goal of sentencing so as to promote non-disparate dispositions.

FOOTNOTES

1. Because not all crimes come to the attention of the police, the International Association of Chiefs of Police limited the reporting of offenses known to them to seven offense classifications called "index" crimes. The index crimes are the ones assumed to be most likely to be reported and which occur with sufficient frequency to provide an adequate basis for comparison purposes. The seven index crimes are: 1. criminal homicide; 2. forcible rape; 3. robbery; 4. aggravated assault; 5. burglary; 6. larceny-theft; 7. motor vehicle theft. (These index crimes are further broken down into two categories: crimes against the person (violent crimes), consisting of the first four named; and property crimes (the last three named). In 1970, the total index crimes reported in Hawaii was 40,552, and this figure had increased by 63% to 66,245 in 1979. The index crime rate (index crimes per 100,000 population) in 1970 was 5,267.1 and this had increased to 7,241.5 by 1979, a 37% increase. Hawaii Criminal Justice Statistical Analysis Center, COMPARATIVE CRIME TRENDS STATE OF HAWAII 1970-1978; CRIME IN HAWAII 1979.

2. A recent opinion poll sponsored by the Honolulu Advertiser asking voters what they think is "the most important problem facing the (newly elected) mayor of Honolulu...the problem that needs to be given the highest priority", received a response which rated crime at 47% with the next highest problems mentioned being inflation and housing at 5% each. THE HONOLULU ADVERTISER, Nov. 9, 1980.

3. Sykes, "The Future of Crime," NATIONAL INSTITUTE OF MENTAL HEALTH, CENTER FOR STUDIES OF CRIME AND DELINQUENCY. Judge David L. Bazelon of the U. S. Circuit Court of Appeals for the District of Columbia writes: "...there is precious little hard evidence that the more uniform sentences, or even the longer sentences...will significantly reduce crime. In addition, while the concept of deterrence may have application in the area of white collar crime, it has little or no meaning in the alienated world of violent street crime. This world is one of savage deprivation. Virtually all street crime comes out of wretched poverty, broken families, malnutrition, mental and physical illenss, mental retardation, racial discrimination, and lack of opportunity. Street crime springs from the anger and resentment of those who have been twisted by a culture of

grinding oppression. The roots of street crime are thus embedded deep within the inequities of our very social structure. So long as these inequities remain, the roots will be continually refreshed and rejuvenated. To speak of incapacitation and deterrence in this context is to consign oneself to a treadmill, unable to stem the increasing crime rates despite a succession of repressive measures." Bazelon, Missed Opportunities in Sentencing Reform, 7 HOFSTRA L. REV. 57 (1978).

4. Colonial history from CRIME AND PUNISHMENT IN NEW YORK, Report to Governor Carey by the Executive Advisory Committee on Sentencing (1979), hereafter referred to as CRIME AND PUNISHMENT IN NEW YORK.

5. Brockway, FIFTY YEARS OF PRISON SERVICE: AN AUTOBIOGRAPHY (1912); Zalman, The Rise and Fall of the Indeterminate Sentence, 24 WAYNE L. REV. 45, 50 (1977).

6. Wines, TRANSACTIONS OF THE NATIONAL CONGRESS ON PENITENTIARY AND REFORMATORY DISCIPLINE (1871).

7. Zalman, see Note 5.

8. Orland, From Vengeance to Vengeance: Sentencing Reform and Rehabilitation, 7 HOFSTRA L. REV. 29 (1978).

9. Act 45, SESSION LAWS OF HAW. 1909.

10. Act 9, SESSION LAWS OF HAW. 1972.

11. HAW. REV. STAT., Sec. 706-606.

12. HAW. REV. STAT., Sec 706-605.

13. HAW. REV. STAT., Sec. 706-620. This section provides that "The court shall deal with a person who has been convicted of a crime without imposing sentence of imprisonment unless...it is of the opinion that:
    (1) There is undue risk that during the period of a suspended sentence or probation the defendant will commit another crime; or
    (2) The defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution; or;
    (3) A lesser sentence will depreciate the seriousness of the defendant's crime."
    Additionally, HAW. REV. STAT., Sec. 706-621 advises the judge of nine "grounds" (such as no harm caused or threatened, strong provocation, hardship to

dependents, likelihood of responding to probationary treatment, etc.) in favor of "withholding sentence of imprisonment." (There were eleven grounds originally listed in the Hawaii Penal Code but two were deleted in 1980.) The requirement that the judge affirmatively finds that at least one of the three considerations to be present before he can impose a prison sentence and the added checklist of "grounds" against a sentence of imprisonment certainly appears to raise a presumption against imprisonment.

14. Felonies (excepting murder, which is treated specially) are divided into three classes: A, B, and C. Class A felonies carry a 20-year term of imprisonment; Class B felonies, a 10-year term; and Class C felonies, a 5-year term. "When ordering such a sentence, the court shall impose the maximum term..." HAW. REV. STAT., Sec. 706-660. Modifications of the mandatory A, B, and C terms of imprisonment may come about in the following circumstances: where the defendant is a first-time offender under 22 years of age, the judge may, in his discretion, treat the defendant as a "youthful offender" and impose a shorter term of imprisonment; where the defendant is found to be a certain type of offender (multiple, dangerous, persistent, or professional offender) the judge must impose an "extended term" of imprisonment increasing the Class A term to life, the Class B term to 20 years, and the Class C term to 10 years. HAW. REV. STAT., Sec. 706-667 and 706-661, 662, as initially enacted.

15. HAW. REV. STAT., Sec. 353-62(a)(3).

15a. HAW. REV. STAT., Sec. 353-69.

16. All sentences of imprisonment are indeterminate sentences; that is, although the judge imposes a set term of "x" number of years, the prisoner is eligible for earlier release by being paroled by the parole authority. (HAW. REV. STAT., Sec. 706-660; 706-669; 706-670.) However, certain repeat offenders (HAW. REV. STAT., Sec. 706-606.5) and felony offenders using firearms (HAW. REV. STAT., Sec. 706-606.1) are required to be given mandatory minimums, by reason of amendments to the Penal Code subsequent to 1972.

17. Act 188, SESSION LAWS OF HAW. 1975.

18. HAW. REV. STAT., Chap. 853.

19. HAW. REV. STAT., Sec. 706-660.1.

20. Act 181, SESSION LAWS OF HAW. 1976.

21. Act 98, SESSION LAWS OF HAW. 1979.

22. Act 284, SESSION LAWS OF HAW. 1980. The repeat offender statute initially applied mainly to class A felonies, and Act 284 broadened the coverage to include many class B and C offenses. It further split the offenses into two classes, one which could be characterized as the "more serious" and the other as the "less serious" offenses. The more serious offenses are subject to a five-year mandatory minimum term for the second conviction and a ten-year minimum term for the third and subsequent convictions. The less serious offenses are punishable by a mandatory three-year minimum term for offenders with one prior conviction, and a five-year minimum term for offenders with two or more convictions. The sentencing court is given the discretion to impose lesser mandatory minimums if it found "strong mitigating circumstances" (to be put in writing by the judge).

23. Act 294, SESSION LAWS OF HAW. 1980. The committee report on this bill puts the matter very simply: "...the serious of class A felonies...which all involve violence, physical harm, or the threat thereof, merits mandatory imprisonment.. This bill effects this purpose by denying suspension of sentence and probation as sentencing options in class A convictions, but retains, through indeterminate sentence, the option of parole by the parole authority in order that unusual extenuating circumstances can be given due consideration." (Act 294 reads: "Notwithstanding sections...706-606.5...and any law to the contrary, a person who has been convicted of a class A felony shall be sentenced to an indeterminate term of imprisonment of twenty years without possibility of suspension of sentence of probation. The minimum length of imprisonment shall be determined by the Hawaii paroling authority in accordance with section 706-660."

24. Act 295, SESSION LAWS OF HAW. 1980.

25. "A person who has been convicted of a felony may be sentenced to an indeterminate term..." HAW. REV. STAT., Sec. 706-660. The young adult offender may be sentenced to a "special indeterminate term." HAW. REV. STAT., Sec. 706-667. Where an extended term is to be imposed because the offender or crime is of a special type, the sentence is an "extended indeterminate term of imprisonment." HAW. REV. STAT., Sec 706-661. The class A felon, mandated to

prison, is given "an indeterminate term of imprisonment of twenty years without possibility of suspension of sentence or probation. The minimum length of imprisonment shall be determined by the Hawaii paroling authority..." Act 294, SESSION LAWS OF HAW. 1980. A murderer is sentenced to "an indeterminate term of imprisonment," but a special category of murderers do not become eligible for parole for a period of 20 years. HAW. REV. STAT., Sec. 706-606. Felony-firearms offenders and repeat offenders are also sentenced to indeterminate terms, although they may not become eligible for parole for varying periods set by statute. HAW. REV. STAT., Sec. 706-660.1 and 606.5.

26. HAW. REV. STAT., Sec. 353-64, 65 and 706-669, 670.

27. Act 179, SESSION LAWS OF HAW. 1970.

28. State Law Enforcement and Juvenile Delinquency Planning Agency, 1 CORRECTIONAL MASTER PLAN 1.3-1.4 (1972).

29. Act 179, SESSION LAWS OF HAW. 1973.

30. HAW. REV. STAT., Sec. 353-1, 2.

31. For discussion of some of the problems encountered in the implementation of the CMP and the operation of the Intake Services Center, see, State Law Enforcement and Planning Agency, PROGRESS AND ASSESSMENT REPORT OF THE HAWAII STATE CORRECTIONAL MASTER PLAN (1980).

32. Act 214, SESSION LAWS OF HAW. 1979.

33. PROGRESS AND ASSESSMENT REPORT OF THE HAWAII STATE CORRECTIONAL MASTER PLAN (1980), see Note 31, at 32, 36.

34. See studies cited in Hood & Sparks, Key Issues in Criminology, pp. 141-170, 171-193 (1970), relating to sentencing disparity and the efficacy of correctional treatment; K. Menninger, The Crime of Punishment (1968); Donald Cressey, Limitations on Organization of Treatment in the Modern Prison, and Lloyd Ohlin, Conflicting Interests in Correctional Objectives in Theoretical Studies in Social Organization in the Prison (pamphlet, SOCIAL SCIENCE RESEARCH COUNCIL, March (1960).)

35. Alaska (1978), Arizona (1978), California (1977), Colorado (1979), Illinois (1978), Indiana (1977), Maine (1978), Minnesota (1978), Missouri (1977), New Jersey (1979), New Mexico (1979), North Carolina (1979), Oregon (1978), Pennsylvania (1970), Tennessee (1979).

36. STRUGGLE FOR JUSTICE, American Friends Service Committee, at 148 (1971).

37. Frankel, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1972); Morris, THE FUTURE OF IMPRISONMENT (1974); Fogel, WE ARE THE LIVING PROOF: THE JUSTICE MODEL FOR CORRECTIONS (1972); TWENTIETH CENTURY FUND, FAIR AND CERTAIN PUNISHMENT (1976).

38. Bailey, An Evaluation of 100 Studies of Correctional Outcomes, THE SOCIOLOGY OF PUNISHMENT AND CORRECTIONS 733, 738 (1970).

39. Hood and Sparks, KEY ISSUES IN CRIMINOLOGY 186 (1970).

40. Martinson, What Works? Questions and Answers About Prison Reform, 35 PUB. INTEREST 25 (1974).

41. Id. at 42.

42. Martinson subsequently qualified his prior conclusion on the basis of studying recidivism among juvenile offenders, finding that "...treatments will be found to be 'impotent' under certain conditions, beneficial under others, and detrimental under still others," depending on the conditions under which they are administered. Martinson, New Findings, New Views: A Note of Caution Regarding Sentencing Reform, 7 HOFSTRA L. REV. 254 (1979).

43. Ward, Sweden: The Middle Way to Prison Reform?, in PRISONS: PRESENT AND POSSIBLE 89, 110-114 (1978).

44. Id., at 128-9.

45. Id., at 135 quoting Bondeson, A Critical Survey of Correctional Treatment Studies in Scandinavia, 1945-1974, in CRIME DETERRENCE AND OFFENDER CAREER PROJECT 328 (1975).

46. Reid, A Rebuttal to the Attack on the Indeterminate Sentence, 51 WASH. L. REV. 565 (1976).

47. "Among the key concepts of the plan are the precepts that community-based correctional programs are preferable to institutional treatment where this is feasible without detriment to the safety of the community." Governor J. Burns, in the Foreward to

the NATIONAL CLEARINGHOUSE FOR CRIMINAL JUSTICE PLANNING AND ARCHITECTURE and STATE LAW ENFORCEMENT AND JUVENILE DELINQUENCY PLANNING AGENCY, STATE OF HAWAII, CORRECTIONAL MASTER PLAN SUMMARY (1973). Halfway houses are favored because they are felt to be more humane than imprisonment, because they can be used to reintegrate the offender into the community, and because of possible economic savings. H. Allen, E. Carlson, E. Parks, & R. Seiter, HALFWAY HOUSES 1 (1978). The effectiveness of halfway houses and other in-community treatment programs in reducing recidivism is open to question. See, Fishman, An Evaluation of Criminal Recidivism in Projects Providing Rehabilitation and Diversion Services in New York City, 68 J. CRIM. L. & CRIMINOLOGY 283 (1977).

48. von Hirsch, Doing Justice: The Choice of Punishments (1976).

49. Pugsley, Retributivism: A Just Basis for Criminal Sentences, 7 HOFSTRA L. REV. 379 (1979).

49a. THE HONOLULU ADVERTISER, "Violent Crime in Hawaii," series, Sept. 10 through Sept. 20, 1978.

50. Frankel, Lawlessness in Sentencing, 41 U. CIN. L. REV. 1 (1972).

51. Diamond, The Psychiatric Prediction of Dangerousness, 123 U. PA. L. REV. 439 (1973); Reid, A Rebuttal to the Attack on the Indeterminate Sentence, 51 WASH. L. REV. 565 (1975); Morris, The Future of Imprisonment: Towards a Punitive Philosophy, 72 MICH. L. REV. 1161 (1974); Dershowitz, The Law of Dangerousness, Some Fictions About Predictions, 23 J. LEGAL EDUC. 24 (1970); von Hirsch, Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons, 21 BUFFALO L. REV. 717 (1972); Lipton, Martinson, & Wilks, EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES (1975); Monahan & Monahan, Prediction Research and the Role of Psychologists in Correctional Institutions, 14 SAN DIEGO L. REV. 1028 (1977).

52. Kozol, Boucher, & Garofalo, The Diagnosis and Treatment of Dangerousness, 18 CRIME & DELINQUENCY 371 (1972).

53. Wenk, Robison, & Smith, Can Violence Be Predicted? 18 CRIME & DELINQUENCY 393, 395 (1972).

54. Monahan, The Prediction of Violent Criminal Behavior: A Methodological Critique and Prospectus in DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES (1978).

55. Id., at 250.

56. AMERICAN JUSTICE INSTITUTE & NATIONAL COUNCIL ON CRIME AND DELINQUENCY: SENTENCING AND PAROLE RELEASE SOURCEBOOK 8-11 (1979).

57. Id., at 10.

58. Morris, The Future of Imprisonment: Toward a Punitive Philosophy, 72 MICH. L. REV. 1161, 1173 (1974). "Yet, it must be admitted, our inability to predict dangerousness with any acceptable measure of certainty does not alone compel the abandonment of dangerousness as a determinant of the decision to imprison. There are those, no doubt, who would accept the cost. Thus, any firm conclusion drawn from these observations on our modest capacity to predict violent behavior must await resolution of the second question addressed here--why risk any future criminality by releasing convicted criminals? My own conclusion may be properly foreshadowed: As a matter of justice we would never take power over the convicted person based on uncertain predictions of his dangerousness."

59. Cohen, The Incapacitative Effect of Imprisonment: A Critical Review of the Literature in DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES 187, 188 (1978). "Even if one is prepared to accept the thesis that conviction of a crime confers on society the right to confine a person in order to prevent future crimes, the opponents of preventive detention and preventive confinement of convicted offenders go on to argue, with some merit, that convicted offenders are entitled to the same safeguards against unwarranted government interference and, in particular, the same standards of proof as accused offenders. Thus, preventive confinement can only be employed when there is no reasonable doubt about the future crimes."

60. Diamond, The Psychiatric Prediction of Dangerousness, 123 U. P. L. REV. 439 (1975); Scott, Violence in Prisoners and Patients, Medical Care and Prisoners and Detainees, 143, 152 (Ciba Foundation Symposium 16 (n.s.)) (1973).

61. Task Force on the Role of Psychology in the Criminal Justice System, Report 33 AM. PSYCHOLOGIST 1099, 1110 (1978).

62. Iverson, The Human Element in Justice, 10 J. CRIM. L. & CRIMINOLOGY 90 (1919).

63. Id., at 99.

64. Comment, Empirical Study of California Penal Code Section 666: Enhanced Sentences Only Applied to Second Offenders Who Have Served Jail Time Violates Equal Protection and Due Process, 12 U.S. F. L. REV. 679, 689 (1977).

65. Comptroller General, Reducing Federal Judicial Sentencing and Prosecuting Disparities: A Systemwide Approach Needed (1979).

66. Fujioka, Iha, Wong, & Wong, WHAT DETERMINES A SENTENCE. A research project submitted in partial fulfillment of the requirements for the degree of Master of Social Work, University of Hawaii (1978).

67. HAW. REV. STAT., Sec 706-620.

68. HAW. REV. STAT., Sec. 706-621.

69. THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 28 (1967).

70. Tiffany, Yakov, Avichai, & Peters, A Statistical Analysis of Sentencing in Federal Courts: Defendants Convicted After Trial, 1967-1968, in J. LEGAL STUDIES 369, 380 (1976).

71. Alaska Judicial Council, Alaska Felony Sentencing Pattern: A Multivariate Statistical Analysis (1974-1976); Tiffany, Yakov, Avichai, & Peters, A Statistical Analysis of Sentencing in Federal Courts: Defendants Convicted After Trial, 1967-1968 in J. LEGAL STUDIES 369, 387-8. (1976). But note: New Jersey's Sentencing Guidelines Project found that "the data do not support the contention that minority race offenders receive more severe sentences than similar white offenders"--the difference in incarceration rate (47% for blacks and 33% for whites) being justified on the basis of other factors. SENTENCING GUIDELINES PROJECT TO THE ADMINISTRATIVE DIRECTOR OF THE COURTS ON THE RELATIONSHIP BETWEEN RACE AND SENTENCING 9, 26, 35 (1979).

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ERRATA

EVALUATION OF HAWAII'S INDETERMINATE SENTENCING LAW
by Statewide Sentencing Project
dated March 1981

Footnote 84 was inadvertently omitted from the list of footnotes on page 140. Footnote 84 should read:

84. D. Nagin, General Deterrence: A Review of the Empirical Evidence, in DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES (1978).

72. Frankel, Lawlessness in Sentencing, at 21, see Note 50.

73. HAW. REV. STAT., Sec. 706-660.

74. HAW. REV. STAT., Sec. 706-669.

75. HAW. REV. STAT., Sec. 353-65.

76. HAW. REV. STAT., Sec. 353-62(a)(3).

77. HAW. REV. STAT., Sec. 353-69.

78. Ploscowe, The Court and the Correctional System in CONTEMPORARY CORRECTION, TAPPAN (ed.), 51 (1951).

79. Bennett, Of Prisons and Justice, Sen. Doc. No. 70, 88th Cong. 2nd Sess. 319 (1964).

80. Singer, In Favor of "Presumptive Sentences" Set by a Sentencing Commission, 24 CRIME AND DELINQUENCY 401, at 39, see Note 50.

81. Twentieth Century Task Force on Criminal Sentencing, FAIR AND CERTAIN PUNISHMENT, 139 (1976). Citing from the "Official Report of the New York State Special Commission on Attica." 93 (1972).

82. Pugsley, Retributivism: A Just Basis for Criminal Sentences, 7 HOFSTRA L. REV. 379, 380 (1979).

83. See, e.g., Cook, Punishment and Crime: A Critique of Current Findings Concerning Criminal Sanctions (1976); Tullock, Does Punishment Deter Crime?, 36 PUB. INTEREST 103 (1974).

85. Id., at 110.

86. U. S. Department of Justice, CRIMINAL VICTIMIZATION IN THE UNITED STATES (1979).

87. The formula used in evaluating the effectiveness of sanctions on criminal activity is the following:

$$\text{Sanction level} = \frac{\text{commitments}}{\text{reported offenses}}$$

$$\text{Crime rate} = \frac{\text{reported offenses}}{\text{population}}$$

Thus, a decrease in reported crime will increase the apparent sanction level (since the denominator decreases), even though the actual crime rate may not have decreased. This negative association is

attributable not to the deterrent effect of increased sanctions, but is a result of the changes in the reporting rate. See, Yeager, Do Mandatory Prison Sentences for Handgun Offenders Curb Violent Crime? 11 (1976): "...strong citizen support for law enforcement may lead to a higher certainty of detection or to more crimes being reported to the police. The inability to control factors other than punishment that might influence crime rates is a major weakness of many studies on deterrence."

88. "Punishment has an impact on crime, but crime also has an impact on punishment, and this two-way process may either create a false impression of a deterrent effect, or, on the contrary, serve to conceal such efforts. If crime rates, for some reason, have increased, they may lead to greater use of probation or fines to reduce overcrowding in prisons, and thus create an impression that lenience in dealing with offenders is responsible for high crime rates." Andenaes, General Prevention Revisited: Research and Policy Implications, 66 J. CRIM. L. & CRIMINOLOGY 342, 348 (1975).

89. "Of course, these estimates have limitations. First, the studies do not really isolate general deterrence effects from those of recidivism and incapacitation; rather, the estimates have combined these individual effects in a single correlation measure. Thus, while underlying the findings reported in these studies, it is misleading to refer to these findings as estimates of the 'deterrence' effect." Rhodes & Wellford, Sentencing and Social Science: Research for the Formulation of Sentencing Guidelines, 7 HOFSTRA L. REV. 355, 363 (1979).

90. Nagin, at 117, see Note 84. Andenaes also argues that the models do not take into account the effects of the community attitudes in influencing the crime rate. "If community condemnation of certain criminal acts is strong, this may lead to lower crime rates and at the same time to a greater severity of punishment, thus creating an impression that the lower crime rate is due to the severity of punishment."

91. Nagin, at 136, see Note 84.

92. Pugsley, at 392, see Note 82.

93. "The claim for deterrence is belied by both history and logic." Barnes & Teethers, NEW HORIZONS IN CRIMINOLOGY 286 (3rd ed. 1959).

94. CRIME AND PUNISHMENT IN NEW YORK, at 111, see Note 4.

95. "Notwithstanding these stiff penalties, a joint report issued by the Association of the Bar of the City of New York and the Drug Abuse Council found that the revised law had no deterrent effect--it failed to reduce heroin use or drug-related property crime. The reason appeared to be, at least in part, that the severe sanctions contained in the 1973 law reduced the certainty of punishment. There were actually fewer arrests for drug offenses after the new law than before; a smaller percentage of repeat offenders who were arrested were indicted; a smaller percentage of those offenders who were indicted were convicted; and the time to process cases increased considerably." Id., at 114.

96. It should be noted that this percentage would be subject to adjustment by the fact that offenses reported do not include all offenses committed (lowers the percentage) or the fact that one individual may be the perpetrator of more than one of the offenses reported (increases the percentage). A prosecutor was recently quoted as saying that the chances of a robber getting to the sentencing stage was one out of 4,000. HONOLULU STAR BULLETIN, March 13, 1981. During the one year period between September 1979 and August 1980, 14.7% of all adults who had been arrested on felony charges reached the stage of being sentenced. HAWAII CRIMINAL JUSTICE STATISTICAL ANALYSIS CENTER, REPORT ON ADULT ARREST DISPOSITIONS (JANUARY 1981). The report does not compare the ratio of the number of offenses reported to the number of sentences imposed.

97. Greenwood, The Incapacitative Effect of Imprisonment: Some Estimates, 9 LAW & SOCIETY REV. 541, 542 (1975).

98. Shinnar & Shinnar, The Effects of the Criminal Justice System on the Control of Crime: A Quantitative Approach, 9 LAW & SOCIETY REV. 581 (1975), at 607.

99. Greenberg, at 542, see Note 97.

100. CRIME AND PUNISHMENT IN NEW YORK, at 116-117, see Note 4.

101. Cohen, The Incapacitative Effect of Imprisonment: A Critical Review of the Literature, in DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES, 187 (1978).

102. Id., at 230.

103. Id., at 209-210.

104. Id., at 218.

105. Id., at 226.

106. Hawaii ranked third in the nation in the index crime rate in 1978, according to the Uniform Crime Reports published by the U. S. Department of Justice. Cohen, see Note 101, at 240, rated Hawaii last among 29 states in 1970 in rates of arrest, conviction, and imprisonment when a crime was committed.

107. Cohen, at 225, see Note 101.

108. "Andrew T. Chang, director of the state Department of Social Services and Housing, said that present construction costs for each Hawaii State Prison inmate is $48,000 to $50,000 and annual operational costs per prisoner are $15,000 to $16,000." HONOLULU STAR-BULLETIN, Mar. 19, 1980.

109. Cohen, at 225-226, see Note 101.

110. Id., at 225, 228.

111. CRIME AND PUNISHMENT IN NEW YORK, at 118, see Note 4.

112. Pugsley, at 389, see Note 82.

113. Cohen, at 216, see Note 101.

114. Van Dine, Conrad, & Dinitz, The Incapacitation of the Chronic Thug, 70 J. CRIM. L. & CRIMINOLOGY (1979).

115. Although available evidence is far from conclusive, it appears that imprisonment (as compared to probation) increases the probability of the offender recidivating. See, Levin, Policy Evaluation and Recidivism, 6 LAW & SOCIETY REV. 17, 37 (1971).

116. CRIME AND PUNISHMENT IN NEW YORK, at 121, see Note 4.

117. Packer, The Limits of the Criminal Sanction, 58-59 (1968).

118. STRUGGLE FOR JUSTICE, at 146, see Note 36.

118a. Waldo and Chiricos, Work Release and Recidivism; An Empirical Evaluation of a Social Problem, 1 EVALUATION QUARTERLY 87 (1977); Jeffrey and Woolpert, Work Furlough as an Alternative to Incarceration: An Assessment of its Effects on Recidivism and Social Cost, 65 J. CRIM. L. & CRIMINOLOGY 405 (1974); Le Clair, An Evaluation of the Impact of the MCT Day Program, cited in Greenberg, CORRECTIONS AND PUNISHMENT (1977); Fishman, An Evaluation of Criminal Recidivism in Projects Providing Rehabilitation and Diversion Service in New York City, 68 J. CRIM. L. CRIMINOLOGY 283 (1977).

118b. See, e.g., Lipton, Martinson, and Wilks, THE EFFECTIVENESS OF CORRECTIONAL TREATMENT (1975); Levin, Policy Evaluation and Recidivism, 6 LAW & SOCIETY REV. 17 (1972). Reviews of Oahu's 1972 and 1974 probationers indicate a reconviction rate of 50% in 5 years.

118c. CRIME AND PUNISHMENT IN NEW YORK (Appendix), at 316.

119. CRIME AND PUNISHMENT IN NEW YORK, at 121-122, see Note 4.

120. Id., at 121-122.

121. Id., at 122.

122. Id., at 122.

123. See, e.g., Dershowitz, Background Paper, in FAIR AND CERTAIN PUNISHMENT 67, 72-3 (1976); Coffee, The Repressed Issues of Sentencing: Accountability, Predictibility, and Equality in the Era of the Sentencing Commission, 66 GEO. L. REV. 975, 1060 (1978); Von Hirsch, DOING JUSTICE 47 (1976); Pugsley, at 381, see Note 82.

124. KANT'S POLITICAL WRITINGS (H. Reiss ed. 1970) at 154, 155.

125. Id., at 155.

126. Id., at 155.

127. Pugsley, at 398, see Note 82.

128. Id., at 399 et. seq.

129. Id., at 401.

130. Id., at 400.

130a. It has been recognized that, "[i]n fact, the estimate of the shadow price of crime may be a major determinant of the benefit-cost ratio of programs that are expected to yield crime reduction as their major benefit." Weimer & Friedman, Efficiency Considerations in Criminal Rehabilitation Research:

Costs and Consequences, 251, 260. The "shadow price" is the price that must be estimated because there is no market that deals in that commodity.

131. See, Zalman, A Commission Model of Sentencing, 53 NOTRE DAME L. REV. 266, 272 (1977).

132. Kramer, Hussey, Lagoy, Katlin, & McLaughlin, Assessing the Impact of Determinate Sentencing and Parole Abolition in Maine 52 (1978).

133. Anspach & Kramer, The Crossroads of Justice: Problems with Determinate Sentencing in Maine (undated).

134. Letter from John H. Kramer, Executive Director of the Pennsylvania Commission on Sentencing, to Alvin T. Ito (December 18, 1979).

135. HAW. REV. STAT., Sec. 706-606(a). Commutation of the sentence to life with parole by the governor is possible after 20 years.

136. See, Antunes and Hunt, The Deterrent Impact of Criminal Sanctions: Some Implications for Criminal Justice Policy, 51 J. URBAN L. 145, 158 (1973). "From this analysis we find no support for the proposition that severity of sentence acting alone is a general deterrent to crime. However, we find a consistent, moderate effect for certainty of punishment acting to reduce crime rates." See also, Antunes and Hunt, The Impact of Certainty and Severity of Punishment on Levels of Crime in American States: An Extended Analysis, 64 J. CRIM. L. & CRIMINOLOGY 486 (1973).

137. "This court has previously recognized that 'for the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender'...Consideration of both the offender and the offense in order to arrive at a just and appropriate sentence has been viewed as a progressive and humanizing development." Woodson vs. North Carolina, 428 U. S. 280 (1976).

138. Hoffman & Stover, Reform in the Determination of Prison Terms: Equity, Determinancy, and the Parole Release Function, 7 HOFSTRA L. REV. 89, 98-99 (1979).

139. Id., at 101.

140. JOINT COMMITTEE ON NEW YORK DRUG LAW EVALUATION, THE NATION'S TOUGHEST DRUG LAW: EVALUATING THE NEW YORK EXPERIENCE, 65 n. 4D (1977).

141. FAIR AND CERTAIN PUNISHMENT, at 22, see Note 37. The Twentieth Century Fund, Task Force on Criminal Sentencing, advocates the retention of the parole board in a presumptive sentencing system. The parole board or releasing agency would have more limited authority than at present to release the defendant earlier than prescribed by the judicially fixed sentence. The board could decide on release, but only within a previously fixed range and on the basis of relevant information (as defined by the legislature) that was not available to the sentencing judge. The justification for early release would be to facilitate the prisoner's transition to the outside community or because of compelling medical need.

142. CAL. PENAL CODE Sec. 1170 (West 1977) (effective July 1, 1977); IND. CODE Sec. 35-50-1-1 et. seq. (1977) (effective October 1, 1977); ARIZ. REV. STAT. ANN. Sec. 13-701 et. seq. (1978) (effective October 1, 1978); COLO. REV. STAT. Sec. 16-11-101 et. seq. (1979) (effective July 1, 1979); N. M. STAT. ANN. Sec. 31-18-15 (1979) (effective July 1, 1977); N. J. STAT. ANN. Sec. 2C:43-1 et. seq. (1979) (effective September 1, 1979); ALASKA STAT. Sec. 12.55.005 et. seq. (1978) (effective January 1, 1980); N. C. GEN. STAT. Sec. 14-1-1 et. seq. (1979) (effective July 1, 1979).

143. The prosecution or defense may submit statements in aggravation or mitigation of the offense to supplement or controvert the probation officer's pre-sentence report. CAL. PENAL CODE, Sec. 1170(b) (West 1978). The prosecution may agree not to allege aggravating circumstances as part of a plea bargain agreement. See, CRIME AND PUNISHMENT IN NEW YORK, see Note 4; Howard, Determinate Sentencing in California 19 (1978). The Twentieth Century Fund's study anticipated this result: "Bargaining in exchange for sentencing recommendations will probably be curtailed through the narrowing of judicial discretion and the elimination of the plea of guilty as a mitigating factor. But bargaining for a reduced charge will be possible and could conceivably become more prevalent; it could also take place over mitigating and aggravating factors. (If the defendant pleads guilty, the government will neither raise any aggravating factors nor challenge any mitigating factors.) FAIR AND CERTAIN PUNISHMENT at 26, see Note 37.

144. Howard, Determinate Sentencing in California 25 (1978).

145. FAIR AND CERTAIN PUNISHMENT, at 13, see Note 37. "The overcrowding of prisons has exacerbated the problems created by indeterminancy of sentencing. Under the indeterminate sentence and its many variations, the basic question for the sentencing judge today tends to be 'in or out.' Should the defendant be sentenced to imprisonment or placed on probation? A large proportion of offenders are placed on probation simply because there is no room for them in overcrowded prisons. (Or there may be no room for them on the crowded court dockets, thus necessitating the acceptance of a plea bargain that results in probation.)" Although the foregoing statement is made as a criticism of indeterminate sentencing (disparity resulting from overcrowding where the judge is given unstructured discretion on the IN/OUT decision), it should be noted that overcrowding (caused by the presumptive sentencing approach) can also result in disparity through the charging process or in plea bargaining.

146. See Exhibits B, C, and D in APPENDIX B.

147. Dershowitz contends that the legislature should be the body to set penalties for crimes: "The questions of justice and policy embodied in the sentencing decision involve the relative seriousness of crimes and the level of punishment appropriate for each crime and/or type of criminal--questions of enormous gravity both for individuals and for society. Democratic theory would seem to dictate that such important decisions concerning human liberty should be made by the most representative elected body... The legislative process, whatever its shortcomings, is the most open; debates are public, votes are recorded, and anyone may present an opinion to a representative for his consideration.
.....
It is clear that no democratic society would ever leave it to judges, administrators, or experts to decide which acts should constitute crimes. That decision is quintessentially legislative, involving, as it does, fundamental questions of policy. Likewise, it should not be left to judges, administrators, or experts to determine the bases on which criminal offenders in a democratic society should be deprived lawfully of their freedom." Dershowitz, Background Paper, in FAIR AND CERTAIN PUNISHMENT 123-3, see Note 37.

148. OR. REV. STAT. Sec., 144.780 (1980).

149. OR. REV. STAT., Sec. 144.780 (1980).

150. MINN. STAT. ANN., Sec. 244.09(5)(2) (1979).

151. S. 1722, 96th CONG., 1st Sess., Sec. 994(f) (1979).

152. MODEL SENTENCING AND CORRECTIONS ACT, Sec. 3-115(c).

153. CRIME AND PUNISHMENT IN NEW YORK, at 61, see Note 4.

APPENDIX A

Generally, two methods may be employed to test for disparity. The first involves gathering relevant background data and sentencing outcomes for actual sentences, then subjecting the information to statistical analysis. The second is to run a simulation, using hypothetical defendants and having judges "sentence" these same individuals. The second method enjoys the advantage of presenting identical fact situations to each of the judges. Such a simulation was undertaken by the Project.

Six presentence reports were prepared based on actual cases that had been heard by judges in the First Circuit. Because some of the judges participating could have been familiar with the cases, the information relating to the identity of the defendant and the circumstances of the offense was altered. The presentence reports involved two cases of rape in the first degree (defendants V and Z), two cases of theft in the first degree (defendants Y and W), and two cases of manslaughter (defendants U and X). Three of the reports were selected because it was felt that the IN/OUT decision would be close (defendants V, X, and Z); the other three because the IN/OUT decision was relatively clear (defendants U, W, and Y).

The presentence reports and other materials were mailed to nine Circuit Court judges who were on the criminal bench, of whom eight responded.

Table A lists the total number of sentences of imprisonment and probation given to each defendant. There was only one instance (defendant Y), where all judges agreed as to the IN/OUT decision. For all other defendants, there was at least one judge who disagreed with the decisions rendered by the other judges. In four cases (defendants U, V, X, and Z) at least two judges imposed a sentence different from that imposed by the other judges. The results contained in Table A clearly show that where the decision to imprison or place on probation is a close one (defendants V, X, and Z), there will be significant differences. Where the IN/OUT decision is not as close (defendants U, W, and Y), there is still a good possibility that the sentence will be largely determined, not only by the facts of the offense and the background of the offender, but by who the judge is that is doing the sentencing.

Table B lists the specific sentences imposed by each judge for each defendant. The defendants (U through Z) are listed on the vertical axis of the chart, and the dispositions are listed on the horizontal axis of the chart. The identifying letter for each judge (A through H) was placed in the box if that judge imposed that sentence for the offender. Thus, for defendant U, judges E and F placed defendant U on probation (box in upper left corner) and judges E and F also imposed a jail term as a condition of probation (box to the right). Proceeding horizontally to "Imprisonment: Normal Term," judges A, B, C, D, G, and H

would have imprisoned defendant U to ten years of imprisonment.

An examination of the dispositions given to defendants W and Y (for whom there was the most agreement for the IN/OUT decision) indicates that there may be more disparity than observed at first glance. For defendant W, one judge felt that imprisonment was the appropriate sentence. Of the seven judges who sentenced defendant W to probation, five would have imposed some jail time as a condition of probation, two would have fined him, one would have required restitution, and two would have required some sort of community service to be performed. Thus, even for the sentences of probation given, the judges disagreed as to the conditions that were to be performed as part of the probationary period. Of the five judges who would have made jail a condition of his probation, three judges would have sentenced defendant W to three months in jail, one judge would have sentenced him to six months in jail, and one judge would have sentenced him to a full year in jail.

There is a total agreement among the eight judges that defendant Y should not be placed in prison. However, Table B indicates that two judges would have granted the motion to defer acceptance of guilty plea and six judges would have denied the motion. Defendant Y, a professional, was convicted of a white collar offense. The granting or denial of the deferred acceptance of guilty plea will affect Y's future criminal record and have substantial

impact upon his personal and professional life. Seven judges made jail a condition of probation or deferred acceptance of guilty plea, ranging from eight weekends in jail (one judge), one month in jail (three judges), three months in jail (one judge), and six months in jail (two judges, one would have allowed work release).

For defendant Z, three judges would have placed him on probation, and five judges would have placed him in prison. Among the judges who would have imprisoned defendant Z, two would have opted for the special youthful offender provision (four years imprisonment) and three would have sentenced defendant Z to the full twenty-year term of imprisonment. The disagreement regarding the appropriate length of imprisonment gives some insight as to the potential for disparity if judges were allowed to select the appropriate prison length.

Table C indicates the total number of sentences of probation and imprisonment imposed by each judge. Judges C and G imprisoned the most offenders (4), two-thirds of those they sentenced. Judge F imprisoned none of the offenders, Judge D imprisoned only one. This table indicates that there is a tendency for certain judges to imprison more than others. However, because of the small number of sentencing decisions made and the types of cases involved, there can be no generalization as to how "soft" or "hard" certain judges are.

Table D indicates the responses given by judges to the following question: "What general principle related to sentencing do you feel the criminal justice system should be most concerned with?" The judges ranked the five listed principles (rehabilitation, deterrence of others, deterrence of defendants, punishment, and incapacitation) in the order from the most important to the least important. As can be seen from Table D, five of the eight judges indicated that rehabilitation is the most important principle that the criminal justice system should be concerned with. Although not as strong as the consensus regarding rehabilitation, it appears that the deterrence of the offender is ranked second. The third-ranked principle would probably be punishment of the offender, followed by the deterrence of others, and finally the incapacitation of the offender. The belief in rehabilitation may reflect the policy contained in the Hawaii Penal Code and the Correctional Master Plan. It is interesting to note that rehabilitation is the principle that judges feel that the sentencing process should be concerned with and that punishment appears to rank somewhere in the middle of the five principles. This is at odds with the nationwide movement towards more punitively oriented sentencing schemes as well as to the great amount of public pressure that is presently being placed on judges to become more punitive. It appears that judges still adhere to the principle of rehabilitation and find that punishment should be given a secondary role in the sentencing of offenders.

Table E illustrates the reasons why each sentence was imposed and the outcome, by judge and defendant. It attempts to illustrate the relationship between the principle applied and the sentence imposed. For most defendants, when the same principle was applied, the same outcome resulted. For example, for defendant V, judges B, D, and F applied the principle of rehabilitation and sentenced defendant V to probation. Judges C and G applied the principle of punishment and sentenced defendant V to prison. Finally, judges E and H applied the principle of incapacitation and sentenced defendant V to prison. For the most part this pattern holds true for the other offenders. That is, when the judge applied the same principle, the same outcome resulted. However, when viewing the case of defendant U, we see that judge E applied the principle of punishment yet sentenced defendant E to probation, while judges B, C, and D applied the same principle of punishment and sentenced defendant U to prison. The same can be said when looking at the case of defendant Z. Judge D applied the principle of specific deterrence and sentenced defendant D to probation. Judge H also applied the same principle of specific deterrence but sentenced defendant Z to prison.

The implication of the above analysis is that application of the same sentencing principle will result in more uniform sentences. Thus, if it were clearly spelled out that the penal policy of sentencing were either rehabilitation, punishment, specific or general deterrence, or incapacitation,

it can be anticipated that some amount of disparity will be reduced. However, this conclusion should be considered to be tentative at best, as it is unclear as to the thought process that a judges uses in arriving at his sentence. To the extent that a judge may arrive at his decision and then decide which rationale to use, or use some other process or factor, the conclusion would be invalid.

Of the reasons given for the imposition of the sentence (excluding the disposition given by judge A for defendants U, V, X, and Z because more than one principle was used) fifteen sentences were imposed for purposes of punishment, thriteen sentences imposed for purposes of rehabilitation, eight sentences imposed for the deterrence of the defendant, six sentences imposed for the deterrence of others, and two sentences imposed for purposes of incapacitation. This is in contrast to Table C that indicates that most of the judges felt that the rehabilitation of the offender should be the foremost consideration in the criminal justice system. The reason that punishment is most frequently used may be due to the nature of the cases that were given to the judges. Two of the presentece reports were for rape cases, two for manslaughter cases, and two for theft in the first degree cases. Thus, four of the six cases presented to the judges involved injury or death to the victim. Given the nature of the cases, it is not surprising to find that punishment played a significant role in the sentencing decisions.

Table F illustrates the relationship between the principles applied and the sentencing outcome. It is really not surprising to find that rehabilitation is the reason for imposing probation or that imprisonment is ordered because punishment or incapacitation is necessary. What is perhaps the most significant aspect of Table F is that the application of the principle of rehabilitation never involved a prison sentence. In theory, the purpose of the indeterminate sentencing system is to encourage the rehabilitation of the offender who is placed in prison. But Table F reflects an awareness on the judges' part that prisons do not rehabilitate persons, and that if any rehabilitation is to occur, it is best done while on probation. Whether this belief is conscious or unconscious, it is confirmed by studies that show that the recidivism rates of probationers are at least as good as, and probably better than that of parolees, given similar offenders and offenses.

In conclusion, it can be inferred that there is a potential for disparity in our sentencing system. If the results of our survey reflect the actual working of our judicial process, then an unacceptable level of disparity exists for many of the sentences imposed. There appears to be a relationship between the sentence imposed (imprisonment or probation) and the principle used in the decision making.

Again, the caveats should be underlined. First, the relatively small number of sentencing decisions that were made makes any statistically meaningful generalization very difficult. Second, because "close" cases were chosen, the six presentence reports do not reflect the typical mix of cases faced by a sentencing judge. It is, therefore, impossible to use the results of this survey to project the extent of disparate treatment that occurs.

TABLE A: Distribution of Sentences, by Defendants

Disposition	Defendant					
	U	V	W	X	Y	Z
Probation	2	3	7	5	8	3
Imprisonment	6	5	1	3	0	5
Total	8	8	8	8	8	8

TABLE B: Distribution of Sentences by Defendants (U thru Z) and Judges (A thru H)

Defendant	Disposition							
	Probation	Jail as a Condition of Probation	Fine	Restitution	Community Service	Imprisonment: Normal Term	Imprisonment: Youthful Offender	DAG
U	E, F	E, F	F	G		A, B, C, D, G, H		
V	A, B, D, F	B, D, F	F	B, C, D, G		A, C, E, G, H		
W	A, C, D, E, F, G, H	C, D, E, F, H	F, G	C	A, G		B	
X	A, B, D, F, H	A, B, F, H	F	B, C, D, E, G		C, E, G		
Y	B, D, E, F, G, H	B, C, D, E, F, G, H	C, F, G	A, B, C, D, E, F, G	A, C			A, C
Z	B, D, F	B, D, F	F	B, C, D, E, G, H		C, E, G	A, H	

TABLE C: Distribution of Sentences, by Judges

Disposition	Judge							
	A	B	C	D	E	F	G	H
Probation	3	4	2	5	3	6	2	3
Imprisonment	3	2	4	1	3	0	4	3
Total	6	6	6	6	6	6	6	6

TABLE D: Ranking of Importance of Sentencing Principles, by Judges

Principle	Judge							
	A	B	C	D	E	F	G	H
Rehabilitation	2	1	2	1	1	1	1	2
Deterrence of Others	4	4	4	5	2	5	3	4
Deterrence of Offender	1	3	1	4	4	2	2	1
Punishment	3	2	3	3	3	4	4	5
Incapacitation	5	5	5	2	5	3	5	3

TABLE E: Principle Used in Sentencing Offenders, by Judges

Judge	Defendant					
	U	V	W	X	Y	Z
A	Rehabilitation Punishment Deterrence of Others (Prison)	Rehabilitation Punishment Deterrence of Others (Prison)	Rehabilitation (Probation)	Rehabilitation (Probation)	Deterrence of Others (Probation)	Rehabilitation Punishment (Prison)
B	Punishment (Prison)	Rehabilitation (Probation)	Punishment (Prison)	Rehabilitation (Probation)	Punishment (Probation)	Rehabilitation (Probation)
C	Punishment (Prison)	Punishment (Prison)	Deterrence of Defendant (Probation)	Punishment (Prison)	Deterrence of Others (Probation)	Punishment (Prison)
D	Punishment (Prison)	Rehabilitation (Probation)	Deterrence of Defendant (Probation)	Rehabilitation (Probation)	Deterrence of Others (Probation)	Deterrence of Defendant (Probation)
E	Punishment (Probation)	Incapacitation (Prison)	Deterrence of Defendant (Probation)	Punishment (Prison)	Deterrence of Others (Probation)	Deterrence of Others (Prison)
F	Rehabilitation (Probation)	Rehabilitation (Probation)	Rehabilitation (Probation)	Rehabilitation (Probation)	Punishment (Probation)	Rehabilitation (Probation)
G	Punishment (Prison)	Punishment (Prison)	Rehabilitation (Probation)	Punishment (Prison)	Rehabilitation (Probation)	Punishment (Prison)
H	Deterrence of Defendant (Prison)	Incapacitation (Prison)	Deterrence of Defendant (Probation)	Deterrence of Defendant (Probation)	Deterrence of Others (Probation)	Deterrence of Defendant (Prison)

TABLE F: Number of Sentences Imposed by Principle Applied*

Principle Applied	Outcome	
	Probation	Prison
Potential for Rehabilitation	13	0
Punishment	3	12
Deterrence of Others	5	1
Deterrence of Defendant	6	2
Incapacitation	0	2

*Omits sentences imposed by Judge A for defendants U, V, X, & Z.

APPENDIX "B"

HAWAII PAROLING AUTHORITY GUIDELINES

INTRODUCTION

In General

Attached are proposed rules which could be considered by the Hawaii Paroling Authority (HPA) for adoption to structure its decisions in setting the minimum terms of imprisonment. The proposed rules include sample guidelines, which are set forth as examples and not as definitive recommendations.

How the Guidelines Would Work

Prior to the hearing for the setting of a minimum term, an HPA member or staff member would review the offender's file which should include the offender's presentence report, the individual evaluation report and other background documents. He would then fill out a "score sheet" that contains the offense and offender score. (The score sheet is attached to the proposed rules as Exhibit "A".) The numerical values obtained on the score sheet would then be applied to the appropriate guidelines chart and, by doing so, the presumptively correct minimum term would be found. If the HPA found no aggravating or mitigating factors that would justify a greater or lesser minimum term, it would impose the presumptive minimum term but must record a written justification for its deviation. Deviations are limited to 15% of the presumptive term.

There are three guidelines charts attached as Exhibits "B", "C", and "D" to the proposed rules to accommodate the

three classes of felonies. These are examples only. A different approach to formulating a guidelines chart is that taken by the United States Parole Commission whose charts are constructed on the basis of categories which group specifically named crimes. For example, murder and kidnapping is in one category; rape and robbery with a weapon in another; burglary and extortion in still another, and so forth. The use of the classes of felony was chosen because such categorization follows a legislative determination of the gravity of crimes.

Prior to the hearing, the offender or his attorney would be given a copy of the score sheet containing the calculations. All interested parties would have an opportunity to review the score and present evidence and argument for or against it. After the hearing, the HPA makes its final decision on the minimum term.

Once this term is imposed, there would be a presumption that the offender will be released upon its expiration. However, the HPA could extend this minimum term if it found that (a) that the inmate had not substantially observed the rules of the institution or (b) that release, in the opinion of the HPA, would jeopardize the public welfare.

Score Sheet Example

X is convicted for Robbery in the Second Degree, a class B felony, and sentenced to 10 years. X had robbed a bank by handing a note to the teller, indicating that he was armed with a pistol. The teller gave X $300, and X left. No one was

injured. X had one prior conviction: theft in the second degree, a misdemeanor, for which he was on probation at the time of the robbery.

On the score sheet (Exhibit "A" to the proposed rules), under "Offense Score" X would get zero points under item (A) because there was only one event involved; zero points under item (B) because of lack of proof of X having been armed; one point under item (C) because robbery is a crime against a person; and zero points under item (D) because no one was injured. X has an offense score of one point.

Under "Offender Score" X would get one point under item (A) because he was on probation at the time of the robbery; zero points under item (B) because he has no prior juvenile adjudication; zero points under item (C) because his prior conviction was not for a crime against a person; one point under item (D) because his prior adult conviction for theft; and zero points under item (E) because he had not been incarcerated when previously placed on probation. He has an offender score of two points.

Exhibits "B", "C", and "D" attached to the proposed rules are guidelines charts for felonies A, B, and C, respectively. X's crime being a class B felony, the class B felony chart is used (Exhibit "C"). Going across on the one-point "offense score" row, and going up on the two-points "offender score" column, the box at which these two scores intersect shows that 51 months is the presumptive minimum term.

Guidelines Source

The factors and weight given to each factor as shown on the score sheet are taken from a guidelines system that was developed for use in the state of Washington for the determination of the IN/OUT (prison or probation) decision. Another model which should be reviewed in setting up a guidelines score sheet would be the guidelines system of the United States Parole Commission which is used for the setting of minimum terms.

The presumptive minimum terms inserted in each of the boxes on the charts were determined by inserting the median period for each class of felony in the center box (offense score of 2, offender score of 3) and callibrating the rest of the boxes to a reasonable degree above and below that median period to accommodate the points on the score sheet. The median period of each class of felon was selected for the center box because it generally coincided with the average minimum term set by the HPA for each class over the years 1975 through 1979: class A, 10.12 years; class B, 4.87 years; and class C, 3.54 years. The guidelines charts shown in the Exhibits are not intended to be definitive recommendations but are only design examples of how a guidelines chart may be set up and used.

Proposed Rules Source

The proposed rules are based upon the rules promulgated by the Minnesota Sentencing Guidelines Commission, the rules

governing the operations of the Oregon Board of Parole, and the regulations of the United States Parole Commission. Appropriate changes were made to reflect Hawaii laws relating to sentencing and Hawaii's structure of the decision-making process.

Youthful Offenders

Although separate guidelines charts could be set up for youthful offenders, the proposed rules treat youthful offenders the same as other offenders because it is believed that the decrease in the maximum term imposed is a sufficient accommodation to the age of the offender. If the minimum term suggested by the guidelines chart exceeds the maximum term, the maximum term becomes the minimum term.

Mandatory Minimums

There may be instances where the suggested minimum term under the guidelines chart is less than the mandatory minimum term required by law. In such cases, the mandatory minimum term required by law would prevail.

Recommitments after Parole Revocations

The HPA should also promulgate guidelines for determining the appropriate length of recommitment for technical parole violators based upon the seriousness of the violation. The proposed rules include such guidelines.

Good Time

The Authority, after considering the guidelines charts and

any aggravating or mitigating factors, sets the minimum term. The granting of good time credits does bring into play factors occurring subsequent to the offense which alter the penalty imposed for an offense and also does call for the exercise of judgment in the deciding whether good time was earned or not, thus somewhat weakening the emphasis on equal and determinate punishment for the offense committed. However, nearly all jurisdictions adopting a determinate system provide for good time on the thinking that it provides some inducement to good institutional adjustment. Therefore, good time is provided for in the proposed guidelines for the setting and administration of minimum terms.

It may be noted that good time was superfluous under the indeterminate system because early release was geared to good institutional adjustment as part of the rehabilitation picture.

PROPOSED RULES AND REGULATIONS GOVERNING
THE PRACTICES AND PROCEDURES OF THE
HAWAII PAROLING AUTHORITY

DEPARTMENT OF SOCIAL SERVICES & HOUSING

Sec. 1. General

The purpose of the parole guidelines is to promote a more consistent exercise of discretion, keeping in mind that punishment in proportion to the seriousness of the offense is the purpose of imprisonment, and to enable fairer and more equitable decision-making. The guidelines indicate the customary range of time to be served before release for various combinations of offense and offender characteristics. The time ranges specified by the guidelines are established specifically for cases with good institutional adjustment. The time range or ranges are merely guidelines. Where the circumstances warrant, decisions outside of the guidelines (either above or below) may be rendered.

Sec. 1.1. Application of Guidelines to Establish Prison Term

The guidelines, as amended from time to time, which are in effect at the time of the hearing shall govern the setting of minimum terms. The suggested term is determined by calculating the offender and offense scores (see Exhibit "A", Scoresheet) and applying such scores to the appropriate offense-class guidelines chart (see Exhibits "B", "C", and "D".) The box at the intersection of the offense and offender score on the chart contains the presumptive minimum term. The Authority has the discretion to raise or lower this presumptive minimum term if there are aggravating or mitigating circumstances

additional to those listed on the Scoresheet; provided, that any such raising or lowering of the presumptive minimum term shall not exceed 15% of such term.

Sec. 1.2 Definitions

(a) Offense Score: The offense score is determined by attendant circumstances related to the offense. Such factors and the numerical values appurtenant to each factor are listed on the Score Sheet attached hereto as Exhibit "A".

(b) Offender Score: The offender score is determined by factors relating to the offender. Such factors and the numerical values appurtenant to each factor are listed on the Score Sheet attached hereto as Exhibit "A".

(c) Guidelines Chart: The guidelines chart refers to the table of guidelines ranges that displays the presumptive minimum terms of imprisonment for the various combinations of offense and offender scores. There is a separate guidelines chart for each category of felonies. They are attached as Exhibits "B", "C", and "D".

(d) Presumptive Minimum Term: The term of years or months contained in the guidelines chart that corresponds to the offense and offender scores for an offender's particular felony is the offender's presumptive minimum term.

Sec. 1.3 Calculation of Offense and Offender Score

(a) A prior felony conviction shall not be used in computing the offender score after a period of ten years has elapsed since the date of discharge from or expiration of the

sentence, provided that during such period the offender was not convicted of a crime.

(b) A prior misdemeanor conviction shall not be used in computing the offender score after a period of five years has elapsed since the date of discharge from or expiration of the sentence, provided that during such period the offender was not convicted of a crime.

(c) A prior juvenile adjudication shall not be used in computing the offender score unless such adjudication was for an offense which would have been a felony if committed by an adult and was committed after the offender had attained 14 years of age.

(d) The designation of out-of-state convictions and adjudications as felony or misdemeanor convictions and adjudications shall be governed by the offense definitions and sentences provided under Hawaii law on a substantially comparable basis.

(e) All factors which are considered in computing the offender score shall be those existing at the time the offense was committed.

Sec. 1.4 Procedure to Set Minimum Term

(a) The class of offense for which the offender was convicted determines which guidelines chart is to be used. The scores as determined on the score sheet shall be applied to the guidelines chart (the offense score to the vertical axis and the offender score to the horizontal axis). The presumptive minimum term shall be that which is found at the intersection

of the appropriate column for the offender score and the appropriate row for the offense score.

(b) A tentative score sheet shall be completed prior to the hearing on the setting of the minimum term, together with a listing of any additional aggravating or mitigating factors considered. A copy thereof shall be made available to the offender or his attorney prior to the hearing.

(c) The offender shall be afforded an opportunity to be heard at the hearing and present any information relating to the appropriate scores and aggravating or mitigating circumstances.

(d) The Authority may consider the reasons, if any, given by the court for the sentence imposed.

(e) Disputes as to circumstances and factors that relate to the calculation of the offense or offender scores shall be resolved by the Authority on the basis of the preponderance of the evidence.

(f) The Authority shall provide the offender with a copy of its final calculation of the offender score, offense score, and presumptive minimum, and also the actual minimum term which it sets. If the Authority sets a minimum term which deviates from the presumptive minimum term, it shall provide the offender with its reasons for such deviation.

Sec. 1.5 Considerations in Setting Minimum Terms

(a) The presumptive minimum terms provided in the guidelines charts are presumed to be appropriate for all cases. The Authority shall adopt such presumptive minimum terms unless

the individual case involves aggravating or mitigating circumstances. When such circumstances are present, the Authority may deviate from the presumptive minimum term by imposing a greater or lesser minimum term; provided, however, that any such deviation shall not exceed 15% of the presumptive minimum term. When departing from the presumptive minimum term, the Authority must provide a written record of the reasons for the deviation,

(1) The following factors should not be used as reasons for a deviation:

(A) race or sex;

(B) employment factors, including: occupation or impact of the minimum term on occupation, employment history, or employment potential.

(C) social factors, including: educational attainment, marital status, length of residence in the state, living arrangements, potential for rehabilitation.

(D) exercise of constitutional rights by the offender during the adjudication process.

(2) The following is a non-exclusive list of factors which may be used as grounds for deviation:

(A) mitigating factors:

(i) victim was aggressor in the incident;

(ii) offender played a minor or passive role in the offense;

(iii) age of offender;

(iv) crime committed while under extreme mental or emotional distress;

(v) offender honestly believed his conduct to be morally justified;

(vi) other substantial grounds which tend to mitigate the offender's culpability although not amounting to a defense.

(B) aggravating factors:

(i) victim was particularly vulnerable due to age, infirmity or reduced physical or mental capacity, which was known or should have been known to the offender;

(ii) crime was especially atrocious or cruel;

(iii) crime committed in connection with commission of or attempt to commit a more serious crime;

(iv) crime was committed for pecuniary gain;

(v) the offender has pleaded guilty to the crime of commitment and has admitted or stipulated to facts either in court or before the Authority which shows the occurrence of more serious charges or other charges which have not been brought or have been dismissed.

(vi) the offender has pleaded guilty to the crime of commitment and the Authority finds that the offender's actual criminal conduct was of a greater degree of seriousness than the crime of which he was convicted, in which case the Authority shall state its finding on the record.

(vii) other substantial grounds which tend to aggravate the offender's criminal conduct.

(b) Where an offender is convicted of an offense or offenses while incarcerated and a consecutive term is imposed, the Authority shall set the minimum term to commence upon completion of any term that was being served when the offense was committed.

(c) Where an offender is simultaneously sentenced on separate offenses to consecutive terms of imprisonment, the Authority shall separately determine the minimum terms of each offense. In computing the minimum terms, the offense and offender score shall be computed for the most serious offense for which the offender was convicted; for all other offenses, the minimum term shall be computed with an offender

CONTINUED

2 OF 3

score of zero. The intent hereof is to take into consideration the offender's offender score only once in computing the minimum term.

(d) Offenders committed as youthful offenders shall have their minimum term set in the same manner as all other offenders. However, in no event shall the minimum term of a youthful offender exceed the maximum term of the sentence ordered by the court.

Sec. 1.6 Increase of Minimum Term

Once the offender's minimum term has been set, there is a presumption that he shall be released upon expiration of the minimum term. This presumption may be rebutted and the minimum term may be increased if the Authority finds that:

(a) The offender has not substantially observed the rules of the facility in which he is confined; or

(b) release, in the opinion of the Authority, would jeopardize the public welfare.

Before any such finding is made, the offender shall be given notice that such adverse findings are proposed and shall be given an opportunity to be heard thereon. The hearing shall be held not later than 30 days prior to the expiration of the minimum term previously set. The Authority's final decision shall be stated in writing together with reasons therefore and a copy shall be given to the offender.

Sec. 1.7 Minimum Terms While on Parole

The following guidelines for the setting of minimum terms

shall apply to offenders upon revocation of parole for technical (no new criminal conduct) violations of the terms and conditions of parole.

Positive Supervision History (Examples)	Minimum Term: 3-6 months
a. No serious alcohol/drug abuse and no possession of weapon(s) and	
b. At least 8 months from date of release to date of violation and	
c. Present violation represents first instance of failure to comply with parole regulations of this term.	

Negative Supervision History (Examples)	Minimum Term: 6-12 months
a. Serious alcohol/drug abuse (e.g., readdiction to opiates) or possession of weapon(s), or	
b. Less than 8 months from date of release to date of violation, or	
c. Repetitious or persistent violations, or	
d. arrested for a new crime.	

The Authority may increase or decrease the foregoing minimum terms depending upon the presence or absence of aggravating and mitigating circumstances.

Sec. 1.8 Good Time

The minimum term set by the Authority shall be advanced for good institutional behavior on the part of the offender, as follows:

(a) The offender shall receive credit of three months toward the service of his minimum term at the end of each year of his term of imprisonment, beginning after the first year of the term, unless the Authority determines that during the year he has not satisfactorily complied with institutional rules and regulations.

(b) If the Authority determines that during the year the offender has not satisfactorily complied with institutional rules and regulations, he shall receive no credit or such lesser credit as the Authority determines to be appropriate.

(c) Each year's credit vests unless proceedings to deny or reduce the credit are initiated by the Authority not later than 30 days after the end of each year of the offender's term of imprisonment. Credit that is vested shall not later be withdrawn, and credit that has not been earned shall not be later granted.

(d) No determination to take away good time credit shall be made by the Authority unless the offender has first been given an opportunity to be heard on the issue of non-compliance with the rules and regulations.

(e) The minimum term previously set by the Authority shall be reduced by the aggregate of all vested good time

credit of the offender.

Sec. 1.9 Modifications of Guidelines

The Authority shall review the guidelines periodically and may revise or modify them at any time as deemed appropriate.

EXHIBIT "A"

SCORE SHEET

OFFENDER ______________________ CRIMINAL NO. ____________

OFFENSES CONVICTED OF: CLASS

______________________ ( )

______________________ ( )

______________________ ( )

DATE OF HEARING ___/___/___

OFFENSE CLASS:

Most Serious Convicted Offense [ ] OFFENSE CLASS

OFFENSE SCORE:

A. Number of Separate Events ______
   0 = One Event
   1 = Two or more events
B. Weapon Usage ______
   0 = No weapon
   1 = Weapon present and/or used
C. Type of Crime ______
   0 = Not a crime against the person
   1 = Crime against the person
D. Physical Injury Suffered by Victim ______
   0 = None or minor injury
   1 = Serious injury or death

[ ] OFFENSE SCORE

OFFENDER SCORE:

A. Current Legal Status ______
   0 = Not under state supervision or control
   1 = Under some type of state supervision or control (e.g. bail, incarcerated, probation, parole, escape)
B. Prior Juvenile Adjudications ______
   0 = None or one
   1 = Two or more
C. Prior Adult Convictions (Felony and/or Misdemeanor) For Crimes Against the Person ______
   0 = None
   1 = One
   2 = Two or more
D. Prior Adult Convictions (Felony and/or Misdemeanor) For Crimes Not Against the Person ______
   0 = None
   1 = One or more
E. Prior Adult Incarcerations (Over 30 days) ______
   0 = None
   1 = One or more

[ ] OFFENDER SCORE

PRESUMPTIVE MINIMUM TERM: ______________________

ACTUAL MINIMUM TERM: ______________________

REASON(S) (If actual minimum term does not fall within guidelines):

____

CLASS A FELONIES*

OFFENSE SCORE	0	1	2	3	4	5	6
4	9 years	10 years	11 years	12 years	13 years	14 years	15 years
3	8 years	9 years	10 years	11 years	12 years	13 years	14 years
2	7 years	8 years	9 years	10 years	11 years	12 years	13 years
1	6 years	7 years	8 years	9 years	10 years	11 years	12 years
0	5 years	6 years	7 years	8 years	9 years	10 years	11 years

OFFENDER SCORE

*Does not include persons sentenced to life imprisonment with or without the possibility of parole

EXHIBIT "B"

CLASS B FELONIES

OFFENSE SCORE	0	1	2	3	4	5	6
4	55 months	60 months	65 months	70 months	75 months	80 months	85 months
3	51 months	55 months	60 months	65 months	70 months	75 months	80 months
2	46 months	51 months	55 months	60 months	65 months	70 months	75 months
1	41 months	46 months	51 months	55 months	60 months	65 months	70 months
0	36 months	41 months	46 months	51 months	55 months	60 months	65 months

OFFENDER SCORE

EXHIBIT "C"

CLASS C FELONIES

OFFENSE SCORE \ OFFENDER SCORE	0	1	2	3	4	5	6
4	26 months	30 months	34 months	37 months	41 months	44 months	48 months
3	23 months	26 months	30 months	34 months	37 months	41 months	44 months
2	19 months	23 months	26 months	30 months	34 months	37 months	41 months
1	16 months	19 months	23 months	26 months	30 months	34 months	37 months
0	12 months	16 months	19 months	23 months	26 months	30 months	34 months

EXHIBIT "D"

APPENDIX C

The following are propose statutory changes (1) to adopt punishment as the goal of sentencing, (2) to require the Hawaii Paroling Authority to promulgate guidelines to structure its parole decisions, and (3) to allow good time credit and to have the Authority take into accoud over-crowding in its parole decisions.

A. Add the following sentence in HRS Sec. 706-600:

> The purpose of a sentence shall be to impose punishment on the defendant in proportion to the seriousness of the offense committed, taking into account the circumstances of the offense and the defendant's background.
>
> Commentary: This is a policy statement adopting punishment as the primary goal of sentencing.

B. Repeal HRS Sec. 706-620 Sentence of imprisonment withheld unless imprisonment is necessary.

> Commentary: This removes the bias towards non-imprisonment. All the sentencing alternatives are placed on an even ground for judicial selection on a punishment basis. Every sentencing alternative, including probation and suspension of sentence, is a viable alternative as "punishment", so long as it is deemed appropriate in view of the circumstances of the offense and the defendant's background.

C. Delete from HRS 353-62(3) the following phrase:

> ...maximum benefits of the correctional institutions to the individual have been reachd and...
>
> Commentary: The deleted phrase is related to the rehabilitation concept which is being replaced by the punishment principle.

D. Enact the following section (new):

> Sec. 353-_____ Guidelines.
>
> (1) The Hawaii paroling authority shall promulgate rules and regulations establishing guidelines for use in determining the appropriate minimum term of imprisonment and additional terms of imprisonment upon parole revocation.
>
> (2) The Hawaii parole authority, in establishing categories of offenses for use in the guidelines governing the imposition of the minimum terms of imprisonment, may consider, but need not limit its consideration to the relevancy of:
>
> (a) the class and grade of the offense;
>
> (b) the circumstances under which the offense was committed which mitigates or aggravates the seriousness of the offense;
>
> (c) the nature and degree of the harm caused by the offense, including whether it involved property, a person or a breach of a public trust; and
>
> (d) the community view of the gravity of the offense.
>
> (3) The Hawaii paroling authority, in establishing categories of offenders for use in the guidelines governing the imposition of the minimum terms of imprisonment, may consider, but need not limit its consideration to the relevancy of the offender's:
>
> (a) criminal history;
>
> (b) mental and physical condition at the

time of the offense, including drug dependence;

(c) role in the offense; and

(d) degree of dependence upon criminal activity for a livelihood.

Factors relating to the offender's potential for rehabilitation are not relevant considerations.

(4) The Hawaii paroling authority, in promulgating guidelines pursuant to subsection (1) shall keep in mind that punishment in proportion to the seriousness of the offense is the purpose of imprisonment, with particular attention to eliminating disparities in prison terms.

(5) The Hawaii paroling authority, in promulgating its guidelines, shall take into account the nature and capacity of the penal, correctional, and other facilities and services available in order not only to assure that the most appropriate facilities and services are utilized to fulfill the applicable purposes but also to assure that the available capacities of such facilities and services will not be exceeded.

(6) The Hawaii paroling authority shall periodically review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section. It shall consult with authorities on and individuals and various representatives of the criminal justice system, including but not limited to representatives of the adult probation service, the corrections division of the Department of Social Services and Housing, the judiciary, the attorney general, the county police and prosecutor, the public defender, the Intake Services Center, and any other interested organizations.

(7) The Hawaii paroling authority shall insure that information relating to the minimum term set, the offense involved, the age, race, and sex of the offender and other information relating to the factors relevant to its parole decisions, shall be maintained by itself or some other agency involved in the administration of criminal justice.

Commentary: This requires the Authority to promulgate written guidelines to structure its minimum term decisions.

E. Add and insert appropriately the following three subsections into HRS 706-669:

( ) The authority, in setting the minimum term of imprisonment, shall consider the guidelines promulgated under section 353-___.

( ) The authority shall fix the minimum term within the range of the guidelines unless it finds that aggravating or mitigating circumstances exist that were not adequately taken into consideration in the formulation of the guidelines.

( ) The authority shall, at the time the minimum is fixed, state in writing the basis for its decision; and if the term is outside the term indicated by the guidelines, shall state in writing the facts relied upon for the deviation.

Commentary: This refers the Authority to its guidelines in the setting of minimums. The basis for its decisions are requires to be given the inmate as a matter of fairness.

F. Enact the following section (new):

Sec. 706-____ Credit toward service of sentence for satisfactory behavior.

(1) A prisoner who is serving a term of imprisonment of more than one year, other than a term of life imprisonment, shall receive credit toward the service of his minimum term of imprisonment of three months at the end of each year of his term of imprisonment, beginning after the first year of the term, unless the Hawaii paroling authority determines that during that year he has not satisfactorily complied with the institutional rules and regulations. If the authority determines that during that year, the prisoner has not satisfactorily complied with such institutional rules

and regulations, he shall receive no credit toward service of his sentence or shall receive such lesser credit as the authority determines to be appropriate. Such credit toward service of sentence vests unless proceedings to deny or reduce credit have been initiated not later than thirty days after the end of each year of the sentence. Credit that is vested may not later be withdrawn, and credit that has not been earned may not be later granted.

(2) The prisoner shall be given reasonable notice of any proceedings to deny or reduce credit and the basis therefor, and shall be entitled to be heard.

(3) In the event that credit is denied, the authority shall, within a reasonable time, notify the prisoner in writing of its denial and the reasons for its actions.

Commentary: This section recognizes that some good time reduction should be provided as an incentive under a system where the minimum term is geared to factors related to punishment rather than rehabilitation. The incentive under rehabilitation is a negative one--the minimum term is extended.

END