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Discretion in Felony Sentencing—A Study of Influencing Factors

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COMMENT

DISCRETION IN FELONY SENTENCING— A STUDY OF INFLUENCING FACTORS

Criminal sentencing is a unique legal process in that it combines the heaviest sanctions available to the legal system with the fewest procedural protections for persons subjected to these sanctions. This comment examines the need for empirical study of sentencing and reveals the inadequacy of earlier studies. The primary thrust of the comment, however, is a detailed analysis of the method and data of a recent study[1] conducted by the Washington State Superior Court Judges' Association (W.S.S.C.J.A.). The analysis of the study begins to answer important questions about sentencing by isolating the significant factors used in judicial sentencing decisions and demonstrating the relative importance of these factors. The data from the study challenge the constitutionality and public policy underlying discretionary sentencing and indicate that discretionary sentencing embodies systematic racial and social biases in no way dependent upon the culpability of the offender, his background, or the circumstances of the crime.

I. THE NEED FOR EMPIRICAL DATA

Sentencing is the end result of every criminal conviction. Although the lengthy and tedious trial process is devoted to fairness in ascribing guilt, most judges have virtually unfettered discretion to sentence the defendant at the conclusion of that process.[2] Ordinarily, the judiciary is free of any statutory constraints or appellate review in sentencing.

1. WASHINGTON STATE SUPERIOR COURT JUDGES' ASS'N, FACTORS AFFECTING JUDICIAL DISCRETION IN FELONY SENTENCING IN WASHINGTON STATE, A STUDY OF JUDICIAL ATTITUDES (1971) [hereinafter cited as W.S.S.C.J.A. STUDY]. The study was made possible through a federal grant from the Law Enforcement Assistance Administration of the United States Department of Justice, authorized under Title I, Pub. L. No. 90-351. The official report received limited distribution within the Law Enforcement Assistance Administration, the Washington State Planning and Community Affairs Agency, and the Washington State Superior Court Judges' Association. The basic raw data and copies of the official report are in the University of Washington School of Law Library.

2. Frankel, *Lawlessness in Sentencing*, 41 U. CINCINNATI L. REV. 1, 29 (1972). Judge Frankel eloquently describes the typical jurisdiction's sentencing posture:

> The common form of criminal penalty provision confers upon the sentencing judge an enormous range of choice. The scope of what we call "discretion" permits

Present sentencing systems fall into two classes: the Model Penal Code format and the totally or partially indeterminate sentence format. The Model Penal Code is a recent reform enacted by many states as part of an overall revision of their criminal codes.[3] It substantially reclassifies offenses[4] and, as adopted by many states, establishes criteria to be considered by the court in determining a sentence.[5] Totally or partially indeterminate sentencing schemes[6] generally allow the judge to set only the maximum sentence (and sometimes the minimum), permitting the length of the offender's actual sentence to be later determined by statute, by the sentencing court, or by the parole authorities or some similar agency.

The fundamental role of the criminal law is to create the "good society" by defining man's minimum responsibility to his fellows and by holding him to that responsibility. Its greatest value lies not in the correction of offenders, but in the stimulus it provides to the great

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imprisonment for anything from a day to one, five, 10, 20, or more years. All would presumably join in denouncing a statute that said "the judge may impose any sentence he pleases." Given the mortality of men, the power to set a man free or confine him for up to 30 years is not sharply distinguishable.

The statutes granting such powers characteristically say nothing about the factors to be weighed in moving to either end of the spectrum or to some place between.

Id. at 4.

3. As of April 1971, eleven states had revised their codes along the lines of the Model Penal Code. Fourteen had completed revisions but had not yet enacted them, and eighteen were planning revisions. *Hearings on Reform of the Federal Criminal Laws Before a Subcomm. of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess., pt. 2, at 558-59 (1971).

4. Although the proposed Revised Washington Criminal Code does not follow the Model Penal Code format, it does reduce the nineteen categories of criminal sentences which exist under the current Washington Criminal Code to three major categories of no more than three gradations. *A Hornbook to the Code*, 48 WASH. L. REV. 149, 149-50 (1972).

5. *See, e.g.*, N.Y. PENAL LAW § 70.00 (McKinney 1967). The proposed Washington Code does not include similar provisions because the judge does not have discretion to determine the length of incarceration. This authority resides in the Board of Prison Terms and Parole. WASH. REV. CODE §§ 9.95.010, .040 (1959). *See* note 20 *infra*.

6. Judge Frankel provides a useful working definition of "indeterminate sentencing":

> [The] term ["indeterminate sentence"] is widely used. But it has a somewhat indeterminate meaning. As I use it . . . it refers generally to any sentence of confinement in which the actual term to be served is not known on the day of judgment but will be subject, within a substantial range, to the later decision of a board of parole or some comparable agency. In this sense there are varying degrees of indeterminacy, ranging from places like California, where the Adult Authority is empowered to set a maximum term of anywhere from a year to life, to, say, our federal system where, as a general matter, the Board of Parole has discretion to grant parole at any point between completion of one-third and two-thirds of the stated sentence.

Frankel, *supra* note 2, at 29.

bulk of mankind to take pride in abiding by the law.[7] However, the criminal law undeniably goes beyond condemnation of criminal conduct and punishment of wilful transgressions. Concepts like correction, rehabilitation and treatment reflect the assumption that society has a right, even a duty, to tailor an individual sentence for each offender in a way that will prevent him from committing future crimes.[8] This assumed need to individualize the sentencing process is the primary justification for giving judges unfettered discretion to sentence as they please.[9] However, in the absence of any tested and proven scientific sentencing theories, the process of sentencing an offender without external standards remains an intuitive decision[10] subject to the sen-

7. Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 410 (1958).

8. The underlying rationale of . . . treatment [in criminal sentencing] . . . is deceptively simple. It rejects inherited concepts of criminal punishment as the payment of a debt owed to society, a debt proportioned to the magnitude of the offender's wrong. Instead it would save the offender through constructive measures of reformation, protect society by keeping the offender locked up until that reformation is accomplished, and reduce the crime rate not only by using cure-or-detention to eliminate recidivism, but hopefully also by the identification of potential criminals in advance so that they can be rendered harmless by preventive treatment. Thus the dispassionate behavioral expert displaces judge and theologian. The particular criminal act becomes irrelevant except insofar as it has diagnostic significance in classifying and treating the actor's particular criminal typology. Carried to an extreme, the sentence for all crimes would be the same: an indeterminate commitment to imprisonment, probation, or parole, whichever was dictated at any particular time by the treatment program. Any sentence would be the time required to bring about rehabilitation, a period which might be a few weeks or a lifetime.

AMERICAN FRIENDS SERVICE COMM., STRUGGLE FOR JUSTICE, A REPORT ON CRIME AND PUNISHMENT IN AMERICA 37 (1972).

9. [O]ur development [of a sentencing system] followed the logic of a seductive slogan, "Let the punishment fit the criminal, not the crime." Given this premise, it was but a short step to the indefinite or indeterminate sentence, which made the need for and response to treatment the formal standard for determining whether and for how long to imprison. This in turn fathered the two dominant characteristics of the system . . . : wide discretionary power, allegedly so that the offender's treatment could be matched with his individual needs, and the location of much of this discretionary power with the agencies responsible for protecting society from criminals.

Id. at 27.

10. The treatment model tends to be all things to all people. . . . In fact, the model has never commanded more than lip service from most of its more powerful adherents. The authority given those who manage the system, a power more absolute than that found in any other sphere of law, has conceded the practices carried on in the name of the treatment model. At every level—from prosecutor to parole-board member—the concept of individualization has been used to justify secret procedures, unreviewable decision making, and an unwillingness to formulate anything other than the most general rules of policy.

Id. at 37, 39-40.

tencer's conscious and unconscious biases. The desirability of permitting such discretionary sentencing can only be ascertained if the factors judges actually use in imposing their sentences are known.

In addition, recent Supreme Court authority recognizing that a convicted offender has constitutional rights in the sentencing process[11] suggests that scientific data on judicial sentencing tendencies may be very important in delineating the constitutional limitations of discretionary sentencing. While the current rule appears to be that neither due process nor equal protection prohibits imposition of different sentences on similarly situated offenders,[12] the Court in *Furman v. Georgia*[13] recognized that discretionary imposition of the death penalty constitutes cruel and unusual punishment in violation of the eighth and fourteenth amendments. Although *Furman* was limited to discretionary death penalty statutes, all nine justices showed sensitivity to the equal protection and due process arguments applicable to criminal sentencing and recognized that the cruel and unusual punishment clause "prescribes a flexible, dynamic standard by which to review criminal punishments, a standard designed to reflect the changing moral perceptions of the society."[14] Thus, for the first time society faces successful constitutional challenges based on the selectivity and randomness of severe criminal punishments. The sentencer now must accept that theoretical disputes over public policy in sentencing do not relieve him of the burden of basic fairness. An argument over sentencing theory or a court challenge to a discretionary sentencing system can be resolved only if facts that adequately describe the system's functioning are available.

Empirical studies of the theories and factors judges use in fashioning their sentences are a recent development. The paucity of statistical studies of sentencing tendencies is indeed remarkable in a system

11. Furman v. Georgia, 408 U.S. 238 (1972); Mempa v. Rhay, 389 U.S. 128 (1967); Williams v. New York, 337 U.S. 241 (1949); Townsend v. Burke, 334 U.S. 736 (1948). *See also* Pugh & Carver, *Due Process and Sentencing: From Mapp to Mempa to McGautha,* 49 TEX. L. REV. 25, 27 (1970), and Comment, *The Right to Nondiscriminatory Enforcement of State Penal Laws,* 61 COLUM. L. REV. 1103 (1961).

12. Pugh & Carver, *supra* note 11, at 44-45; *see, e.g.,* Snowden v. Hughes, 321 U.S. 1 (1944); *see generally* Comment, *The Right to Nondiscriminatory Enforcement of State Penal Laws,* 61 COLUM. L. REV. 1103 (1961).

13. 408 U.S. 238, 239-40 (1972).

14. Junker, *The Death Penalty Cases: A Preliminary Comment,* 48 WASH. L. REV. 95, 96 (1972).

which avows the maximization of personal liberty and freedom as one of its major tenets. Early studies simply presented data on quantitative sentence dispositions of judges, emphasizing the disparity observed.[15] These studies assumed that in a large sample of cases the judges would handle similar distributions of offenders and offenses; the studies thus concluded that any significant deviation in disposition percentages from court to court was due to the judge.[16] While these early studies aided in supporting or rejecting local attorney folklore, their lack of true randomization makes their conclusions suspect.

Recently, more sophisticated studies[17] have attempted to pinpoint the reasons for the obvious disparity in sentencing by analyzing the characteristics of the offender, the crime and the judge. These charac-

15. Everson, *The Human Element in Justice,* 10 J. AM. INST. CRIM. L. & C. 90 (1919); Frankel, *The Offender and the Court: A Statistical Analysis of the Sentencing of Delinquents,* 31 J. AM. INST. CRIM. L. & C. 448 (1940); Gaudet, Harris & St. John, *Individual Differences in the Sentencing Tendencies of Judges,* 23 J. AM. INST. CRIM. L. & C. 811 (1933); Somit, Tanenhaus & Wilke, *Aspects of Judicial Sentencing Behavior,* 21 U. PITT. L. REV. 613 (1960); S. B. WARNER & H. CABOT, JUDGES AND LAW REFORM 165-68 (1936).

16. *See, e.g.,* Gaudet, Harris & St. John, *Individual Differences in the Sentencing Tendencies of Judges,* 23 J. AM. INST. CRIM. L. & C. 811, 813 (1933). Gaudet's assumption that the caseload of each judge was approximately the same with respect to the proportions of serious and minor crimes and the past record of the offenders, a premise upon which the whole validity of his study rests, has been seriously questioned. E. GREEN, JUDICIAL ATTITUDES IN SENTENCING 17-19 (1961). Green states that the "method by which [Gaudet's] assumption is verified . . . does not meet critical standards of experimental control." *Id.* at 17. Green points out that the scale of penalties for each offense was quite broad, and an unequal apportionment of various offenses could contribute to the variations between judges. *Id.* at 17-18. The frequency distribution of each type of offender between the six judges was information Gaudet must have possessed but apparently did not choose to publish. Green concludes:

> In short, Gaudet's analysis is insensitive to the scope and variability of the legal factors—the type of crime, the number of criminal acts charged, the circumstances of the acts charged, the circumstances of the crime, and the offender's past record—factors which may reasonably affect the judge's selection of a penalty.

Id. at 19. These criticisms apply to any qualitative study which does not attempt to include an analysis of these types of factors as they independently act upon the total decision-making process.

17. R. MARTIN, THE DEFENDANT AND CRIMINAL JUSTICE (U. Tex. Bull. No. 3437, 1934). Martin's technique was simply to compare the frequency of occurrence of a factor in the offender population with the frequency of occurrence of the same factor in the total Texas population as provided by the 1930 federal census. Although the conclusions seem intuitively correct, simple tabular correlations are inadequate to determine any direct causal relationships, and they cannot account for the effects of other factors.

Henry Allen Bullock conducted a study in 1958 of 3,644 inmates in a Texas state prison to determine the significance of the race factor in the length of prison sentences. Bullock, *Significance of the Racial Factor in the Length of Prison Sentences,* 52 J. CRIM. L.C. & P.S. 411 (1961). He catalogued six factors for each man and used a tabular analysis chi-square contingency coefficient technique to determine differences in observed

teristics are usually called "factors" or "variables." However, these studies suffer from methodological shortcomings[18] and frequently fail to account for variables such as judges' backgrounds. Nevertheless, studies which attempt to analyze the variables involved in a particular case are more useful to the policymaker than the earlier studies in that they permit the impact of each variable to be evaluated. Once all of

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and expected frequencies and to measure the relationship between the main variables. He concluded that blacks did suffer some degree of judicial discrimination. Bullock also found that offenders who pled guilty received shorter sentences, east Texas generated longer sentences than did west Texas, and judges in urban areas imposed longer sentences than those in rural areas.

Edward Green studied the sentences resulting from 1,437 convictions during the years 1956-57 in the nonjury prison court of the Philadelphia Court of Quarter Sessions, using the chi-square contingency coefficient technique. E. GREEN, JUDICIAL ATTITUDES IN SENTENCING (1961). Green concluded that the primary "legally relevant" factor affecting sentencing disposition was the nature of the offense. Next in order of importance was the number of separate criminal acts for which the sentence was being given and the offender's prior criminal record. Among the "legally irrelevant" factors, preferences existed for women over men, youth over age and white over black. The study's analysis also demonstrated disparity in sentencing practices among judges.

A much more advanced study was conducted in Texas in 1966 using the statistical technique of multiple linear regression analysis to manipulate and analyze data on 1,720 felony cases. Comment, *Texas Sentencing Practices: A Statistical Study*, 45 TEX. L. REV. 471 (1967). The study concluded that certain elements in the administration of the criminal justice system have an unwarranted effect on sentence severity. For example, whether the defendant was free prior to trial, whether he was defended by a retained or appointed defense counsel, and in which trial court he appeared all had a substantial effect on sentence severity.

In 1968, a research team of Stanford University students undertook a study of sentencing behavior of California first-degree murder juries. *A Study of the California Penalty Jury in First-Degree-Murder Cases*, 21 STAN. L. REV. 1297 (1969). The study used the 238 first-degree murder cases tried in California between 1958 and 1966 in which the penalty was determined by the same jury that determined guilt. Correlations were run to determine the 78 variables or factors most closely correlated with the penalty variable. Then several partial correlations were run on selected variables to isolate areas where a reasonable inference of causation could be drawn between the existence of a factor and the sentence.

Whether or not the defendant's prior criminal record had been introduced into the record during the penalty trial was found to be the most important factor in determining the disposition. Jury behavior was found highly predictable when as few as ten variables were known. The study stressed that some factors not logically related to criminal justice goals in sentencing were apparently important criteria in a jury's deliberative process.

The most recent published statistical study again dealt with Texas sentencing practices. Johnson, *Sentencing in the Criminal District Courts*, 9 HOUSTON L. REV. 944 (1972). Johnson investigated empirical data drawn from cases appearing on the docket sheets of ten Texas criminal district courts in Harris County (Houston) during the first six months of 1970. The study analyzed 27 variables relating to the ten individual judges. It used the Pearson "r" correlation and the Pearson coefficient of variation. When he examined the disposition alone, Johnson found the expected sentence disparity between courts. In determining the influence of the variables relating to the judges, the highest correlation (with severity of sentence) was found in factors relating to judge's age.

18. *See, e.g.*, notes 54-60 and accompanying text *infra*.

the relevant factors are known, this type of study also allows prediction of an offender's sentence.

II. HISTORY AND EXPERIMENTAL DESIGN OF THE W.S.S.C.J.A. STUDY

The felony sentencing structure in Washington State is an "indeterminate sentencing" scheme.[19] The judge does not set the length of a convicted felon's prison term, but turns him over to a separate agency which sets the length of his term and periodically reviews the offender's "progress" during incarceration.[20] Although the original legislative purpose of the Washington sentencing scheme is uncertain, equivalent treatment for similarly situated offenders became one of the main benefits cited by proponents of Washington's sentencing system.[21]

Nevertheless, it is doubtful that in Washington felony sentences even grossly approximate equal treatment in fact. If similar defendants from different communities are sent to the Department of Institutions, the likelihood of equal treatment is theoretically increased because fewer decision-makers are involved than if each community retains individual control over disposition. But there is a growing trend to treat the offender in the community whenever possible.[22] Individual trial judges still retain a vast amount of discretion to commit the de-

19. Seattle Post-Intelligencer, March 7, 1935, at 4, col. 4. *See* note 6 *supra* and accompanying text for a discussion of indeterminate sentencing.

20. WASH. REV. CODE. §§ 9.95.010, .040 (1964). The judge and prosecutor are required to recommend a minimum sentence, but this recommendation is not binding on the Board of Prison Terms and Parole. WASH. REV. CODE § 9.95.030 (1964). Indeed the recommendations for minimum sentences made by judges and prosecutors are consistently less than the Board's imposed sentence. *See* WASH. ST. BD. OF PRISON TERMS & PAROLES, COMPARISON OF MINIMUM TERMS FIXED WITH PROSECUTING ATTORNEY AND SUPERIOR COURT JUDGES' RECOMMENDATIONS (1970). The sentences imposed by the Board are determined after initial testing and diagnosis of the prisoner at the Shelton corrections facility.

21. A substantial majority of the judges interviewed for the present study felt Washington's sentencing system is "the most advanced, equitable system in use in any of the fifty states today." W.S.S.C.J.A. STUDY at 77. In its first report to the Legislature, the Board of Prison Terms and Parole characterized Washington sentencing legislation as follows:

> It is obvious, of course, that one of the primary purposes of this act was to relieve . . . the dissimilarity of sentence. To this end, it is a wise and beneficent law. Every Warden of any penal institution in any state where such a statute does not exist can testify as to the complaints of inmates as to the dissimilarity of sentence . . . .

WASH. ST. BD. OF PRISON TERMS & PAROLES, SEVENTEENTH BIENNIAL REPORT 40 (1968), *quoting* FIRST BIENNIAL REPORT.

22. *See, e.g.*, HUMAN RESOURCES AGENCIES, ST. OF WASH., 1970 ANNUAL REPORT 47, 49 (1970).

fendant or defer or suspend the sentence[23] and may impose a wide variety of conditions on such a deferral or suspension. These conditions may include a term in jail, monetary payments, obtaining and keeping a job, or participation in a drug rehabilitation program or other "resocializing" programs such as volunteer work or education. The statutes give the judge no guidance in imposing such conditions, or indeed in deciding whether to grant probation in the first instance.

In response to the problems posed by this lack of statutory guidance, the Washington State Superior Court Judges' Association undertook a study during the summer of 1971 of the sentencing behavior of its member-judges. Interviews were conducted with sixty-nine of Washington's ninety-two superior court judges[24] in an attempt to isolate the particular facts surrounding a defendant and his crime which have the greatest impact on the judge's decision.

The interviews consisted of three phases: the first phase was devoted to the resolution of hypothetical grand larceny cases,[25] the

23. WASH. REV. CODE §§ 9.95.210, .240 (1959).

24. The interviewees included judges in office as little as a week and as long as thirty years. Also interviewed was a retired judge serving pro tem. Twenty-four judges were not interviewed: sixteen judges were unavailable during the interview period because of vacations; two judges were seriously ill; five judges were unwilling to be interviewed and one judge was not interviewed because of project manpower limitations.

Five law students conducted the bulk of the interviews, under the supervision of a specialist in methodology and Judge David W. Soukup of the King County Superior Court, director of the project. The interviews were largely free-form. The level of interest and work schedule of each judge dictated different lengths of time for each interview. The interviews ranged from one to four hours in length; the mean was three hours. Each interviewer attempted to adjust the testing instrument to the particular judge while following the same basic format and sequence of events in all interviews.

25. The following is a typical hypothetical case presented to a judge:

Edward Gronlund is a 24 year old white male. He is single and has no dependents. Gronlund has lived in Washington less than a year. He is a skilled pipefitter but is not regularly employed and was not working at the time of the crime. He has no history of alcoholism but is addicted to heroin. Although he has no psychiatric history, he is suffering under severe current emotional stress due to the serious illness of his mother. There is no stable person in the community with whom Gronlund has close ties. Gronlund served in the military and was given an honorable discharge. He is generally neat in appearance.

Gronlund has a juvenile record, and his adult record shows one felony arrest and conviction, three years ago, for conducting a gambling operation. His record shows no misdemeanor arrests. Gronlund has spent time in jail and his period of probation has been successful.

The current conviction, which is not related to regular criminal activity on the defendant's part, is for taking a $675 garden tractor from Robert Lewis. The defendant had a weapon at the time of the crime. He was not drunk or under the influence of drugs, but admits that his motive was to obtain money for drugs. The crime was premeditated.

Guilt was determined by plea. The defendant's attitude toward the court is respectful. A good rehabilitation program has been presented by the probation officer.

second stage employed a checklist of the operational facts in isolation,[26] and the third stage concluded the interviews with a qualitative search for attitudes and ideas concerning the functions of the sentencing system.[27] The hypothetical cases were the analytical heart of the study. Each judge who participated was asked to resolve five cases, all different from the cases given any other judge.[28] Each hypothetical was a composite of one fact from each of forty categories of facts present in grand larceny crimes.[29] The categories of facts and the frequency of the variables within each category were generated through searches of previous sentencing studies, discussion with the study's consultants,[30] and analysis of available Washington State statistics. An attempt was made to include all categories of factors possibly influential in sentencing dispositions. Sixteen characteristics related to the personal background of the defendant, eleven to his criminal background, eight to the offense and five to court procedure.[31] After the interview but prior to the analysis of the sentencing decisions, nine factors relating to the particular judge who resolved the case were added.[32] The sentencing decision was coded in one of three ways: probation without jail, probation with jail, and prison.[33]

26. The list of 115 items presented to each judge included every fact of every category used in constructing the hypothetical cases. The judge was asked to specify how strongly the fact would influence his sentencing decision and whether it would influence it in the direction of leniency or severity. *See* W.S.S.C.J.A. STUDY at 88 *et seq.* for an analysis of the results of this portion of the interview.

27. *See* W.S.S.C.J.A. STUDY at 49 *et seq.* for a compilation of the information derived from this portion of the interview.

28. The hypothetical cases were grouped in sets of five in a non-random fashion. Each set had some variance in age, race, marital status, work history and criminal background of the defendants. This was done to assure that disposition by any particular judge would not consistently be influenced by a unique reaction to any particular factor. Where possible the hypothetical cases were presented to each judge sufficiently in advance of his interview to insure that he would have time to review them carefully before being asked for his disposition. In cases where this was not possible, the cases were presented to the judge at the beginning of the interview.

29. For example, in the hypothetical case reproduced in note 25 *supra*, the first four categories are age, race, sex, and marital status, and the facts chosen from these categories are 22-29, white, male, and single.

30. The study's consultants included eleven judges, two professors of law and one professor of sociology.

31. *See* Appendix I *infra* for a list of categories and the facts included therein.

32. The factors relating to each judge were (1) the location of his home county, (2) his age, (3) the length of time he had been on the superior court bench, (4) the length of time he had practiced law, (5) the law school from which he graduated, (6) his view of prosecutors' recommendations, (7) when he asks for probation officers' pre-sentence reports, (8) his view of probation officers' recommendations, and (9) his view of defense counsel's recommendations.

33. This characterization was deemed the simplest and most universal way of

The test population consisted of 350 hypothetical cases, [34] each of which was constructed as follows. The desired frequency of each variable within each fact category was resolved for the population as a whole. (For example, for the category "sex," available statistics on grand larceny in Washington indicated about fifteen percent of the convicted defendants were female.) For each case a code sheet was compiled, utilizing one fact from each of the categories. (For example, from the category "sex," the fact "female" might have been chosen.) Then each code sheet was converted into a prose case history. Concentrated effort was devoted to using nonjudgmental descriptive words and to maintaining a uniform format for all the case histories.

The chief problem in constructing the hypothetical cases was the distribution of the variables across the population of cases. In some instances, official statistics provided the requisite distributions, but often informed guesswork had to be employed.[35] When no information on the correlations between the various fact distributions was available, an attempt was made to randomize the distribution. But realism and consistency within each case demanded certain departures from a completely randomized method. For example, the number of prior felony arrests was obviously correlated with the number of prior felony convictions (the prior arrests had to equal or exceed the number of prior convictions); sex was correlated with military service (a smaller percentage of females than males have served). Also included were some less obvious correlations, such as alcoholic history with number of prior misdemeanor arrests (those with alcoholic history have a higher percentage of "five or more misdemeanor arrests").

separating the sentences into three grades ranging from "lenient" to "severe." Some judges would object to the use of the terms "lenient" and "severe" arguing that for some defendants a probation incorporating many stringent conditions is more "severe" in the conventional sense than an out-and-out incarceration. Other judges differentiated between deferred and suspended sentences, but since these were minimal in number, their differentiation was not included.

34. Although 350 cases were originally generated, only 320 of these ultimately were used in the study. The cases eliminated were either not presented to a judge or not resolved by the judge to whom they were presented.

35. Information available from the King County Prosecutor's Office and the Office of Probation and Parole and the personal experience of several judges and prosecutors gave good approximations of the actual breakdown according to age, sex, race, marital status, number of dependents, length of residence in the state, job classification, employment history, whether the defendant was under the influence of drugs or alcohol at the time of the offense, psychiatric history, how guilt was determined, and whether the defendant testified at his trial.

The hypothetical case population was restricted in two other ways: the charged offense in all cases was grand larceny (one count only) and all hypothetical offenders were assumed not to be on probation or parole at the time of the offense. It was necessary to limit the study to one offense due to the differing types of fact categories present in other types of offenses. Presence of different types of facts would make general comparisons more difficult and would lessen the sample size for each type of offense. Grand larceny was chosen because it presents the least personalized set of factors. Widely variant judicial reactions to a defendant convicted of a drug offense or a "personal threat" crime such as assault could not realistically be duplicated through a hypothetical case that omitted personal contact between the judge and the defendant. All hypothetical defendants were assumed not to be currently on probation or parole because statutory restraints governing their dispositions would have been different.

Although the hypothetical case approach coupled with a multiple linear regression analysis provides great insight into the sentencing process,[36] several limitations must be kept in mind when analyzing the results of this study. The first and most obvious limitation is the scope of the empirical data. The study purposely took a very narrow portion of the total criminal justice spectrum. As a result, no conclusions can be drawn about other parts of the criminal justice system that were not examined. Sentencing may in fact be subsidiary to or controlled by other facets of the criminal justice process such as police screening,[37] the availability of probation department facilities,[38] or plea bargaining in the prosecutor's office.[39] However, the study does describe controlling factors *to the extent* that sentencing by the judge is independent and not determined by extra-judicial agents.

The second limitation upon any general conclusions from the study is the nature of the data. As mentioned above, the hypothetical cases resolved by the interviewed judges were all larceny cases because in-

36. *See* notes 40-43 and accompanying text *infra* for a discussion of the technique of multiple linear regression analysis.

37. *See, e.g.,* Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice,* 69 YALE L.J. 543 (1960).

38. Over half of the judges interviewed in the course of this study indicated the availability of adequate probation programs heavily influenced the sentence they accorded the offender. *See* W.S.S.C.J.A. STUDY at 68.

39. *See, e.g.,* Newman, *Pleading Guilty for Considerations: A Study of Bargain Justice,* 46 J. CRIM . L.C. & P.S. 780 (1956).

clusion of more than one category of crimes would have expanded the scope of the data beyond manageable limits. Many judges frankly admitted that their response to sentencing was dependent upon the nature of the crime involved. The study does describe the directions this dependency assumes, but the empirical data are limited to grand larcenies.

The third major limitation of the study is the method of analysis. The experimental design does not allow determination of what caused a particular decision in a particular case. The purpose of the study was to examine the system as a whole, so an analytical method was chosen to achieve that end alone.

The fourth limitation to the study is inherent in the hypothetical case approach. The cases presented to the judges were not real, so the results express what a particular judge *believed* he would do in a particular situation. In fact, a judge's historical record may be quite different from what the judge believes he does. This limitation does not lessen the value of the study, however, because the decisions rendered in hypothetical cases best portray which factors the judges believe *should* control sentencing.

III. RESULTS

The proponents of indeterminate and discretionary sentencing argue that such sentencing promotes the "rehabilitative ideal." This argument assumes that the sentencer has the capability of identifying the causes of particular criminal behavior and removing those causes through treatment, thereby rehabilitating the offender toward a law-abiding life in the future. The wide acceptance of indeterminate and discretionary sentencing throughout the United States suggests a belief that such a "help the offender" attitude is (1) feasible, (2) constitutionally permissible, and (3) desirable. The results of the Washington State Superior Court Judges' Association study challenge the first two beliefs and compel review of the third.

Table 1 presents the beta coefficients of the major determinants of felony sentencing calculated from the data[40] generated in the W.S.S.C.J.A. Study. The beta coefficients for the entire set of

40. A multiple linear regression analysis was used. *See* section IV, *Analysis of the Data: Methodology, infra,* for a comparision of this method of analysis with other possible approaches and for a discussion of the inherent limitations of this method. The pro-

TABLE 1

MAJOR DETERMINANTS OF FELONY SENTENCING

BETA COEFFICIENT	INDEPENDENT VARIABLE
+.306	Number of defendant's prior felony arrests
+.257	Nature of defendant's most serious prior felony conviction
+.194	Length of time since trial judge was admitted to the bar
−.159	Defendant's attitude was respectful
−.152	Defendant's motive was to obtain money for drugs
−.139	Defense counsel presented a rehabilitation program to the court before sentencing
+.136	Defendant's race was white
−.130	Defendant's motive was "whim"
+.126	Type of crime was larceny by possession of stolen goods
−.125	Length of judge's tenure on bench
+.123	The judge's philosophy of defense recommendations
+.122	The victim of the crime was a private individual
+.121	The judge became a lawyer through private study without attending a law school
+.118	The defendant had previously served time in prison
−.112	The judge's philosophy of probation officer recommendations
−.111	The defendant had a prior history of psychiatric problems

sixty-eight independent variables appear in Appendix II. A positive value means that the variable contributes to incarceration, and a negative value means the variable contributes to probation. The degree of contribution is indicated by the magnitude of the coefficient. Beta

cedure used for the calculation of the beta coefficients, BMD02R, is available at most university computer installations. Computational methods are available in many standard texts. *See, e.g.*, A.S. GOLDBERGER, ECONOMETRIC THEORY (1964).

coefficients vary ordinarily from -1 to $+1$.[41] It is evident that none of the independent variables overwhelms any of the others; sentencing for the most part is a consequence of the interaction of a number of factors rather than one or two factors. The total set of independent variables considered in this study accounts for approximately fifty percent of the variance observed in the sentences assigned the hypothetical case population;[42] that is, more than fifty percent of the variation in sentencing is explained by the independent variables included in the study.[43] Therefore, because of the broad range of independent variables and because of the way in which they explain the variation, Table 1 contains *the* major determinants of sentencing.

The study clearly demonstrates that the following factors played an important role in influencing the sentencing judge's decision: the race of the defendant, the judge's educational background, the length of time the judge had been a lawyer and had served on the bench, the number of felony arrests (not convictions) the defendant had experienced, the attitude of the defendant as perceived by the judge, and the judge's personal philosophy of probation officer and defense attorney recommendations.

Table 1 shows that white defendants were treated more severely than non-white defendants, reflecting a systemic bias against whites in a hypothetical case situation. Although it is beyond the scope of the data to explain *why* such a systemic bias exists, it is likely, in the authors' view, that some Washington State judges favored non-whites in this hypothetical study because of a conscious racial preference.[44] It is possible that some judges feel an identity and familiarity with a white

41. Under certain circumstances the beta coefficient may exceed an absolute value of one. This most often occurs in cases involving unusual combinations of negative and positive correlations among the independent variables and the dependent variable. Since such unusual combinations were not present, the possibility of a coefficient exceeding one is not a concern.

42. The squared multiple correlation coefficient which may be interpreted as the proportion of explained variance to total variance is .491. This is a surprisingly high proportion. *See* H. BLALOCK, SOCIAL STATISTICS 354-57 (1960) [hereinafter cited as BLALOCK] for a discussion of how to interpret the squared multiple correlation coefficient.

43. It is assumed that the list of variables in Appendix I *infra* is not exhaustive of all the variables present in a sentencing decision. *See* note 30 and accompanying text *supra* for a discussion of how the variables under study were selected.

44. In fact at least two judges participating in the interviews commented that they consciously attempt to treat non-white defendants more leniently than white because they recognize the likelihood of unconscious prejudice on their part against blacks and other minorities.

defendant's cultural background which makes them more willing to impute blame to the white offender than to his environment,[45] thereby creating a presumption or bias operating against whites that is solely racial in character.

Other striking biases emerge from a review of the sixteen most important factors in sentencing presented in Table 1. Much of the variance in severity of the sentences is accounted for by the judge's educational and professional background, completely apart from any facts related to the offender or the offense. Three of the sixteen most important factors are related to the judge's experience level and the law school he attended. Again, these factors certainly are related to other data not under study.[46] For instance, the undergraduate credentials and cultural background of a judge affected whether he was able to attend law school. Further, factors involving the judge's experience level are probably related in part to how many criminals the judge has sentenced in the past as well as his attitudes at the time he went on the bench. It would not be surprising if a judge found it more difficult to distinguish between individual defendants over time as the number of defendants he has sentenced increases. In any event, it is clear from the data that the sentence is heavily influenced by *who* the judge is and *what* his background is.[47]

Three factors in Table 1 which related to the offender's past record show that the defendant's prior incarceration and the number of his prior arrests (particularly felony arrests) rather than convictions are influential elements. The judges apparently consider both arrests and prior prison terms highly accurate measures of criminality, or at least did so in the hypothetical cases. If this is correct, what has happened to the presumption of innocence where there is no conviction? And if an earlier prison sentence tends to make a later felony sentence more severe, isn't this double punishment for the earlier crime? Several possible explanations for this result exist. First, judges may assume that a defendant with a prior prison record is a hardened criminal. Second, judges probably rely on the arrest data because a Washington statu-

45. It is likely that judges feel the community gives more advantages to white offenders than to non-white offenders and thus feel there is a greater likelihood that non-white crime is environmental in origin.

46. A limitation on the study data was the inclusion of only nine information bits about each judge; *see* note 32 and accompanying text *supra*.

47. These results are strikingly similar to the findings of the Houston study, Johnson, *supra* note 17, at 62-64.

tory provision allows deferred sentences which are later cleared entirely from the conviction record, thus leaving only the felony arrest as evidence of the earlier transgression.[48] Finally, the judges may place great confidence in police analysis of a citizen's criminality, *i.e.*, the frequency of his arrest.

Six factors on the list relate to the offender's motive at the time of crime and attitude during the trial. An offender's attitude towards reform, repentance or rehabilitation is important. These six factors also seem to suggest that "impulse" and drug offenders are treated leniently and voluntary[49] criminals severely. The apparent importance of the judge's subjective evaluation of the defendant's attitude and motive is not at all reassuring, given the cultural and racial biases already discussed. Criminal lawyers seem to recognize the importance of this judicial perception when they advise their clients to wear suits and cut their hair for trial.

The study findings seriously challenge the underlying assumption of indeterminate and discretionary sentencing that it is *possible* to individualize a sentence for a particular offender. The results of the study were generated by moderate judges,[50] yet the individualized sentences of these non-aberrant judges were directly dependent upon the judge's background and unconscious biases rather than upon the defendant's needs. Although it is beyond the scope of this analysis to predict whether the same problem would arise if the sentencing decision were made by someone other than the judge, a calculated guess is that unconscious biases in human decision-making are not limited to judges and probably would appear in any group of decision-makers given the same breadth of discretion. The question then becomes whether it is possible to truly individualize sentences by only considering factors related to the offender and the offense. Stated another way, if sentencing is to be individualized, is it possible to keep the decision from being controlled by factors dependent on who the decision-maker is?

The W.S.S.C.J.A. findings raise a second serious challenge to discretionary, individualized sentencing. Any sentencing system must

48. WASH. REV. CODE § 9.95.210 (1959).

49. "Voluntary" means premeditated or thoughtful crimes (*e.g.*, sale of stolen goods) in which the offender has a chance to consider his acts. The judges often mentioned during the study that offenders trying to support a drug habit were "impulse" criminals.

50. *See* note 69 and accompanying text *infra*.

withstand the constitutional tests of due process and equal protection and must avoid cruel or unusual punishment in its operation. For the first time, studies such as this one allow review of the standards used by sentencing decision-makers. Currently there is little case law elaborating the constitutional requirements surrounding discretionary sentencing[51] because the courts have had little data or evidence with which to identify the standards used. However, it would appear that if data similar to the W.S.S.C.J.A. study reveal that current determinants for inflicting severe discretionary criminal punishments are factors such as racial bias, the constitutionality of discretionary sentencing will be subject to severe sixth and fourteenth amendment scrutiny.

IV. ANALYSIS OF THE DATA: METHODOLOGY

The raw data collected during the interviews was analyzed to ascertain which of the following are important determinants in sentencing: the defendant's criminal history, race, or sex; the offense; the conduct of the case; or the characteristics of the judge. The question is: which factors are most important in determining sentence severity, and how much more do they affect the sentence than the other factors? To make this determination, standardized multiple linear regression must be used.

In multiple linear regression, coefficients are selected to best fit the following equation:

$$Y = B_1X_1 + B_2X_2 + \ldots + B_nX_n + A$$

where Y represents the dependent variable and the X's are the independent variables.[52] The B's, called regression coefficients, are the partial derivatives (rates of change) of the dependent variable with respect to the independent variable of which it is a coefficient, controlling for all of the other independent variables. Thus, any single regression coefficient may be interpreted as the amount of change produced in the dependent variable when a given independent variable is increased one unit and all the other variables are held constant. However, in order to compare the B's directly for an assessment of their

51. *See* note 11 and accompanying text *supra*.
52. *See* BLALOCK at 346.

relative direct effects, it is necessary that all of the independent variables be measured in the same units or be standardized. Since the W.S.S.C.J.A. data were not measured in the same units, the variables must be standardized—expressed in terms of standard deviations from their respective means.[53] Standardization allows direct comparison of the regression coefficients—now called "beta" coefficients. The beta coefficient is a measure of relative direct effect, controlling for the influence of all of the other independent variables. Since this is precisely what is needed in order to assess the relative effects of the different independent variables on sentencing, the analysis in this comment uses standardized multiple regression coefficients.

Several other analytical approaches are available but are less satisfactory than multiple linear regression in analyzing raw data such as that obtained in the W.S.S.C.J.A. study. The first possible approach would inspect the *correlation coefficient*[54] of each of the facts (independent variables) with the observed sentence (dependent variable). Under such an approach, it is presumed that the independent variables more highly correlated with the dependent variable are more important than those less correlated. This type of strategy was employed by Johnson[55] in a study of ten criminal district courts in Harris County (Houston), Texas. In analyzing the effects of various variables in the judge's background on sentencing, he found, for instance, that both age and length of time in private law practice correlated very highly[56] (.93) with the severity of sentences in theft cases. Although these findings are interesting, it is certain that the high correlation of length of private practice with the severity of a sentence is due in large part to the age of the judge; the reverse is just as certain. Stated another way, the raw correlation coefficients are not good evidence of direct effect because some of the effect of each of the independent

53. The standard deviation is a parameter of the normal distribution. It may be described as the root mean square of the deviations of the variables about the mean. This sort of a unit is used because of its favorable mathematical properties for this kind of analysis.

54. A correlation coefficient measures the amount or degree of association of two variables. The more closely related the variables, the higher will be the correlation. The correlation coefficient always varies between $+1$ and -1. *See* BLALOCK at 285 for computation formulas.

55. Johnson, *Sentencing in the Criminal District Courts*, 9 HOUSTON L. REV. 944 (1972), discussed in note 17 *supra*.

56. Since the correlation coefficient is never greater than one, a .93 correlation is very high and indicates that the sentence is almost a complete function of the judge's age and length of time in private law practice.

variables has been "stolen" from the others. It would be more desirable to know the magnitude of the effect of age on sentence *independent* of any effect length of private practice may have, and vice versa. In order to ascertain this independent effect, some method is needed for controlling the interrelationships among the independent variables. Statistical control of the interrelationships requires knowledge of the correlations of the independent variables among themselves.[57]

Another analytical approach which is less satisfactory than multiple linear regression is *partial correlation.* In a California study of the felony sentencing patterns of juries,[58] partial correlations[59] were used as a method of determining the effect of a particular independent variable on the dependent variable. In partial correlation the investigator statistically removes any variation due to the control variables (variation not being observed), thus leaving an uncontaminated correlation. This is satisfactory for a study of any one independent variable in a set, but if a comparison of the uncontaminated effect of each of the independent variables is desired so that an assessment of their relative importance with respect to each other can be obtained, partial correlations are not satisfactory. A common "metric" or standard for comparison is needed. A common standard cannot be established in partial correlation since variation is extracted from the dependent variable as well as from the independent variable. Thus no standard unit of measure is possible since the one common element in each of the comparisons, the dependent variable, is controlled to a different degree in each partial correlation. Therefore, an investigator who used partial correlations might be able to say that the correlation of a particular independent variable with the dependent variable "survived" the statistical controls (*i.e.*, the correlation remained about the same after control as before control), but he could not legitimately say that it survived to a greater or lesser degree than did any of the other independent variables.

57. Correlations among the various independent variables were not presented in the Johnson study. The only correlations presented were those between the independent variables and the dependent variable, the sentence.

58. *A Study of the California Penalty Jury in First-Degree-Murder Cases*, 21 STAN. L. REV. 1297 (1969), discussed in note 17 *supra*.

59. A partial correlation is a correlation between two variables that is controlled for the effects of a third variable. *See* BLALOCK at 333-36 for computational formulas and a more extended description.

In the earliest sentencing studies which used tabular analysis, only very limited questions were answered, and many competing explanations remained. Later studies using the ordinary correlation coefficient did not broaden the scope of questions which could be answered. It was found, for instance, that the judge's age was highly correlated with the severity of sentence.[60] However, since this correlation might be due to the causal effect of other independent variables with which it was correlated, alternative explanations still were not eliminated.

The use of partial correlations increases the number of questions which can be answered satisfactorily. This technique can determine whether the relationship of age and sentence "survives" when the effects of other independent variables are controlled. But this method, too, fails when the relative influence of each factor or independent variable upon the severity of sentence is sought to be determined.

Thus multiple linear regression analysis constitutes the best technique for answering the questions of how judges sentence. However, the W.S.S.C.J.A. study data present a methodological problem regarding the use of a multiple regression model. The multiple regression technique was designed for data that have interval or ratio properties, *i.e.*, data measured with numbers that have multiplicative and additive properties. The W.S.S.C.J.A. study data, on the other hand, include nominal and ordinal scales as well as interval and ratio scales.[61] Multiple regression will handle nominal scales if each category of the scale is treated as a separate variable having two possible values: zero or one (one if the case falls in that category, and zero if not). Thus race is not treated as a single variable, but as four variables—black or non-black, white or non-white, Indian or non-Indian, and Mexican-American or non-Mexican-American. Multiple regression analysis of ordinal variables is harder to justify, though there is sufficient evidence[62] to suggest that basic conclusions are relatively un-

60. *See* Johnson, *supra* note 17.

61. A *ratio scaled variable* may be expressed in terms of real numbers. An *interval scaled variable* is essentially arbitrary with respect to zero; in other words, the scale could be moved up and down on the real number scale as long as the relative positions of the scale were kept the same. An *ordinal scale* carries information only about the relative order of the items; that is, it is not known whether a certain value is twice or three times the value of another, but it is known that it is greater. A *nominal scale* is one in which no value at all may possibly be assigned to the categories. An example of a nominal scale is sex; it varies between male and female, but no numbers could be assigned which would distinguish one as higher or lower than the other. *See* BLALOCK at 12-15.

62. Boyle, *Path Analysis and Ordinal Data*, 75 AM. J. SOCIOLOGY 461 (1970).

touched when ordinal variables are treated as interval. At any rate ordinal variables can be included in the analysis with some recoding to maximize interpretability.[63]

A special problem existed in the W.S.S.C.J.A. study because the dependent variable, the sentence, was ordinal. The W.S.S.C.J.A. study data allowed only the values of one (probation without jail), two (probation with jail), or three (prison),[64] but the computed expected value given the estimated standardized regression coefficients was not restricted in value. An adequate justification for proceeding with an ordinal dependent variable in this case is an assumption that an essentially interval variable is being trichotomized. Thus it is possible to have an interval expected value even though the observed response has only three possible values.[65]

Two characteristics of the sample used for this analysis bear mentioning. First, since the sample of hypothetical cases is not a probability sample,[66] there is no possibility of generalizing to a population. Therefore, usual statistical methods[67] will not help in distinguishing significant coefficients from nonsignificant ones. This is not really a problem since comparison of the effects of the different independent variables and the interpretation of their relative position is not affected by the non-randomness of the sample. Second, earlier analysis of this same data suggested that there were clear differences in the manner in which the independent variables affected the sentencing patterns of severe or lenient judges as opposed to more moderate judges.[68] On the basis of the previous analysis the sample was divided into three groups: severe, moderate, and lenient. By far the greatest number of judges fell into the middle category. The conclusions presented in this paper do not apply to the extreme judges, since an attempt to apply the present analysis to the extreme judges (both severe

63. For example, "nature of most serious felony conviction" was coded: -1 = less serious than current offense; 0 = similar to current offense; $+1$ = more serious than current offense.

64. *See* note 33 and accompanying text *supra*.

65. It is also true that some heteroskedacisity is produced, but since we do not intend to invoke statistical tests of significance this is not a serious danger. *See* BLALOCK at 279.

66. *See* notes 35, 36 and accompanying text *supra* for details of the present sample. *See* BLALOCK at 392 for a discussion of sampling problems.

67. For example, the *F* test. *See* BLALOCK at 302.

68. W.S.S.C.J.A. STUDY at 135-36.

and lenient) failed because of severe multi-collinearity.[69] Nor may the conclusions be applied to other judges not included in the study, such as Washington municipal court judges, federal judges, or judges from other states, though it is hoped that the results of this study will encourage others to extend this type of research to these groups.

CONCLUSIONS

Although the results of the W.S.S.C.J.A. study should be evaluated in light of the reservations discussed above, the data are useful in confirming several conclusions drawn in earlier studies.[70] Race is significant. The previous criminal record of the offender is much more important than the nature of the current crime. Factors unrelated to the defendant's culpability or rehabilitation potential have great impact on the sentence. Factors from the *judge's* background such as education and length of legal practice are extremely important in accounting for particular sentences. The results of this and other existing empirical studies of sentencing practices clearly demonstrate dependence on factors unrelated to any justifiable goal of individualized sentencing.

One partial solution to these unacceptable sentencing practices is to enunciate standards for sentencing. Professor Kadish argues that wide discretion without standards in sentencing must be subjected to equal protection and due process review, pointing out that the essential question is the extent to which, in a government of law rather than of men, rules must control the making of critical judicial decisions.[71] Both the ABA and the Model Sentencing Act[72] advocate preserving

69. Multi-collinearity is high intercorrelation of the independent variables. In this case many of the independent variables were correlated perfectly with each other and therefore complete functions of each other. *See* BLALOCK at 268.

70. *See* note 17 *supra*.

71. Kadish, *Legal Norm and Discretion in the Police in Sentencing Processes*, 75 HARV. L. REV. 904 (1962).

72. ABA PROJ. ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES 14 (1967); ADVISORY COUNCIL OF JUDGES OF THE NAT'L COUNCIL ON CRIME & DELINQUENCY, MODEL SENTENCING ACT art. I, § 1 (1963), *reprinted in* ABA STANDARDS RELATING TO SENTENCING, *supra* at 330.

There has been serious, intense scholarship and proposed law reforms in sentencing. Most notable, in addition to the MODEL SENTENCING ACT *supra*, and the ABA STANDARDS RELATING TO SENTENCING *supra*, are the MODEL PENAL CODE (Proposed Official Draft 1962); the proposed new Federal Criminal Code, NAT'L COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT, PROPOSED NEW FEDERAL CRIMINAL CODE (1971), *reprinted in Hearings Before the Subcomm. on Criminal Laws and Procedures*

the principle of individualization while eliminating the extremes in sentencing behavior by specifying factors which a judge must consider. Unfortunately, the ABA approach will not resolve the use of the questionable factors isolated by the W.S.S.C.J.A. study, for the factors in Table 1 are *not* those used by aberrant judges;[73] they are the factors used in the *ordinary* sentencing decision. Since factors such as the judge's age and legal education are presumably unconscious considerations, they cannot be controlled by specifying conscious "standards for discretion."

An alternative approach to controlling undesirable biases[74] is reassessment of individualization and its role in criminal sentencing. The proponents of individualized sentencing argue that courts should be allowed to treat the offender in any of a multitude of ways designed to eliminate his criminal behavior. This "I know what's best for you" attitude toward criminal sentencing has fostered a huge amount of discretion as well as secrecy in decision-making. This excess of discretion would be shocking if encountered in any other area of the law.[75] The entire sentencing apparatus—from presentence report to parole board hearings and parole officer reports—is shrouded in secrecy and hidden from the offender's review.

One possible means of reducing the breadth of discretion is to limit the cases in which discretion can be exercised. Statutes could define precisely those instances when a sentencer may use discretion or the statutes could place the burden on the defendant to invoke the court's discretion and show it should be exercised in his particular case. This approach is already used successfully in the substantive criminal law,[76] and its benefits would be just as great in sentencing.

Controlling discretion is not easy, but a start can be made by admitting there is a problem. In the words of Judge Frankel:[77]

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of the Senate Comm. on the Judiciary, 92d Cong., 1st Sess., at 129 (1971); and ABA PROJ. ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES (Approved Draft 1968).

73. *See* note 69 and accompanying text *supra*.

74. Policies (or biases) in sentencing are not bad per se. The problem arises when these policies are neither articulated nor agreed upon, subjecting defendants to dramatically different treatment without any justification or approval by society as a whole.

75. Surely it is no coincidence that the business community has lobbied long and hard for precise controls on discretionary governmental authority in areas such as tax and business and commercial transactions. Yet no precise controls limiting judicial and administrative discretion are found in criminal sentencing.

76. *See, e.g.*, MODEL PENAL CODE §§ 3.01, 4.03 (Proposed Official Draft 1962).

77. Frankel, *Lawlessness in Sentencing*, 41 U. CINCINNATI L. REV. 1, 54 (1972).

Sentencing is today a wasteland in the law. It calls, above all, for regulation by law. There is an excess of discretion given to officials whose entitlement to such power is established by neither professional credentials nor performance. Some measures already in existence—such as sentencing councils and appellate review—seem desirable because they operate to channel the exercise of discretion. On the other hand, the evil of unbounded discretion is enhanced by the uncritical belief that a beneficent "individualization" is achieved through indeterminate sentencing. Indeterminancy in its most enthusiastic forms takes on its literal dictionary quality of vagueness; it means conferring of power to extend or terminate confinement where the grounds of the power have been misconceived and the occasions for its exercise are not ascertainable.

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APPENDIX I
TABLE OF INDEPENDENT VARIABLES

This table lists the independent variables used in the authors' analysis of the W.S.S.C.J.A. study. The right hand column presents the assigned values possible in any given hypothetical case history used in the study.

A. DEFENDANT'S PERSONAL HISTORY

INDEPENDENT VARIABLE	POSSIBLE VALUES
1. Defendant's age	(1) 18–21 years old
	(2) 22–29
	(3) 30–39
	(4) 40–49
	(5) 50 and older
2. Defendant's race was black	(0) no
	(1) yes
3. Defendant's race was Indian	(0) no
	(1) yes
4. Defendant's race was white	(0) no
	(1) yes
5. Defendant was male	(0) no
	(1) yes
6. Defendant was single	(0) no
	(1) yes
7. Defendant was divorced	(0) no
or separated	(1) yes
8. Defendant was married	(0) no
	(1) yes
9. Number of defendant's	(1) 0
dependents	(2) 1 or 2
	(3) 3 or more
10. Length of defendant's residence	(1) less than 1 year
in the State of Washington	(2) 1–5 years
	(3) more than 5 years
11. Defendant's job classification	(0) no
was professional or managerial	(1) yes
12. Defendant's job classification	(0) no
was white collar	(1) yes

INDEPENDENT VARIABLE	POSSIBLE VALUES
13. Defendant's job classification was "skilled"	(0) no (1) yes
14. Defendant was regularly employed	(0) no (1) yes
15. Defendant was employed at the time of crime	(0) no (1) yes
16. Defendant had a history of alcoholism	(0) no (1) yes
17. Defendant had a history of no drug use	(0) no (1) yes
18. Defendant had a history of use of marijuana	(0) no (1) yes
19. Defendant had a history of use of amphetamines or barbituates	(0) no (1) yes
20. Defendant had a history of psychiatric disturbances	(0) no (1) yes
21. Defendant was suffering from current emotional problems	(0) no (1) yes
22. Defendant had close ties to a responsible member of the community	(0) no (1) yes
23. Defendant was honorably discharged from military service	(0) no (1) yes
24. Defendant received a less than honorable discharge from military service	(0) no (1) yes
25. Defendant presented a neat appearance	(0) no (1) yes

B. DEFENDANT'S CRIMINAL RECORD

INDEPENDENT VARIABLE	POSSIBLE VALUES
1. Defendant had a juvenile record	(0) no (1) yes
2. Number of defendant's prior felony arrests	(1) none (2) 1 (3) 2 (4) 3 or more

INDEPENDENT VARIABLE	POSSIBLE VALUES
3. Number of defendant's prior felony convictions	(1) none (2) 1 (3) 2 (4) 3 or more
4. Time of defendant's most recent prior felony conviction	(1) less than 5 years ago (2) more than 5 years ago
5. Nature of defendant's most serious prior felony conviction	(1) less serious than current offense (2) as serious as current (3) more serious than current
6. Number of defendant's prior misdemeanor arrests	(1) none (2) 1–4 (3) 5 or more
7. Time of defendant's most recent misdemeanor arrest	(0) none (1) less than 1 year ago (2) more than 1 year ago
8. Defendant's current conviction was related to other criminal activity	(0) no (1) yes
9. Defendant had served time in prison	(0) no (1) yes
10. Defendant had served time in jail	(0) no (1) yes
11. Defendant's prior probation or parole record	(−1) yes with at least 1 failure (0) none (+1) yes with no failures

C. FACTS OF THE CRIME

INDEPENDENT VARIABLE	POSSIBLE VALUES
1. The victim was an individual	(0) no (1) yes
2. The victim was a business	(0) no (1) yes
3. The amount of the larceny	(1) less than $100 (2) $100–$499 (3) $500–$999 (4) more than $1,000

INDEPENDENT VARIABLE	POSSIBLE VALUES
4. The type of larceny was possession of stolen goods	(0) no (1) yes
5. The type of larceny was theft	(0) no (1) yes
6. Defendant carried a weapon at time of crime	(0) no (1) yes
7. Defendant was drunk at time of crime	(0) no (1) yes
8. Defendant was under influence of drugs at time of crime	(0) no (1) yes
9. Defendant's motive was money for drugs	(0) no (1) yes
10. Defendant's motive was hardship	(0) no (1) yes
11. Defendant's motive was unknown	(0) no (1) yes
12. Defendant's motive was whim	(0) no (1) yes
13. The crime was premeditated	(0) no (1) yes

D. FACTS OF THE TRIAL

INDEPENDENT VARIABLES	POSSIBLE VALUES
1. Defendant's guilt was determined by plea	(0) no (1) yes
2. Defendant's guilt was determined by jury trial	(0) no (1) yes
3. Defendant's testimony at trial was believable	(0) no (1) yes
4. Defendant's testimony at trial was unbelievable	(0) no (1) yes
5. Defendant's attitude in court was respectful	(0) no (1) yes
6. The type of rehabilitation presented to the court	(0) none (1) mediocre (2) good
7. Defense counsel presented a rehabilitation program	(0) no (1) yes

E. PERSONAL DATA ON THE SENTENCING JUDGE*

INDEPENDENT VARIABLE	POSSIBLE VALUES
1. Judge's philosophy toward prosecuting attorneys' recommendations	(1) does not consider (2) considers, but decides independently (3) varies with the particular prosecutor (4) considers strongly but is generally more lenient (5) generally follows (6) follows if deferred sentence is recommended
2. In what cases does sentencing judge order presentence report	(1) all, or almost all (2) when unsure of sentence but tending toward probation (3) when unsure but tending toward incarceration (4) usually, unless defendant has regular criminal activity or crime was violent (5) never if the plea was bargained (6) only if there was a plea or important information is lacking (7) seldom unless defendant was previously on probation or either attorney requests (8) almost never
3. The sentencing judge's philosophy toward probation officers' recommendations	(1) does not consider (2) varies with the probation officer

* The information on the sentencing judges was obtained from two sources. During the interviews, each judge was asked to express his view of prosecutor, defense counsel, and probation officer recommendations and also his procedure for deciding to require a presentence report. These answers were then summarized and grouped according to similarity of responses. The personal history data on each judge were obtained from legal directories. The data on each judge were added to the particular hypothetical cases he sentenced. *See* note 32 and accompanying text *supra*.

INDEPENDENT VARIABLE	POSSIBLE VALUES
	(3) considers strongly but tends to be more severe
	(4) generally follows
4. The sentencing judge's philosophy toward defense recommendations	(1) does not consider
	(2) considers for rehabilitation program
	(3) varies with attorney
	(4) considers strongly with reservations
5. The sentencing judge's age	(1) 41 or younger
	(2) 42–51
	(3) 52–61
	(4) 62–71
	(5) 72 or older
6. The year the judge was appointed or elected to the bench (Length of time on bench)	(1) 1970 or later
	(2) 1960–1969
	(3) 1950–1959
	(4) 1940–1949
	(5) 1939 or earlier
7. Date admitted to Bar (Length of time a lawyer)	(1) 1960 or later
	(2) 1950–1959
	(3) 1940–1949
	(4) 1930–1939
	(5) 1920–1929
8. The judge became a lawyer through private study	(0) no
	(1) yes
9. The judge attended the University of Washington Law School	(0) no
	(1) yes
10. The judge attended a law school in the Northwest other than University of Washington or Gonzaga University	(0) no
	(1) yes
11. The judge attended law school outside the Northwest	(0) no
	(1) yes

APPENDIX II
TABLE OF BETA COEFFICIENTS

This table presents the results of the authors' analysis of the W.S.S. C.J.A. study data. The independent variables are listed in descending order of importance.* The size, or magnitude, of the beta coefficient is evidence of the relative importance of the variable in the sentencing decision. The sign (+ or −) of the coefficient indicates the direction of influence of the variable. A positive sign means the variable tends the sentence toward incarceration as the value of the variable increases. A minus sign means the variable tends the sentence toward probation without jail as the value of the variable increases. Appendix I lists the possible values for each independent variable.

BETA COEFFICIENT		INDEPENDENT VARIABLE
+.306	B–2	Number of defendant's prior felony arrests
+.257	B–5	Nature of defendant's most serious prior felony conviction
+.194	E–7	Date sentencing judge admitted to Bar
−.159	D–5	Defendant's attitude in court was respectful
−.152	C–9	Defendant's motive was money for drugs
−.139	D–7	Defense counsel presented a rehabilitation program
+.136	A–4	Defendant's race was white
−.130	C–12	Defendant's motive was whim
+.126	C–4	Type of larceny was possession of stolen goods
−.125	E–6	The year judge was appointed to bench
+.123	E–4	The judge's philosophy toward defense counsel recommendations
+.122	C–1	The victim was an individual

* The legal reader should use caution in interpreting the regression coefficients. The correlations, and therefore the observed regression coefficients, have an accuracy within approximately ±.1 of the true value of the independent variable. This level of accuracy is only a rule of thumb because the ordinal and nominal character of the variables obviates dramatic claims of accuracy. It is not possible to construct confidence intervals (mathematical intervals within which the "true value" is probable) for the regression coefficients because of the inapplicability of assumptions necessary for meaningful confidence intervals (*e.g.*, homoskedasicity, *see* note 65 *supra;* generalization to a wider population, *see* note 66 and accompanying text *supra*). In others words, the reader should be skeptical of the regression coefficients as they decrease in absolute value. The smaller the size of the coefficient, the more likely the coefficient is a product of a mathematical artifact and not good evidence of the role of the variable.

BETA COEFFICIENT		INDEPENDENT VARIABLE
+.121	E–8	The judge became an attorney through private study
+.118	B–9	Defendant has served time in prison
−.112	E–3	Judge's philosophy toward probation officers' recommendations
−.111	A–20	Defendant had a history of psychiatric disturbances
+.103	C–2	Victim was a business
+.102	B–8	Defendant's current conviction was related to other criminal activity
−.102	B–7	Time of defendant's most recent misdemeanor arrest
+.099	E–9	Judge attended University of Washington Law School
+.094	D–3	Defendant's testimony at trial was believable
+.094	C–7	Defendant was drunk at time of crime
+.089	A–14	Defendant was regularly employed
−.089	C–11	Defendant's motive was unknown
+.084	D–2	Defendant's guilt was determined by jury
−.080	C–8	Defendant was under influence of drugs at time of crime
+.072	A–3	Defendant's race was Indian
−.072	E–5	Judge's age
−.071	A–17	Defendant had a history of no drug use
−.071	A–25	Defendant presented a neat appearance
+.067	A–19	Defendant had a history of use of amphetamines or barbituates
−.065	B–3	Number of defendant's prior felony convictions
+.064	A–1	Defendant's age
+.062	E–1	Judge's philosophy toward prosecuting attorneys' recommendations
−.062	A–13	Defendant's job classification was "skilled"
+.059	D–4	Defendant's testimony was unbelievable
−.055	B–10	Defendant had served time in jail
+.055	B–6	Number of defendant's prior misdemeanor arrests
−.054	A–8	Defendant was married
+.053	A–6	Defendant was single

BETA COEFFICIENT		INDEPENDENT VARIABLE
+.051	B–1	Defendant had a juvenile record
+.050	D–1	Defendant's guilt was determined by plea
+.050	E–2	Cases in which judge orders presentence report
−.049	C–3	Amount of the larceny
−.048	A–18	Defendant had a history of marijuana use
−.045	A–23	Defendant was honorably discharged from military service
−.043	A–9	Number of defendant's dependents
+.042	E–11	Judge attended law school outside Northwest
−.041	B–11	Defendant's prior probation or parole record
+.037	A–7	Defendant was divorced or separated
+.037	A–12	Defendant's job classification was "white collar"
−.036	A–16	Defendant had a history of alcoholism
+.035	A–15	Defendant was employed at time of crime
+.032	E–10	Judge attended a Northwest law school other than University of Washington or Gonzaga University
−.029	B–4	Time of defendant's most recent prior felony conviction
−.029	A–5	Defendant was male
+.028	D–6	Type of rehabilitation program presented to court
+.026	C–13	The crime was premeditated
+.026	A–24	Defendant received a less than honorable discharge from military service
−.023	C–6	Defendant carried a weapon at time of crime
+.023	A–2	Defendant's race was black
−.022	A–22	Defendant had close ties to a responsible member of the community
+.022	C–5	Type of larceny was theft
−.021	A–10	Length of defendant's residence in Washington
−.009	A–21	Defendant was suffering from current emotional problems
−.008	C–10	Defendant's motive was hardship
−.002	A–11	Defendant's job classification was professional or managerial