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**Enright, Joseph Gerard**

THE IMPACT OF PRESENTENCE INVESTIGATIONS ON PLEA BARGAINED  
DISPOSITIONS IN KINGS COUNTY SUPREME COURT

*City University of New York*

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THE IMPACT OF PRESENTENCE INVESTIGATIONS ON  
PLEA BARGAINED DISPOSITIONS IN KINGS COUNTY SUPREME COURT

by

JOSEPH G. ENRIGHT

A dissertation submitted to the Graduate Faculty  
in Criminal Justice in partial fulfillment of the  
requirements for the degree of Doctor of Philosophy,  
The City University of New York.

1987

This manuscript has been read and accepted for the Graduate Faculty in Criminal Justice in satisfaction of the dissertation requirement for the degree of Doctor of Philosophy.

[signature]

April 22, 1987  
Date

\_\_\_\_\_  
Chair of Examining Committee

[signature]

April 22nd, 1987  
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Supervisory Committee

The City University of New York

## Abstract

### THE IMPACT OF PRESENTENCE INVESTIGATIONS ON PLEA BARGAINED DISPOSITIONS IN KINGS COUNTY SUPREME COURT

Adviser: Professor Harriet Pollack, Ph.D.

This study examines the presentence function of probation from an historical and empirical perspective which argues that the purported diminution of the role of the presentence report (PSR) in the sentencing process--as a result of sentence bargaining--is more reflective of a prevailing disenchantment with the rehabilitative ideal than any thoroughly considered, reliable validation of the PSR's dispensibility. It is demonstrated, through a review of the literature, that poorly conceived, polemically biased empirical research has helped to perpetuate the notion that these reports have little value. A survey of studies and inquiries conducted in New York over the past twenty years highlights this argument.

PSRs, formerly considered an "enlightened" fulcrum for the ameliorating correctional and sentencing reforms of the Progressive era, eventually were linked to the potential and/or actual abuses of indeterminate sentencing schemes by civil libertarians (concerned with sentencing disparity) and anti-positivist criminologists (critical of rehabilitation-directed correctional theory and practice). Such arguments, absent any sustained or substantive rebuttal from the



probation community, bolstered executive branch efforts to scapegoat the judiciary and gain more control over an instrument potentially regulative of jail/prison intake during an era of chronic overcrowding and attendant federal court intervention.

The author's own study of a random sample of PSRs from Kings County Supreme Court in New York City finds considerable evidence for the proposition that PSRs account for a significant proportion of the observed variance between sentence promised and sentence imposed. Path analysis finds that the custodial status has the most effect on the plea bargain and the recommendation of the probation officer, but the latter is the single most important predictor of the eventual disposition. Further analysis suggests that PSRs containing the most relevant information are more likely to result in amendments of the sentence bargain, while perfunctory reports are most likely merely to endorse the sentence already promised.

An examination of reaction to a recent attempt to eviscerate the PSR's content in New York lends further support to this study's hypothesis that presentence reports have much more utility in the criminal justice system than the revisionist literature suggests.

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My heartfelt thanks to Professor Harriet Pollack, whose encouragement and sensible suggestions kept my scholarly zeal focused on what was desirable and possible. To the extent that I've accomplished what I set out to do, I attribute to her patience, insight, guidance and kindness. In equal measure, I am indebted to another mentor and source of inspiration, Professor Emeritus Alexander B. Smith, whose candor, accessibility and sense of humor are as abundant as his considerable accomplishments in academe and corrections. He challenged many of the preconceptions I brought to this work, forcing me to reanalyze some sloppy arguments, dig deeper into the literature and ultimately arrive at different conclusions. And he made this intellectual journey particularly enjoyable.

I especially would like to thank Professor Carl F. Wiedemann, Executive Officer of the C.U.N.Y. Ph.D. Criminal Justice program, for his help and patience in guiding me through the thickets of path analysis. His encouragement, advice and calming influence will always be warmly remembered.

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My thanks to Alan Trachtman, Chief of the Supreme Court Bureau in the Brooklyn District Attorney's Office, for not only allowing me to collect the sentence recommendations of his office from over 300 case files but for also assigning an assistant, Laurie Babikoff, to speed the data collection process. Kenneth Fitzgerald (like Laurie, now an assistant district attorney in another county) was another student legal assistant in the Brooklyn D.A.'s Office who was quite helpful.

I am also indebted to a number of assistant district attorneys and bureau chiefs, both past and present, but particularly to those denizens of Brooklyn Borough Hall, circa 1976-82, for their candid assessment of the strengths and weaknesses inherent in sentence bargaining, particularly Arnie Kris, Andy Plump, Kathleen Bach and Susan Berger.

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## INTRODUCTION

In his history of the American criminal justice system, Samuel Walker identifies three distinct cycles of correctional reform: the last cycle commenced "slowly in the 1930s, reached its peak in the late 1950s and early 1960s, and then collapsed suddenly after 1971." Walker further notes that "the concept of rehabilitation, of individualized correctional treatment, has energized each of the great reform cycles."<sup>1</sup> Although Walker virtually ignores it--there is no reference to probation at all in his survey of the past four decades--one of the major developments in criminal jurisprudence during the period, 1930-1971, was the widespread adoption of the presentence report as the cornerstone instrument of individualized justice throughout the English speaking world. In a sense, presentence investigations (PSIs), which resulted in presentence reports (PSRs)<sup>2</sup> written by probation

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<sup>1</sup>Samuel Walker, Popular Justice (New York: Oxford University Press, 1980), p. 83

<sup>2</sup>"PSI" connotes the investigative process conducted by the P.O. (researching police, prosecutorial and court records; interviewing defendants, their families and complainants; and obtaining financial, educational and medical verification of defendants' backgrounds). "PSR" refers to the actual document summarizing the foregoing data, including a recommendation as to sentence, which is submitted to the court. For the sake of consistency, I have used the unhyphenated spelling of "presentence" throughout, except for footnote and bibliographical references to titles which contain the common earlier usage, "pre-sentence."

officers (P.O.'s), had become living embodiments of the rehabilitative ideal. By supposedly allowing courts and correctional authorities to gear punishment to the particular offender--by considering his "social circumstances," his criminal history and his crime--rather than simply and classically to let the punishment fit the crime, the presentence report came to be seen by correctional theorists and practitioners as the diagnostic stage in a carefully orchestrated course of treatment.

This rehabilitative ideal promised much more than it could ever have hoped to deliver. But it is instructive to note that the withering bombardment which the "medical model" has suffered during the past decade, with the principal targets comprising what some critics have dubbed an "unholy trinity" of probation, parole and the indeterminate sentence, is very much reminiscent of earlier criticisms of the correctional components of the criminal justice system which marked the "Roaring Twenties," a decade similarly beset by public anxiety over "crime waves." It is the intention of this dissertation to demonstrate that the present low esteem in which the presentence report is held was not only an inevitable by-product of the last "great reform cycle" of corrections, but also the result of the reactive nature of probation's function within a criminal justice system that underwent rapid change in the 1960's.

Chapter I will provide an extensive historical overview and analysis of this shift. In it I will trace the presentence report's evolution from the sine qua non of progressive correctional practice and the indispensable mechanism which allowed the sentencing judge

to mete out individualized justice, to its present embattled status. I will show how dissatisfaction with sentencing disparity and with the rehabilitative concepts of the Progressive era which has informed correctional practice and theory throughout most of this century, prompted critics of widely divergent ideological and criminological viewpoints to attack the PSR on two fronts. Those concerned with checking the power of deviance processing agents pointed to the lack of scrutiny of probation officers' decision making--arguing that P.O.'s have too much unchecked discretion--while governmental commissions, court administrators, and those scholars of bureaucratic and organizational determinants of criminal justice system operations and workflow advanced arguments revolving around the unfocused quality of the PSR and labeled its accompanying recommendation an exercise in futility because of the prevalence of sentence bargaining.

In Chapter II, previous empirical studies of the impact of the presentence report are examined. Most are found wanting, partially because of methodological errors, but also because of the narrowness of their focus, indeed their preoccupation, with the congruence (or lack of it) between the presentence investigator's recommendation and the eventual sentence.

In Chapter III, the logical inconsistencies evident among the critics of the presentence report are shown to be particularly evident in New York, where inquiries conducted by municipal and state ad hoc commissions empanelled by executives and legislators concerned about the administration of justice have generally repeated the

condemnations of previous surveyors of the PSR, who in turn relied on secondary sources of dubious validity. Glaring by its absence in most of these studies is any critical assessment of the forces underlying chronic court and correctional underfunding, or the impact of prosecutorial policies on the justice system.

As described more fully in Chapter IV, an empirical study which replicates the methodology of the more salient research noted in the literature was conducted in a state court--Kings County Supreme Court in Brooklyn--to answer the following questions: 1) Does the PSR have a significant impact on sentencing? 2) Are there other factors equally influential in sentencing? 3) Is the quality of a PSR an important factor in determining its impact? Through statistical and content analysis of 340 randomly selected PSR's, I attempt to determine whether the PSR, out of more than 40 other observed independent variables, has the most significant impact on sentencing. My findings are presented in Chapter V.

As governmental scrutiny of PSR's in New York City and New York State became increasingly critical of a perceived diminution of their quality and importance, the focus shifted from streamlining their content and making them more uniform (pursuant to a loss of faith in rehabilitation and a desire to reduce disparity) to an emphasis on client-specific sentencing programs. The latter trend can be viewed as a means of promoting more active alternatives to incarceration (day-fines, restitution, community service, etc.) among a citizenry grown weary of unsupervised probationers but unmoved by

political appeals to solve endemic correctional overcrowding by funding prison building programs. These issues will be explored in Chapter VI against a backdrop of the 1981 PSI speed-up in New York City, which brought into focus judicial resistance to attempted executive devaluation of the PSR.

The importance of this study is underscored by similar chronic overcrowding of correctional facilities throughout the United States since the 1970's. And it is also germane to the ancillary debates involving the efficacy of identifying and targeting career criminals for scarce prison resources on the one hand, and selecting the best candidates for alternatives to incarceration programs on the other.

Indeed, most probation agencies assign the majority of their staff to the production of presentence reports because of the concern of municipal executives to reduce or prevent overcrowding of detention populations. The timely submission of these reports speeds sentencing, which in turn allows for prompt transfer of prison-bound detainees to the state correctional system and the immediate release of other detainees sentenced to community supervision. These outcomes, which can reduce the jail population dramatically if the time period separating conviction date from sentence date can be shortened, depend heavily on the prompt submission of PSR's. Probation administrators' performance in jurisdictions suffering from jail overcrowding is thus most likely to be judged on their ability to deal efficiently with the constant perturbations in the PSI workload generated by judicial and prosecutorial case processing--

which in turn is a by-product of arrest/indictment rates. Knowing which components of the PSR are most important to the court and which are most relevant to arriving at a strongly buttressed sentencing recommendation are therefore essential ingredients for successful probation management in times of crisis. What data can be streamlined? What data can be omitted? How can essential data be obtained more quickly? These are questions not easily answered absent any thorough assessment of the PSR's impact on sentencing.

If, however, the PSR can be shown to have little impact on sentencing decisions, regardless of the quality of the report, pro forma PSR's satisfying only the statutory minimum requirements are given much greater justification. The implications for probation staffing and management goal setting are, in either eventuality, crucial. Should the often argued contention that PSR's have little impact on judges' decision-making be borne out by this dissertation, the implications for probation would appear to be evident: a deemphasis on the preparation of presentence reports and a concentration on supervision. Since probation presently (and traditionally) regards presentence investigations as its primary function, this would mean a pronounced shift in policy.

On the other hand, a detailed analysis of the data might reveal that presentence reports have much more influence than generally believed. In which case future research might better address itself to the truly ethical questions related to criminal sentencing instead of concentrating so narrowly on bureaucratic exigencies.

## CHAPTER I

### HISTORICAL OVERVIEW OF THE PRESENTENCE REPORT

#### The Origins of The Presentence Report

The court process we have come to know as probation originated in large urban centers (Boston and London), where judges presumably had limited knowledge of the social and criminal background of defendants before the bar, unlike rural areas, where informal knowledge of the accused and available familial and community resources might have obviated any need for a probation officer. By extension, probation itself could thus be interpreted, like the first appearance of urban police departments in the 1830's and 1840's, as an instrument of expanded social control, in this case by empowering others to literally serve as the "eyes and ears" of the court in an increasingly anonymous urban environment.<sup>1</sup>

The "Father of Probation," John Augustus, placed great stress on the probationer selection process when he began approaching young alcoholics in Boston courtrooms in 1848 to determine their interest in reforming under his supervision. Thus, his cursory background checks of probation candidates could be considered the first presentence

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<sup>1</sup>The Administrative Office of the U.S. Courts, "The Selective Pre-Sentence Report," Federal Probation 38 (December 1974): 47-54. Also see John Hogarth, Sentencing as a Human Process (Toronto: University of Toronto Press, 1971).

investigations. "Great care was observed," Augustus wrote in his Journal, "to ascertain whether the prisoners were promising subjects for probation, and to this end it was necessary to take into consideration the previous character of the person, his age, and the influences by which he would in future be likely to be surrounded."<sup>1</sup> Despite the care he exercised in selecting his "caseload," and despite his reported success, John Augustus' innovation did not take immediate root. In fact, the adoption of probation and other reforms, such as parole, the reformatory and the indeterminate sentence was very slow indeed until the first two decades of this century, when the United States criminal justice system began to experience an extraordinary revolution in its correctional component. Whereas in 1900, only six states had salaried probation officers, by 1919, 34 states had developed probation staffs.<sup>2</sup> Similarly, in 1900, indeterminate sentence laws held sway in only five states, but during the next 20 years 31 other states enacted statutes which effectively transferred from a court to an administrative authority the power to determine

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<sup>1</sup>John Augustus, First Probation Officer (New York: The Probation Association, 1939), p. 34. This was a reprint of Augustus' Journal, first published in 1852.

<sup>2</sup>Edwin H. Sutherland and C.E. Gehlke, "Crime and Punishment," in Recent Social Trends in the United States, edited by the President's Research Committee on Social Trends (New York: McGraw-Hill, 1933), p. 1156. People Ex Rel. Forsyth v. Court of Sessions of Monroe County, 141 N.Y. 288 (1894) provided the final judicial benediction needed to formalize probation by establishing that the "power to suspend sentence is inherent in every court having criminal jurisdiction." See Sandra Shane-DuBrow, Alice P. Brown, and Erik Olsen, Sentencing Reform in the United States: History, Content and Effect (Washington, D.C.: National Institute of Justice, U.S. Department of Justice, 1985), p. 6.



what portion of an imposed sentence would actually be served.

Finally, by 1900, parole laws had been passed in only 12 states, but by 1920, there were 40 states which had embraced parole supervision.<sup>1</sup>

It was during this halcyon era of penological reform that probation threw off its informal, volunteer trappings and began to produce written reports, handbooks, regulations and a body of literature.<sup>2</sup> The new field's theoretical underpinnings were greatly influenced by the emerging disciplines of sociology and psychology, as embodied in that new figure in the urban landscape--the social worker. Thus, in tracing the development of presentence investigations, Robert Carter identifies William Healy's "Juvenile Psychopathic Clinic," established in Chicago in 1910, as the logical starting point.<sup>3</sup> Healy cried out for accurate "diagnosis" of the offender as a prerequisite for "treatment," and in his seminal 1915 text, The Individual Delinquent, he specified eleven different areas for the youth worker to investigate as a means of pinpointing the cause of the

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<sup>1</sup>Sutherland and Gehlke, "Crime and Punishment," p. 1156.

<sup>2</sup>"Originally the probation officer submitted orally to the judge information used for screening candidates for probation. With the expansion of probation, this process became formalized and written reports were prepared." From "Probation: National Standards and Goals," in Corrections: National Advisory Committee on Criminal Justice Standards and Goals (Washington: U.S. Government Printing Office, 1973), p. 324.

<sup>3</sup>Robert Carter, The Pre-Sentence Report Handbook (Washington: U.S. Government Printing Office, 1978), p. 3. The first juvenile court was established in Chicago in 1899, an institution which also helped spur probation's adoption, since 30 states first established probation bureaus or "clinics" as an integral part of juvenile court procedure. See New York State Division of Probation, Manual for Probation Officers in New York State, 6th edition (Great Meadow Correctional Institution, 1960), p. 101.

delinquency.<sup>1</sup> Carter also cites Mary Richmond's Social Diagnosis (1917), addressed to social workers as well, which called for exact definitions of a client's personality and social background, as an early influence in determining the content and structure of PSR's.<sup>2</sup>

Since the presentence report was initially developed by probation officers who emerged from a background in social work, these early reports emphasized "a social work model that involved strong emphasis on the person's life history."<sup>3</sup> The medical model orientation of probation's pioneers helps to explain not only the shaping of the content of the presentence reports themselves, but also accounts for the structuring of the entire probation bureaucracy as well. For just as medicine clearly separates diagnosis and treatment both chronologically and procedurally, so did probation adopt the same division. It was Edwin J. Cooley, director of a demonstration project in New York City's Court of General Sessions, who pioneered the fundamental dichotomy in probation organization in 1925, when he divided the probation staff under his direction into the "Investigative Corps and Supervision Corps."<sup>4</sup> By the same token, Cooley's influential prescription for the presentence report divided the document into a legal history and a social history, with a concluding "diagnosis" of the offender integrating all that preceded it.<sup>5</sup>

As probation's popularity grew, enshrining the "casework

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<sup>1</sup>Ibid.      <sup>2</sup>Ibid., pp. 3-4.

<sup>3</sup>National Advisory Committee, Corrections, p. 325.

<sup>4</sup>Carter, The Pre-Sentence Handbook, p. 4.    <sup>5</sup>Ibid.

method"<sup>1</sup> of the social scientist in its practices, initial resistance to this ameliorating reform of the criminal law faded and then was revived in the early 1920's, when a perception of increased lawlessness after the lull of the war years precipitated a backlash against the liberalizing reforms which lasted well into the Great Depression. Thus, the dean of American criminologists, Edwin H. Sutherland, in a 1933 survey of the criminal justice system commissioned by the federal government, found that during the decade, 1917-1927, there was a discernible shift in favor of "longer prison sentences, increased use of the death penalty and more opposition to the trend towards humane treatment of the criminal (probation, parole, the indeterminate sentence, as well as improvements in the condition of prison life)."<sup>2</sup> New York provides us with an excellent example of this trend.

In 1926, New York's Baumes Commission, responding to public concern about crime, particularly in New York City, recommended a series of draconian measures to the State Legislature, which speedily enacted them. The new laws all but eliminated the indeterminate philosophy in sentencing, their authors arguing that since "criminology, psychiatry, psychology and sociology have not yet become exact sciences...adoption of the theory that all criminals are sick

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<sup>1</sup>This method "assumes that if knowledge can be acquired of all the facts about an offender, the cause of his criminality can be discovered and a course of corrections determined." From "The Selective Pre-Sentence Report," p. 49.

<sup>2</sup>Sutherland and Gehlke, "Crime and Punishment," p. 1156.

would not remedy the (crime) situation."<sup>1</sup> Other crime commissions in other states came to similar conclusions as public officials "tried to limit the discretion of court and correctional personnel in the administration of indeterminate sentences, probation and parole."<sup>2</sup>

Raymond Moley, one of the foremost political scientists of his time, who was later to become a member of the "New Deal" inner sanctum seemed to have the Baumes Laws in mind when he wrote in 1930, after studying New York's criminal courts: "If the limitations of legislation were frankly recognized and sufficient discretion given to someone to insure that the infinitely varied human types of conduct which fall within the confines of the criminal law would be subjected to more equal determination, justice in its most enlightened sense could be more definitely achieved."<sup>3</sup>

Moley's argument seemed prescient when a later commission found that, instead of deterring crime, the Baumes Laws served only to make judges, juries and prosecutors work harder to find legal loopholes to circumvent their harshness. In fact, the legacy of the Baumes Laws was a decrease in the number of defendants sentenced to state prison during years of rising crime rates. Accordingly, the

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<sup>1</sup>New York State Crime Commission ("The Baumes Commission"), Report, New York State Legislative Document No. 99 (1929), pp. 10-11.

<sup>2</sup>Nathan Couthit, "Police Professionalism and the War Against Crime in the United States, 1920's and 1930's," in Police Forces in History, George L. Mosse, editor (London: Sage Publications, 1975), p. 321. See also, John Pfiffner, "The Activities and Results of Crime Surveys," American Political Science Review 23 (November 1929): 930-55.

<sup>3</sup>Raymond Moley, Our Criminal Courts (New York: Minton, Balch & Co., 1930), p. 174.

Lewisohn Commission of 1932 restored the indeterminate sentence for all felonies except murder.<sup>1</sup>

President Hoover's Crime Commission, in its 1931 report (the "Wickersham Commission") also countered the drift toward repression when it demonstrated with telling effect the final result of an unbridled 'war against crime: "police illegality in arrest, interrogation and detention."<sup>2</sup> Although the Great Depression added a further impetus to undercut correctional programs in an era of chronic municipal funding shortages, dissatisfaction with what J. Edgar Hoover dubbed the "cream-puff school of criminology" eased as public concern over crime rates leveled off and receded.<sup>3</sup>

During World War II, the rehabilitative ideal once again began to gather steam, abetted by the country's need for manpower (convict or not), by a decrease in social anomie occasioned by the national unity on behalf of the war effort, and by the conscription of the most delinquency-prone segment of the population. Lingering unease over the concept of imprisonment in the aftermath of the totalitarian barbarities perpetrated in Europe, coupled with the general elevation

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<sup>1</sup>Commission to Investigate Prison Administration and Construction ("The Lewisohn Commission"), Prisoners: Their Crimes and Sentences, Special Report to the New York State Legislature (Albany, 1933), p. 54.

<sup>2</sup>The United States National Commission on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement (Washington, D.C.: U.S. Government Printing Office, 1931).

<sup>3</sup>J. Edgar Hoover's speech of November 9, 1937, "Crime's Challenge to Society," reported in Couthit's "Police Professionalism and the War Against Crime," p. 315. Hoover was fond of telling his audiences that he was a member of the "machine gun school of criminology."

of the standard of living in the post-war era ushered in what appears to have been a golden age of humanitarianism in correctional history.<sup>1</sup> Such an atmosphere stands in marked contrast to the decade following World War I, but it is reminiscent of post-Civil War America when correctional philosophy entered the reformatory era and gave birth to parole, the indeterminate sentence and "the belief that the way to succeed was through education."<sup>2</sup> In much the same way the 1950's saw the widespread use of group therapy in corrections, the rise of halfway houses, work and study release, therapeutic communities and a generally favorable acceptance of probation and parole among policy makers and the public. Thus, by 1954, every state except Mississippi had institutionalized probation as part of its sentencing structure.<sup>3</sup>

#### The Ascendancy of the Presentence Report

As probation, parole and the indeterminate sentence became fixed in the post-war correctional firmament, the presentence report came to occupy a sanctified position, since it provided the philosophical justification for all three practices. Raymond Moley appears to have been one of the first to recognize the key position which the presentence function of probation had assumed in the

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<sup>1</sup>Charles Silberman, Criminal Justice, Criminal Violence (New York: Random House, 1978), p. 30.

<sup>2</sup>William E. Amos, "The Philosophy of Corrections: Revisited," in An Introduction to the Federal Probation System (Washington, D.C.: U.S. Government Printing Office, 1976), p. N-1.

<sup>3</sup>Shane-Dubrow, Brown and Olsen, Sentencing Reform, p.6.

sentencing process: "Probation has come to mean much more than a method of supervising persons...Its more important function is to provide for many courts a species of intelligence service. It studies the prisoner at the bar...and when the court finds it necessary to pass judgment upon him, is able to provide intelligent information and advice upon which to base the decision."<sup>1</sup>

Not only were these reports assisting judges, they were also forwarded to prison officials, parole boards and the line offices in parole and probation. Thus, "the investigation report," wrote Edmund Fitzgerald in 1956 (then Chief Probation Officer in Kings County Court in New York City), "had come to be the repository for all biographical data needed not only for supervision...but also for planning and executing rehabilitative programs for offenders committed to prisons." Reflecting the still dominant medical model orientation of his field, Fitzgerald concluded that "the investigation (diagnostic) process has become as important as the rehabilitation (treatment) process. It is, in fact, of greater importance, since it is the bedrock of treatment. Quantitatively, it is now the most significant part of all probation work."<sup>2</sup>

The Supreme Court's validation of the presentence investigation as having "high value" for "conscientious judges who want to sentence persons on the best available information, rather than on

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<sup>1</sup>Raymond Moley, Our Criminal Courts, p. 158.

<sup>2</sup>Edmund Fitzgerald, "The Pre-Sentence Investigation," National Probation and Parole Association Journal, no. 2 (1956), p. 325.

guesswork and inadequate information" in its 1949 decision, Williams v. New York, provided the most important imprimatur for the individualized style of criminal jurisprudence and correctional practice that would reign during the following two decades.<sup>1</sup> Briefly, in Williams the Court held that a defendant convicted of murder could be sentenced to death despite a jury's non-binding recommendation for a non-capital sanction (life imprisonment), based on material independently gathered by the probation officer from police and other sources which linked the defendant to numerous other crimes and found him to be possessed of a "morbid sexuality".

Writing for the majority, Justice Hugo Black noted that the officer investigating the convicted before the bar was not motivated by a zealous desire to root out unfavorable information about the subject because probation officers "have not been trained to prosecute but to aid offenders."<sup>2</sup> Thus did the Supreme Court unwittingly provide the legalistic underpinnings for rehabilitative excess. For although Black correctly observed that "retribution is no longer the dominant objective of the criminal law" and that "reformation and rehabilitation of offenders have become important goals of criminal jurisprudence,"<sup>3</sup> he erred in assuming that due process concerns over the presentence investigation were misplaced simply because of the professionalism of the investigators:

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<sup>1</sup>Williams v. New York, 337 U.S. 241 (1949), at p. 249.

<sup>2</sup>*Ibid.*    <sup>3</sup>*Ibid.*, at p. 248.



Undoubtedly, the New York statutes emphasize a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime....For indeterminate sentences and probation have resulted in an increase in the discretionary powers exercised in fixing punishments. In general, these modern changes have not resulted in making the lot of offenders harder. On the contrary a strong motivating force for the changes has been the belief that by careful study of the lives and personalities of convicted offenders, many could be less severely punished and restored sooner to complete freedom and useful citizenship. This belief to a large extent has been justified. (Underscoring added.)<sup>1</sup>

While agreeing with the majority opinion "as to the value and humaneness of liberal use of probation reports as developed by modern penologists," Justice Murphy dissented. Since the damaging material upon which sentencing was based "would concededly not have been admissable at the trial, and was not subject to examination by the defendant," Murphy argued that "the high demands of due process were not obeyed."<sup>2</sup> Even Black allowed that "broad discretionary power...susceptible of abuse can result from a sentencing judge's reliance on out-of-court information," but eschewed "a requirement of rigid adherence to restrictive rules of evidence" in assessing punishment.<sup>3</sup>

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<sup>1</sup>Ibid.    <sup>2</sup>Ibid., at p. 250.    <sup>3</sup>Ibid., at p. 249

The abuse which unscrutinized discretion can sometimes engender in bureaucracies left to police themselves is illustrated by the "treatment" afforded a defendant who was convicted of robbery in the same court which had sentenced Williams four years earlier. This defendant, who came to my attention as the subject of a PSI conducted a quarter of a century later in Brooklyn Supreme Court, was ordered to undergo a psychiatric evaluation as an aid to sentence following a jury conviction in 1953. In a letter contained in the case file, addressed to the investigating probation officer by the examining psychiatrist at Kings County Hospital, the defendant is described as continuing to maintain his innocence. The psychiatrist then writes: "He was given Sodium Amytal [a "truth serum" drug usually administered intravenously] and interviewed while under [the influence of] this drug. He continued to protest his innocence...He admits that he indulges in alcohol to excess at times and states he was drinking when he got into this present difficulty."<sup>1</sup>

Although Black's major concern in exempting out-of-court material from adversarial review was to prevent a time consuming re-trial of collateral issues at the sentencing stage, the inference in Williams--that due process safeguards placed unnecessary limits on the rehabilitative efforts of social workers (and also by extension upon the discretion of judges)--helped to usher in an era of correctional supremacy. In much the same way that probation, parole

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<sup>1</sup>Letter dated 23 May 1953 contained in N.Y.C. Probation Department case file KS82-04199.

and indeterminacy had first swept the country in the early part of the century, now maximum discretion in the post-conviction stage was legislatively enthroned, reaching its full glory in states such as California where (until sentencing reform in 1976 toppled it) "one of the most extreme forms" of indeterminacy permitted sentences of one day to life for even relatively minor offenses.<sup>1</sup>

Although indeterminacy, like its handmaiden, parole, arose out of a desire for prison reform in the second half of the nineteenth century, its use first became widespread in the United States during the 1930s ("given nearly irresistible impetus by the rise of the new social sciences, such as psychiatry and social work"),<sup>2</sup> until, "by the 1960s, every state of the nation had an indeterminate sentencing structure of some variation."<sup>3</sup> And the increased discretion which the indeterminate sentence bestowed upon judges rendered the presentence report just as important to distant wardens and parole commissioners as the essential repository of legal and social data to be consulted at each decision-making stage in administering the imposed sentence.

Thus by 1965, which Carter identifies as the high water mark for the presentence report,<sup>4</sup> the rehabilitative ideal had become

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<sup>1</sup>Shane-DuBrow, Brown and Olsen, Sentencing Reform, p. 33.

<sup>2</sup>The Executive Advisory Committee on Sentencing ("The Morgenthau Committee"), Crime and Punishment in New York: An Inquiry Into Sentencing and the Criminal Justice System (Albany, New York, March 1979), p. 14.

<sup>3</sup>Shane-DuBrow, Brown and Olsen, Sentencing Reform, p. 6.

<sup>4</sup>Robert Carter, The Pre-Sentence Report Handbook, pp. 5-6.

entrenched in our criminal law, in the courts and in corrections:

Much as the precise mix of Bible reading and hard labor necessary to achieve reformation had occupied the attention of reformers a century earlier, correctional personnel now debated the problems of diagnosis and formulation of treatment plans. Criticism of the correctional and sentencing system did not question the assumptions...but focused exclusively upon the need for more resources and better therapeutic techniques.<sup>1</sup>

#### The Eclipse of the Rehabilitative Ideal

Within ten years, this consensus had not only fallen apart, but in some states probation, parole and the indeterminate sentence once again faced abolition. What happened? First, the unpredicted crime wave which suddenly commenced in the mid-1960s undoubtedly played a key part in spreading dissatisfaction with the system, just as spiraling crime rates did in the 1920s. But now the opposition no longer consisted of political and law enforcement spokesmen such as Edward Simons<sup>2</sup> or J. Edgar Hoover, but respected scholars, legal historians and correctional administrators themselves. Secondly, it would appear that the sheer numbers of offenders which now engulfed the courts and prisons dramatized the need for judgments based on more

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<sup>1</sup>Morgenthau Committee, Crime and Punishment in New York, p. 14.

<sup>2</sup>As President of the Chicago Crime Commission in 1920, Simons blamed better prison conditions, as well as probation and parole, for the crime increase. See his article, "Fighting Crime in Chicago," Journal of Criminal Law and Criminology 11 (May 1920): 22.

rational, equitable and expeditious procedures. The traditional reliance on ill-defined, subjective, decision-making came to be seen as rooted in times more conducive to unpressurized scrutiny of offenders: in short, the "careful study" conducted by a probation officer came to be viewed as a luxury. Thirdly, the Warren and Burger Courts' extension of due process protection to the post-conviction stage, combined with an emerging prisoner rights movement, focused interest for the first time on sentencing disparity and the rights of the convicted.<sup>1</sup>

Perhaps the first cracks in the foundation of the presentence report were detected by the "San Francisco Project" of the mid-1960s. Robert Carter and Leslie Wilkins, among others, conducted the first empirical study of the presentence investigation in northern California's federal courts and began to identify what would become seminal issues in the coming debate. The utility of gathering so much information on the accused (at the time of this study, the federal presentence report was organized into 16 separate sections)<sup>2</sup> was seriously questioned by their finding that so much of the information figured not at all in the sentence recommendation.<sup>3</sup> The Project's finding that P.O.'s used very little information in selecting a recommendation was based on a study of 14 P.O.'s and five PSRs, one

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<sup>1</sup>Alexander B. Smith and Harriet Pollack, Criminal Justice: An Overview (New York: Holt, Rinehart and Winston, 1980), pp. 211-33.

<sup>2</sup>Robert Carter, The Pre-Sentence Handbook, p. 5.

<sup>3</sup>Joseph D. Lohman, Albert Wahl, and Robert M. Carter, Decision-Making and the Probation Officer: The Presentence Investigation (Berkeley: University of California, June 1966), p. 16.

of which was described as a clear cut probation case and the other an open-and-shut imprisonment case, which led to later criticism that "to generalize about levels of information usage on the basis of five cases from a universe of thousands is indefensible."<sup>1</sup> I will examine the San Francisco Project at greater length in Chapter III. It will suffice to note here that the importance of the PSR was, by extension, diminished by the finding that the judge uses the same data triumvirate as the probation officer in making nearly all of his decisions: namely, the seriousness of the crime, the prior criminal record and social stability of the defendant.<sup>2</sup> All of which led Carter and Wilkins to pointedly observe that "the increasing problems of crime and delinquency are being addressed by the application of correctional principles and practices which have not been substantially modified, or even questioned, since their inception."<sup>3</sup>

The length of the presentence report and its meandering focus also provided much fuel for subsequent studies. The President's Commission on Law Enforcement and the Administration of Justice (1967) complained of the "high manpower levels required to complete reports" at the expense of better supervising offenders, noting that there was no clear-cut "need for the kind and quality of information that is

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<sup>1</sup>William P. Adams, Paul M. Chandler and Mark G. Neithercutt, "The San Francisco Project: A Critique," Federal Probation 35 (December 1971): 50.

<sup>2</sup>Robert Carter and Leslie Wilkins, "Some Factors in Sentencing Policy," Journal of Criminal Law, Criminology and Police Science 58 (December 1967): 503-14.

<sup>3</sup>Ibid., p. 503.

typically gathered and presented." As a remedy, it urged experimentation with a shortened, simpler format for the reports which some probation agencies had recently developed out of sheer necessity to cope with the rising intake of cases. The Commission, taking notice of the San Francisco Project's findings, also identified the PSR as contributing to disparity in sentencing because of its susceptibility to "arbitrary and random influences," such as the personality of the probation officer or bureaucratic exigencies.<sup>1</sup> The prevalence of plea bargaining--which the Commission partially defended while criticizing its frequent uninformed decision-making--nevertheless also called into question many of the PSIs preconceptions. The Commission proposed remedying this state of affairs by the adoption of procedures "which would enable the parties to call upon the probation office...to obtain what is in effect a presentence investigation for use in the (plea) negotiation discussion."<sup>2</sup> Not addressed by the Commission is the inherent inconsistency posed by its identification of probation officers as conduits of inappropriate and potentially harmful extralegal considerations into the sentencing arena, while simultaneously urging their expanded influence on plea bargaining itself through pre-pleading investigations (PPIs). As discussed more fully in Chapter III, this call for expanded use of PPI's, echoed by a number of subsequent critics, forms one of many paradoxical leit-motifs in

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<sup>1</sup>President's Commission, Task Force Report on Corrections (Washington, D.C.: U.S. Government Printing Office, 1967), pp. 27-37.

<sup>2</sup>President's Commission, Task Force Report on Courts (Washington, D.C.: U.S. Government Printing Office, 1967), p. 12.

the literature produced by purveyors of the argument that sentence bargaining renders PSRs virtually useless.

The American Bar Association Project on Standards for Criminal Justice (1970) was also critical of lengthy reports, reminding the probation community that "the primary purpose of the presentence report is to provide the sentencing court with succinct and precise information" and while recognizing its use by correctional decision makers, it urged such ancillary considerations "be subordinated to its primary purpose" so as to keep the report at a length less intimidating to busy judges. The American Bar Association also joined the President's Crime Commission in urging short-form reports as a strategy for coping with scant resources.<sup>1</sup>

The National Advisory Commission on Criminal Justice Standards and Goals (1973) in turn endorsed the American Bar Association's proposals and complained of the PSR's over-emphasis on the defendant's "life history," emphasizing that "judges want to know the 'here and now' of the offender, not a detailed life history."<sup>1</sup>

Self criticism was also abundant, as probation professionals fought to stay afloat amidst the drowning of many of their once cherished ideals. Chester Bartoo (1963) found a probation officer's sentence recommendation was not always an outgrowth of careful synthesis and analysis of relevant data: rather, it might also be a

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<sup>1</sup>American Bar Association Project on Standards for Criminal Justice, Standards Relating to Probation (New York: Institute of Judicial Administration, 1970), pp. 33-34.

<sup>2</sup>National Advisory Committee, Corrections, p. 327.



reflection of his morale, geography, public opinion, the judge's personality, administrative policies or his own manner of collecting data in the first place.<sup>1</sup> John Wallace (1964), then head of the New York City Office of Probation which serviced the lower courts, called presentence reports chock full of information "for everyone but the main user, the judge."<sup>2</sup> A decade later federal probation administrators traced the social work origins of probation and identified a "a tendency to provide exhaustive historical accounts of an offender's life, perhaps from anxiety that some single pertinent factor, however insignificant it might appear at the time, might be excluded and lost to the future."<sup>3</sup>

While some administrators had become critical of the "compulsiveness" inherent in the "case method" approach, Richard Quinney (1970) identified the social work background of most probation officers<sup>4</sup> as contributing to inconsistent sentencing recommendations

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<sup>1</sup>Chester H. Bartoo, "Some Hidden Factors Behind a Probation Officer's Recommendation," Crime and Delinquency 9 (July 1963): 278-79.

<sup>2</sup>John Wallace, "A Fresh Look at Old Probation Standards," Crime and Delinquency 10 (March 1964): 124-25. Lower court PSR's, of course, have no prison or parole board utility in any case, leading us to conclude that Wallace must have been a somewhat parochial theorist.

<sup>3</sup>Administrative Office of the U.S. Courts, "The Selective Pre-Sentence Report," p. 49.

<sup>4</sup>Not all probation officers are trained as social workers. Donald Newman, for example, notes that a number of Michigan courts employ "a high percentage" of ex-police officers to prepare PSI's that are as a consequence minimally about the defendant and more concerned with arrest details. See Conviction (Boston: Little Brown, 1966), pp. 14-15. Charles Lindner, in a series of articles on the history of probation published in 1984 by Federal Probation, also noted that many probation officers originally came from the ranks of the police.

because of "incompatible role obligations" arising out of difficulties in balancing the authoritative/punitive demands of the job with the social worker's orientation to "help" one's clients.<sup>1</sup> Law professor John Coffee (1978) expanded this argument and identified other extraneous variables that might lead probation officers to contribute to sentencing disparity:

...whether they have a law enforcement perspective or a social welfare one, whether he writes his presentence report in a vivid, novelistic prose style or in a cold bureaucratic one, whether he edits out unverified information or leaves the reliability of the data for the judge to determine--these and other factors are likely to have an impact on the sentencing judge's impression of the defendant.<sup>2</sup>

Coffee chastized fellow attorneys for ignoring these and other sentencing factors controlled by the probation officer and criticized their unfettered power, taking this cue from legal scholar Fred Cohen (1968), who was the first to point out that "probation, unlike law enforcement and prosecution, has been allowed almost total freedom to

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<sup>1</sup>Richard Quinney, The Social Reality of Crime (Boston: Little Brown, 1970), p. 171. Quinney's argument is rebutted by a number of empirical studies, however. See Charles Shireman, "A Study of the Agreement of Probation Officers on the Influence of Specific Factors Upon the Dispositional Recommendation," Social Science Review 40 (September 1966): 339; and Herbert Langerman, "Determinants of Probation Officers' Pre-Sentence Recommendations" (Ph.D. dissertation, New York University, 1976).

<sup>2</sup>John Coffee, "Repressed Issues of Sentencing: Accountability, Predictability and Equality in the Era of the Sentencing Commission," Georgetown Law Journal 66 (April 1978): 1044.

fashion its own decision-making criteria and procedures."<sup>1</sup> A third professor of law (and psychiatry), Willard Gaylin (1974), attacked the courts' "enormous dependence" on PSRs, concluding that "in many courts the probation officer rather than the judge is the sentencer."<sup>2</sup>

What Gaylin found to be even more objectionable than the PSR's poor quality ("[they] are not very good. Those that I have inspected would not have been highly valued in a department of sociology")<sup>3</sup> was the fact that probation officers "are not open to the public scrutiny of the actual decision maker, and they are protected by the false assumption of the objectivity of the social scientist, reinforced by the paternalistic jargon and attitudes of modern day social workers. Whatever their intention, whatever their purposes, disparity exists at an incredible rate..."<sup>4</sup> Coffee takes up this theme in his monograph, comparing investigating probation officers to seventeenth century "ministers who stood quietly behind the throne," manipulating the monarchs they served by letting the kings hear only what they wanted them to hear: "Today the judge must operate in a system that processes a high volume of criminal cases, and therefore he must rely heavily on his own ministers, the probation staff."<sup>5</sup>

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<sup>1</sup>Fred Cohen, "Sentencing, Probation and the Rehabilitative Ideal: The View from Mempa V. Rhay," Texas Law Journal 47 (December 1968): 32.

<sup>2</sup>Willard Gaylin, Partial Justice: A Study of Bias in Sentencing (New York: Alfred A. Knopf, 1974), p. 13.

<sup>3</sup>Ibid., p. 99.    <sup>4</sup>Ibid., p. 13.

<sup>5</sup>John Coffee, "Repressed Issues of Sentencing," p. 984.

The large number of cases found in state courts leads one of Gaylin's interview subjects, "Judge Garfield," to observe: "While I have the appearance of great discretion, I don't have the reality of it. I work under the constant awareness of the burden of cases in this court which demand resolution."<sup>1</sup> Gaylin agrees, suggesting that his disparity paradigm is directed more at federal courts: "Whether discretion is good or bad...is somewhat irrelevant. For all practical purposes, discretion is minimized in the crowded calendar of the big city court."<sup>2</sup> And to deal more rationally with such a large caseload, "Judge Garfield," who sentence bargains 50 percent of his dispositions, urges expanded use of PPis to induce more pleas and thereby reduce congestion.<sup>3</sup>

One of the landmark works on sentencing disparity was written by another judge, now a very successful New York defense attorney, who served as a U.S. District Court Judge in the busiest federal jurisdiction in the country, the Southern District of New York, in the early 1970s. Marvin Frankel's Criminal Sentences (1972) describes how his fellow jurists arrive at sentencing decisions in the absence of guidelines, training or uniformity of penal philosophy. In such an atmosphere it is not surprising that judges lean heavily on probation officers and their recommendations.

Indeed, as a federal probation officer who once served in the Southern District of New York, I can attest to this reliance; many, if

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<sup>1</sup>Gaylin, Partial Justice, p. 77.

<sup>2</sup>Ibid., p. 80.    <sup>3</sup>Ibid., p. 71.

not most, federal judges prefer to discuss the case with the P.O. before sentencing, and some even prefer the P.O. to be present at sentencing. (The P.O.'s presence is often helpful to the court in structuring the plethora of sentencing options under the federal rules of criminal procedure.)

Frankel is thus one of the few recent lawyer-practitioners who posits substantial value in the presentence investigation, which he describes, in a phrase reminiscent of Moley, as "indispensable in any sentencing scheme that does not treat the infinite varieties of people as entirely fungible."<sup>1</sup> It is also worth noting in this regard that even a harsh critic like Gaylin is forced to admit from his survey of state and federal jurists that PSRs, although "not good on an absolute scale, in comparison with what else is offered to the sentencing judge, they seem spectacular."<sup>2</sup> However, unlike Gaylin's easy dismissal of PSRs as laughable exercises in sociological jargon, Frankel is more concerned with the probation officer's "difficient techniques of fact gathering" and his "establishmentism" which relies too heavily on the prosecutorial viewpoint of defendants, thus frustrating the hypothetically mediating role which the PSR should occupy.<sup>3</sup>

Noted criminologists, upon entering the debate on sentencing

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<sup>1</sup>Marvin Frankel, Criminal Sentences: Law Without Order (New York: Hill and Wang, 1972), p. 35.

<sup>2</sup>Gaylin, Partial Justice, p. 99. A federal judge told Gaylin: "I study those reports very carefully. I generally take them home with me...Very often I will reread a report. Then I will always confer with the probation officer who wrote it." Ibid., pp. 103-4.

<sup>3</sup>Frankel, Criminal Sentences, p. 33.

disparity in the 1970s, also tended to side with legal scholars in identifying the manner in which presentence investigators collect their data, and the manner in which the data is embodied in their reports, as the two key ingredients contributing to unequal justice. Roger Hood and Richard Sparks, citing the San Francisco Project, argued that "it is primarily differences in the way information is categorized and perceived (by judges)...which explain disparity in sentencing."<sup>1</sup> Since the PSR determines which pieces of information the judge will receive, the probation officer is seen as playing "an important part in the sentencing process."<sup>2</sup> Leslie Wilkins, the foremost empirical criminologist in this field, is even more forceful in labeling the probation officer as the operative decision-maker: "There is considerable empirical evidence that judges in the sentencing decisions tend to be 'ratifiers' and that probation officers, in operational terms, perform much of the sentencing function."<sup>3</sup>

While presentence reports were coming under increasing attack because of their "exhaustive" length, poor quality and their unscrutinized inconsistent influence on sentencing which led to disparity, others somewhat paradoxically attacked the PSR as

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<sup>1</sup>Roger Hood and Richard Sparks, Key Issues in Criminology (New York: McGraw Hill, 1970), p. 159.

<sup>2</sup>Ibid., p. 166.

<sup>3</sup>Leslie T. Wilkins, "A Typology of Decision-Makers? A Theoretical and Speculative Contribution," in Parole: Legal Issues/Decision-Making/Research, William Amos and Charles L. Newman, editors (New York: Federal Legal Publications, 1975), p. 168.

superfluous because of the prevalence of sentence bargaining.

Although his study is based on observation (and experience as a probation officer), Abraham Blumberg's pioneering work, Criminal Justice (1967), is probably the most cited source for the argument that the need for PSRs is obviated by the court's reluctance to amend sentence bargains and thereby risk losing dispositions sorely needed to cope with the bone crushing volume of cases. Blumberg claims that the PSR's major utility is its service to the modern urban court's "bureaucratic due process" model, which he defines as "a non-adversary system of justice by negotiation (consisting) of secret bargaining sessions, employing subtle, bureaucratically ordained modes of coercion and influence to dispose of onerously large case loads in an efficacious and rational manner."<sup>1</sup> Thus, judges routinely "pass the buck to the district attorney...and prefer to ratify the plea negotiated by the district attorney, the defense counsel and sometimes even the police." Rarely do they exercise "their responsibility to review the propriety of a plea," argues Blumberg, because of bureaucratic pressures to speedily obtain as many dispositions as possible so as to prevent being strangled by burdensomely heavy calendars.<sup>2</sup> Because the actual sentence usually is bargained at the time of the plea negotiation in New York City felony courts (since at least the

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<sup>1</sup>Abraham Blumberg, Criminal Justice (Chicago: Quadrangle Books, 1967), p. 21.

<sup>2</sup>Ibid., p. 131. Abraham Goldstein argues from an opposite perspective in The Passive Judiciary: Prosecutorial Discretion and The Guilty Plea (Baton Rouge: Louisiana State University Press, 1981) that judges have avoided review of plea decisions because of a misplaced belief in prosecutorial expertise and an unfounded fear of abridging the constitutional doctrine of separation of powers.

mid-1960s),<sup>1</sup> Blumberg argues that a probation officer's recommendation has no impact at all on a sentence but instead the report is "cynically employed to validate judicial behavior or is otherwise used to reinforce administrative action already taken in connection with a plea."<sup>2</sup> Blumberg concludes that "the importance of the presentence investigation as a decision-making tool for the judge is overrated" since it is full of "unverified, speculative, hearsay material about an accused" which is "tailored to fit some preconceived model of the offender" and is "replete with cliches and appropriate stereotypes, all serving to rationalize and codify the basis for disposition."<sup>3</sup>

Referring to the Williams decision, Blumberg finds that the "Supreme Court's confidence in the presentence investigation as an impartial means of gathering facts is hardly justified" because of civil service bureaucracy, large caseloads, probation officers' professional dissatisfaction, etc., all of which "cast serious doubt on their objectivity, validity and integrity."<sup>4</sup> In essence, probation officers, "in order to avoid being deceived or manipulated by administrators or clients...adopt an intellectual stance of misanthropy" which in turn is injected into presentence reports "which

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<sup>1</sup>"You don't get a plea without a bargain and part of the bargain is the sentence,"--an unidentified judge quoted in the New York Times, 26 September 1972, at p. 1, column 1. See also New York State Joint Legislative Committee on Crime, Its Causes, Control and Effect on Society ("The Hughes Committee"), Report, New York State Legislative Document No. 26 (1971), pp. 7-15.

<sup>2</sup>Blumberg, Criminal Justice, p. 131.

<sup>3</sup>Ibid., pp. 160-61.    <sup>4</sup>Ibid., p. 157.



reflect these harsh attitudes of displaced hostility."<sup>1</sup> Despite the "vituperative and prejudicial epithets of the most loose, inaccurate and vague" description which characterize the offender in a typical report, the probation officer does perform perhaps his most "significant function" for the court bureaucracy by "cooling out" an accused who has pleaded to a lesser offense," i.e., by allowing the defendant to ventilate frustration with the courtroom processes and by simultaneously ensuring that the offender does not withdraw the plea.<sup>2</sup> Blumberg displays similar contempt for the defense counsel and the judge in his "metropolitan court" (in actuality, Manhattan Supreme Court). He sees the defendant's lawyer as a "confidence man" whose major objective is to get his client to plead guilty as quickly as possible,<sup>3</sup> and pictures the typical county judge as a mediocre political hack.<sup>4</sup> However, these actors remain relatively unscathed compared to his overwhelming assault on probation officers as prejudiced, discontented, lazy, self-important, whining, intemperate and unprofessional minor functionaries in a bureaucratically ruled

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<sup>1</sup>Ibid., p. 158.

<sup>2</sup>Ibid., pp. 157, 161-62. Blumberg decries a widespread ignorance of the fact that the probation officer interviews the defendant immediately after his plea is entered. However, Blumberg himself appears to overlook that the probation officer is also a cathartic agent for complainants.

<sup>3</sup>Abraham Blumberg, "The Practice of Law as a Confidence Game," Law and Society Review 2 (January 1966): 1-25.

<sup>4</sup>Blumberg, Criminal Justice, pp. 137-39.

sentencing process controlled by the district attorney.<sup>1</sup>

Criminal Justice spurred much research into plea bargaining and courtroom procedures. It also stands as the most damning indictment of the PSR ever written and undoubtedly had an impact on subsequent studies,<sup>2</sup> particularly those undertaken by governmental agencies in New York State, which we will examine in Chapter III.

#### Prosecutorial Dominance

Blumberg was by no means the first to recognize the gulf which had developed between the ideal and the reality since Justice Black's 1949 characterization of the probation officer as an impartial mediator between the court and the defendant. As early as 1962, Paul Keve found that "this ideal relationship does not exist anywhere in America...a probation department's 'independence' and 'impartiality' are inevitably tainted by its involvement with the organizational motives and designs of the court itself."<sup>3</sup> Eugene Czajkoski, a decade later, found the probation officer's professional role undermined more by prosecutorial controlled sentence bargaining than

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<sup>1</sup>It is tempting to see the same misanthropy Blumberg attributes to probation officers' descriptions of defendants as reposing in Blumberg's merciless portrayal of probation officers.

<sup>2</sup>Donald Cressey, in a phrase most reminiscent of Blumberg, had this to say on the subject in a 1976 aside: "Frequently, the probation officer has no special training and the reports are nothing more than moralistic statements or gossipy accounts," from his and Arthur Rossett's study of plea bargaining, Justice by Consent (Philadelphia: J.P. Lippincott, 1976), p. 32.

<sup>3</sup>Paul Keve, "The Professional Character of the Pre-Sentence Report," Federal Probation 26 (June 1962): 46.

by a judiciary which had "abdicated a major portion of (its) sentencing role (to) the chief plea bargainer," the prosecutor, "who in reality determines sentence."<sup>1</sup> Echoing Blumberg, Czajkoski also finds the probation officer's major function consisting in soothing the accused who has just pled guilty in the "production-oriented and confidence game-like system of expeditiously moving defendants through the court by means of plea bargaining."<sup>2</sup> Not surprisingly then, Czajkoski posits little value in the recommendation since "whether or not a defendant is sentenced to probation probably depends more now on his success in plea bargaining than on his promise of reformation,"<sup>3</sup> and concludes that "it is now probably more appropriate for the probation officer to counsel the prosecutor on rehabilitation potential than the judge."<sup>4</sup>

Indeed, this suggestion proved remarkably prescient. A defense attorney some six years later was to write (in describing current sentencing practices in Wisconsin):

...the prosecutor is often influenced by the recommendation in the report and the information underlying it. Some prosecutors frequently adopt the report's recommendations as their own to the

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<sup>1</sup>Eugene Czajkoski, "Exposing the Quasi-Judicial Role of the Probation Officer," Federal Probation 37 (September 1973): 9.

<sup>2</sup>Ibid., pp. 9-10.    <sup>3</sup>Ibid., p. 10.

<sup>4</sup>Czajkoski speculates that "if the probation officer ties in more with the prosecutor, then the probation officer's quasi-judicial function may paradoxically increase because of the judicial aggrandizement of the prosecutor's office through plea bargaining and other arrangements." Ibid., pp. 11-13.

court or use it as a benchmark in deciding on their recommendation. Sometimes a plea agreement will include the condition that the prosecutor will adopt the report's recommendation as his own.<sup>1</sup>

As more states abandon the indeterminate sentence, prosecutorial influence on sentencing must of necessity expand; and as judges and parole boards are stripped of their former statutory discretion, the PSR must also undergo change, suggesting perhaps that the pre-pleading investigation--which by definition is devoid of a sentence recommendation--will form the final redoubt for probation's much reduced decision-making function.

### Conclusion

Viewed from an historical perspective, the ebb and flow of scholarly and governmental estimations of the value of the presentence investigation suggests a number of observations. First, the literature reveals that the presentence investigation originally developed in the late nineteenth century as a means to screen potential candidates for probation supervision. As probation assumed all the trappings of a formal institution in the first two decades of this century, its role was expanded. Presentence reports now became lengthy case studies used by the court, the prison, the parole board and probation and parole officers as decision-making tools at each step of an indeterminate sentencing process which was initiated by a

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<sup>1</sup>Walter Dickey, "The Lawyer and the Accuracy of the Pre-Sentence Report," Federal Probation 43 (June 1979): 30.

judge and modified by a parole board.

During an era of quiescent crime rates extending from the middle of the Great Depression until the early-1960s, the agencies of social control enjoyed a stable intake which encouraged a concomitant trend toward professionalization (civil service appointments, educational requirements, expanded training, technological improvements) and an increased sense of self-importance attached itself to their respective roles. For probation, this meant perfecting diagnostic tools and "treatment modalities" for offenders:

The role of the probation officer emerged as part of a two century social movement concerned with the humanitarian reform of western penal systems. The principles of casework used by probation offices were originally intended to assist the probation officer in keeping the person already given probation from re-offending. However, with the introduction of probation reports into the sentencing process, and with the request for probation officer recommendations based on these reports, new significance was given to the social background information collected.<sup>1</sup>

The presentence report thus came to be viewed less as a screening device and more as an offender biography with multiple uses, only one of which involved sentencing. The social work ethos also

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<sup>1</sup>John Hagan, "The Social and Legal Construction of Criminal Justice: A Study of the Pre-Sentencing Process," Social Problems 22 (June 1975): 635.

dictated a "non-judgmental" approach to a client's behavior and this striving for clinical detachment (although frequently violated because of the law enforcement tension in the probation officer's dual role, it nevertheless dictated the structure of the report itself) militated against the report's being more directed and pointed in its evaluations. When there were manageable sentence calendars in urban courts, the unfocused nature of the report could be compensated for by personal contact between probation officer and judge.<sup>1</sup>

However, when the number of defendants increased dramatically during the 1960s, organizational constraints brought about a "bureaucratization of justice." In dispensing justice to three to five times as many offenders,<sup>2</sup> the system, rather than grind to a halt, adopted different strategies: judges, to induce speedy dispositions, made specific sentence promises at the time of the guilty plea--promises which were usually dictated by prosecutorial policy; and probation reports in turn became shorter, less descriptive, more judgmental and less reliable.

Secondly, empirical validation for the anti-rehabilitation arguments of prisoners, civil libertarians and conservatives alike began to gain prominence and coincided with growing public impatience with correctional promises unfulfilled. Since the presentence report

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<sup>1</sup>In federal courts, probation officers are still routinely invited to judges' chambers to discuss their report and recommendation prior to sentencing.

<sup>2</sup>Alexander B. Smith and Harriet Pollack, "The Courts Stand Indicted in New York City," Journal of Criminal Law and Criminology 68 (No. 2, 1977): 252-61.

stood at the nexus of the correctional triumvirate, it naturally came to be identified as a sore spot by critics of every persuasion:

Francis A. Allen (1964), John P. Conrad (1967), Robert O. Dawson (1969), Fred Cohen (1968), American Friends Service Committee (1971), Marvin Frankel (1972), Jessica Mitford (1973), Norval Morris (1974), David Fogel (1975), Ernst van den Haag (1975), James Q. Wilson (1975) and Andrew von Hirsh (1976)<sup>1</sup>. These and other critics have, in effect, "demolished for the current generation the idea that an individualized approach to sentencing that emphasizes treatment and rehabilitation is either feasible or safe."<sup>2</sup>

Indeed, Robert Martinson's 1974 oft-cited study of the literature on correctional treatment's efficacy concluded rather glumly that "these data, involving over 200 studies and hundreds of thousands of individuals as they do, are the best available and give us very little reason to hope that we have in fact found a sure way of

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<sup>1</sup>Francis A. Allen, The Borderland of Criminal Justice (Chicago: University of Chicago Press, 1964); John P. Conrad, Crime and Its Correction: An International Survey of Attitudes and Practices (Chicago: University of Chicago Press, 1967); Robert O. Dawson, Sentencing (Boston: Little, Brown, 1969); American Friends Service Committee, Struggle For Justice (New York: Hill and Wang, 1971); Jessica Mitford, Kind and Usual Punishment (New York: Alfred A. Knopf, 1973); Norvall Morris, The Future of Imprisonment (Chicago: University of Chicago Press, 1974); David Vogel, We Are The Living Proof: The Justice Model For Corrections (Cincinnati: W.H. Anderson, 1975); Ernst Van Den Haag, Punishing Criminals: Concerning A Very Old and Painful Question (New York: Basic Books, 1975); James Q. Wilson, Thinking About Crime (New York: Basic Books, 1975); and Andrew Von Hirsh, Doing Justice: The Choice of Punishments (New York: Hill and Wang, 1976).

<sup>2</sup>John Coffee, "Repressed Issues of Sentencing," p. 977.

reducing recidivism through rehabilitation."<sup>1</sup>

Thirdly, as the criminal justice system became the object of increasing scrutiny by the federal government, political commissions, the legal community and scholars, the evils of unchecked discretionary powers became apparent. Although perhaps failing to recognize that the distance between the ideal and the actual is more palpable today than it was in the more orderly justice system extant in 1949, Fred Cohen nevertheless eloquently sums up this argument:

Implicit in the Williams rationale, and explicit in the opinion of many courts and correctional administrators, is the belief that the goals of corrections can be best obtained by the preservation of maximum discretion on the part of judicial and correctional authorities. [They] confused benevolent purpose with actual or potential arbitrary outcome.<sup>2</sup>

Others convincingly questioned whether anyone could predict an offender's future behavior with any certainty, arguing that the possible inequities of such unscientific guesswork outweighed whatever gains it promised. In short, early critics of discretion urged more standardized techniques of decision-making while later critics

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<sup>1</sup>Robert Martinson, "What Works? - Questions and Answers About Prison Reform," The Public Interest 35 (Spring 1974): 54; see also, Douglas Lipton, Robert Martinson and Judith Wilks, The Effectiveness of Correctional Treatment, A Survey of Treatment Evaluation Studies (New York: Praeger Publishers, 1975).

<sup>2</sup>Fred Cohen, "Sentencing, Probation and the Rehabilitative Ideal," p. 15.



eventually came to recommend demolition of the indeterminacy principle itself.

These developments cannot be viewed in isolation, for it is important to recognize that as public alarm over crime levels increased, funding for the institutions of social control became disproportionately distributed: police and prosecutors expanded their share of the criminal justice dollar while the courts and corrections lost ground. In such circumstances, it is not hard to see how prosecutors came to gain more control over the sentencing process through sentence bargaining and the further narrowing of sentencing options. With the decline of judicial authority, probation, the foremost ancillary service of the court, necessarily suffered a reduction in its influence.

Thus, the literature would appear to suggest that as prosecutorial hegemony over sentencing increased, the value of the PSR has decreased. Since it will be the intention of this dissertation to examine empirically this proposition, we must first determine what prior empirical studies of the PSR have shown.

## CHAPTER II

### A REVIEW OF PRIOR EMPIRICAL STUDIES

#### Introduction

Georgetown Law Professor John Coffee, in a lengthy review of the current debate over sentencing disparity, chides his fellow lawyers' "culture-bound vision of the legal system" which has led to "the belief that the sentencing process is one in which the only participants are lawyers and judges." Noting a "transformation in the sentencing process" which has occurred in the United States over the past thirty years, Coffee writes:

The key event in this process has been the professionalization of the probation staff...the simple turnkey of an earlier era has given way to the modern, highly trained P.O., equipped with a master's degree in criminology, a manual of standard operating procedures, and a highly developed sense of the importance of his role in the sentencing drama. A by-product has emerged, however, from this process of professionalization: a developing bureaucracy that defends its institutional turf zealously...[There is a tendency for probation officers] to define their success in terms of their ability to obtain acceptance of their sentencing recommendations from judges; the higher the percentage of concurrence between the judicial decision and their

recommendation, the greater the evidence...of their recognition as "professionals."<sup>1</sup>

Coffee is undoubtedly correct in identifying this preoccupation with the influence of recommendations upon sentences, but as the following discussion will attest, the "percentage of concurrence" has come to be offered as evidence of the diminution of a probation officer's professional role.

#### California

The first major tabulation of recommendations and sentences in American courts was performed by the California Department of Justice which found that in 1963, 97.6 percent of all adult defendants in the state superior courts who were recommended for probation were so sentenced, while 82.5 percent of all adult defendants who were not recommended for probation were denied probation. Further tabulation of the period 1959-1965 in California Superior Courts revealed a remarkably consistent average agreement rate of 96 percent between judge and P.O. on recommendations for probation and an 81 percent agreement rate for denial of probation.<sup>2</sup>

These statistics caught the eye of an ex-probation officer and a British criminologist who were then engaged in an otherwise "supervision-oriented study" of the federal probation system in the

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<sup>1</sup>John Coffee, "Repressed Issues of Sentencing," p. 983.

<sup>2</sup>State of California, Department of Justice, Delinquency and Probation in California, 1963 (Sacramento, California: 1964), pp. 220-23.

Northern District of California funded by the National Institute of Mental Health. Robert Carter and Leslie Wilkins, as part of the San Francisco Project (1965-66), focused on the decision making process of P.O.'s and judges in Northern California's federal courts and found "a very high relationship between the probation officers' recommendations and the court's dispositions." In essence, they found a 96 percent agreement on the recommendation for probation and a 88 percent agreement on the recommendation for imprisonment, much like the figures reported in state courts.<sup>1</sup> In attempting to explain this consensus, a number of legal and demographic factors in each of the 300 sampled reports were later analyzed. A rank of about 30 such legal and demographic factors utilized by both P.O.'s (for determining recommendations) and judges (for determining sentences), according to probability and contingency coefficient values, revealed "an extremely high and significant rank order correlation"<sup>2</sup> which indicated that the sentence and the recommendation were both more oriented to the crime than the offender:

It appears that there is little "shaping" of presentence recommendations, but some very close agreement on the significance of certain factors and characteristics as being particularly

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<sup>1</sup>Joseph D. Lohman, Albert Wahl, and Robert M. Carter, 300 Presentence Report Recommendations (Berkeley: University of California, June 1965), p. 12.

<sup>2</sup>Joseph D. Lohman, Albert Wahl, and Robert M. Carter, Presentence Recommendations and Demographic Data (Berkeley: University of California, February 1966), p. 68.

important for either probation or imprisonment recommendations or dispositions.<sup>1</sup>

Although they found wide variation among particular P.O.'s recommendation patterns (a frequency range of 25.9 percent to 93.3 percent was tabulated for probation recommendations submitted by individual P.O.'s ),<sup>2</sup> they also observed that formal and informal pressures exerted by superiors tended to reduce such fluctuations.<sup>3</sup> Perhaps the most crucial finding, however, was that "probation officers make decisions relating to presentence recommendations with relatively small amounts of information,"<sup>4</sup> customarily placing the most stress on "prior record, current offense and largest period of (a defendant's) employment."<sup>5</sup> (In a later experiment utilizing Wilkins' "decision-game" technique again, Carter found that P.O.'s arrived at recommendations after selecting the first few items of information about a case which they consistently deemed most important.)<sup>6</sup>

In a later analysis of their empirical studies, Carter and

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<sup>1</sup>Ibid., p. 71.

<sup>2</sup>Lohman, Wahl, and Carter, Decision-Making and the Probation Officer, p. 7.

<sup>3</sup>Ibid., pp. 17-18.    <sup>4</sup>Ibid., p. 16.    <sup>5</sup>Ibid., p. 3.

<sup>6</sup>Robert Carter, "The Pre-Sentence Report and the Decision Making Process," Journal of Research in Crime and Delinquency, no. 4 (1967), pp. 203-11.

Wilkins identified four possible (interacting) factors which might account for the observed 'high degree of agreement between probation officer recommendations and court dispositions': 1) judges follow the probation officer's expertise in sizing up offenders; 2) many offenders are "obviously probation or prison cases"; 3) P.O.'s accurately second-guess the judge's intended disposition; and 4) P.O.'s make their recommendations based on the same factors which judges employ in arriving at sentences.<sup>1</sup> The third factor was to be frequently cited by subsequent critics of the PSR, foreshadowing as it did the debate about the utility of recommendations in jurisdictions where sentences are bargained.

In retrospect, the San Francisco Project set the agenda for future research into the impact of presentence reports on sentencing. However, the applicability of its empirical findings to state courts is limited by the fact that federal courts enjoy uncongested criminal calendars, a plethora of resources, and no need to sentence bargain. Thus, a concomitant conservation of judicial autocracy over the sentencing process obtains there.

#### Britain and Canada

Although not widely recognized, a considerable body of literature has accumulated during the past decade in Canada and Great Britain on the impact of presentence reports on sentencing, clearly influenced by the San Francisco Project methodology. Since both

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<sup>1</sup>Carter and Wilkins, "Some Factors in Sentencing Policy," pp. 509-10.

nations employ common law based systems of jurisprudence, there are great similarities between their criminal jurisprudence and ours--but there are also major differences. It is beyond the scope of this study, however, to conduct any rigorous comparative analyses, although the topic does cry out for some investigation. (Immediately most striking about presentence reports in Canada and England is the fact that they were only very recently incorporated into the sentencing process--specifically, during the post-World War II era<sup>1</sup>--and would thus appear to lend themselves to a more thorough-going organizational analysis.)

The earliest empirical study of British PSRs appeared in 1965 and the results were somewhat dissimilar from the American studies, but therein lies a clue to their slightly different roles in the respective systems. Taking a sample of 272 recommendations prepared between 1955 and 1960 in Cornwall, Jarvis found a 70 percent agreement rate (suprisingly low, compared to most U.S. studies) between judge and probation officer on probation dispositions but an 86.7 percent agreement rate (almost identical to that found by most American studies) on non-probation dispositions.<sup>2</sup>

These findings were duplicated three years later in London's

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<sup>1</sup>David Mathieson, "The Probation Service and Sentencing" Probation Journal 25 (March 1978): 22-25; Stephen White, "The Effect of Social Inquiry Reports on Sentencing Decisions, British Journal of Criminology no. 12 (1972), pp. 230-249; and John Hogarth, Sentencing As a Human Process, p. 246.

<sup>2</sup>F.V. Jarvis, "Inquiry Before Sentence," in Criminology in Transition, T. Grygier, et al., editors (London: Tavistock, 1965), pp. 43-66.

Queen's Court by McWilliams, who found a 77.5 percent agreement rate for probation sentences and a 79 percent agreement rate for prison sentences, with an overall agreement rate of 73 percent for the 170 cases tabulated.<sup>1</sup> Jennifer Thorpe and Kenneth Pease, in a study of 212 reports during 1972 in Kent and Nottingham, found some points to dispute with Jarvis et al., but of most interest was their observation that "recommendations against probation were less likely to be rejected than any other type of recommendation."<sup>2</sup>

Recalling the California Superior Court tabulations and the San Francisco Project's finding that judges are much less likely to agree with a P.O.'s recommendation for prison (81 and 88 percent for state and federal courts, respectively) than a recommendation for probation (96 percent in both state and federal courts), Carter and Wilkins have argued that there is considerable evidence that the "probation officer is more punitive than the judge"<sup>3</sup> in the U.S. However, there are organizational and legal constraints on state court judges here that are absent in England (and less prevalent in federal courts) which appear to explain more of the discrepancy, not only between acceptance of probation and prison recommendations as a whole,

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<sup>1</sup>W. McWilliams, "Pre-Sentence Study of Offenders," Case Conference, no. 15 (1968), pp. 136-39.

<sup>2</sup>Jennifer Thorpe and Kenneth Pease, "The Relationship Between Recommendations Made to the Court and Sentences Passed," British Journal of Criminology 16 (October 1976): 393-94.

<sup>3</sup>Carter and Wilkins, "Some Factors in Sentencing Policy," p. 507.



but which also help to explain the differential between state and federal courts of seven percentage points on the rate of judicial acceptance of prison recommendations (81 percent vs. 88 percent). (A subsequent study--the Witztum Report, discussed more fully in Chapter III--proposed an alternate explanation, however: that judges primarily use PSR's in state courts to "guard against mistaken decisions to release"<sup>1</sup> offenders on probation.)

Probation officers in England meanwhile, are more apt than their American counterparts to see the overall consensus between their recommendations and the court's sentences as cause for alarm, eschewing John Coffee's arguments of "professionalism" in this regard. In fact, Helen Napier argues that presentence investigators could be in danger of losing their independence by colluding with the court in the sentencing function and urges P.O.'s to assume the role of an "independent expert witness" in framing objective reports.<sup>2</sup> Martin Davies, in a similar vein, but more blunt, criticized P.O.'s for attempting to match their recommendations to the anticipated sentence of a particular judge. In effect, Davies here uses Carter and Wilkins' "third factor" mentioned above to explain the degree of congruence between recommendation and sentence, to wit: the P.O. tailors the recommendation to the judge, rather than to the offender

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<sup>1</sup>Ruth Witztum, "The Utilization of Pre-Sentence Reports in Kings County," unpublished report submitted to the Mayor's Criminal Justice Coordinating Council, November, 1972.

<sup>2</sup>Helen Napier, "Probation Officers and Sentencing," Probation Journal 25 (December 1978): 122-24.

and his crime. Since sentence bargaining is not uncommon in felony-level courts in urban England--although appearing in somewhat different guise than in its more obvious American incarnation--this is not an impossible task for the British P.O., but the argument is nevertheless not very convincing when one considers the relatively low rate of agreement between judge and P.O. observed by McWilliams.<sup>1</sup>

Two of the most elaborate empirical studies of the impact of PSRs on sentencing were conducted independently in Canadian courts in the early 1970s by Toronto sociologists John Hogarth and John Hagan.

Hogarth's 1971 study did not tabulate recommendations and dispositions because at the time of his investigation, probation officers were "not permitted by law or policy to suggest a particular sentence" in Ontario; they merely indicated the "likely response of the offender to probation if granted."<sup>2</sup> Instead, Hogarth conducted "decision-games" (using the Wilkins model) with P.O.'s and judges, interviewed 71 magistrates, and compiled data on 2400 reports in the province. Hogarth's findings were significant, relevant and timely but have yet to assume their rightful place in the literature, perhaps because of their "foreign" origin.

Basically, he found a sentencing process benumbed by information overload, widely divergent judicial attitudes on the aims

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<sup>1</sup>Martin Davies, "Social Inquiry for the Courts," British Journal of Criminology 14 (No. 1, 1974): 18-33. For an excellent comparative study of American and British plea bargaining in action, see Silvia Suzen Giovanni Casale, "The Plea Compromise Process in the Criminal Courts of New York and London" (Ph.D. dissertation, Yale University, 1977), pp. 346-48.

<sup>2</sup>John Hogarth, Sentencing As A Human Process, p. 248.

of sentencing, unstandardized reports, and numerous intervening variables which produced sentencing disparity. Hogarth found that: 1) "very often urban magistrates ... 'skim' reports and in some instances they read only the summary at the end";<sup>1</sup> 2) "magistrates tended to seek information consistent with their preconceptions [and] tended to avoid information which was likely to present a picture of the offender that was in conflict with their expectations;"<sup>2</sup> 3) presentence reports were requested in cases for which magistrates were considering sentences that are not normally or usually given for that type of offence"<sup>3</sup> (e.g., prison for dangerous driving or probation for armed robbery); and 4) since "communication tends to be more effective when the receiver does not feel that the communicator is trying to convince him," then the PSR presents problems because not only can it be "viewed as an attempt by the P.O. to affect the magistrate's decision" but the report is the product of a group 49 with a lower status (P.O.'s "tend to accept magistrates' views of the cases, while magistrates would resist any effort of persuasion from P.O.'s").<sup>4</sup> Hogarth concludes that if PSRs are to have any impact on sentencing, then they must be read by the judge, the judge must have informal access to the P.O. to discuss the case and the judge must subscribe to the theory underlying the reports themselves, i.e., the individualization of justice.<sup>5</sup>

John Hagan's study focused less on judges and instead

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<sup>1</sup>Ibid., p. 262.    <sup>2</sup>Ibid., p. 374.    <sup>3</sup>Ibid., p. 373.

<sup>4</sup>Ibid., p. 263.    <sup>5</sup>Ibid., p. 262.

attempted to determine the impact of seven independent variables upon the P.O.'s recommendation and the judge's disposition. Four of the variables were extra-legal--race, socio-economic status, the defendant's demeanor and his/her success prospects (as perceived by the P.O.); and three were legal variables--seriousness of offense, prior record and number of present charges. In analyzing 507 reports and recommendations collected from 15 cities, Hagan computed correlation and path coefficients seeking to relate all nine variables collected. He found that "recommendations alone account for more than fifty percent of the variation in final dispositions. In tabular terms, probation officers and judges agree in 79.7 percent of the cases."<sup>1</sup> Hagan attempted to find validation in his study for three major schools of criminological thought: the conflict theorists (since the defendants studied were all from the lowest socio-economic class); the interactionist school (P.O.'s perceptions of his subject--i.e., the subject's personal characteristics interacting with the P.O.'s prejudices); and the organizational perspective (when judges request recommendations they elevate the P.O.'s sense of importance and transform the resultant reports into more evaluative, less factual exercises that overemphasize the importance of extra-legal variables on sentencing).<sup>2</sup>

Much like the California examples presented earlier, the applicability of these British and Canadian studies to American urban

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<sup>1</sup>John Hagan, "Social and Legal Constraints," p. 628.

<sup>2</sup>Ibid., pp. 635-36.

courts is diminished by their failure to deal with plea bargaining as a crucial dimension in today's sentencing process. In this respect the studies thus far surveyed are much alike: they make no distinction between trial and plea bargained convictions; they treat sentences as dichotomous variables (prison vs. probation); and they ignore sentence bargaining.

#### "Western City"

The most important recent empirical study of the impact of presentence reports, however, did attempt to incorporate the effect of sentence promises into the research design. This was a study conducted by sociologist Rodney Kingsnorth and probation administrator Louis Rizzo in a California city identified only as "Western City." The authors chose 302 cases (from the calendar year 1972) where defendants had pled guilty to felonies. These cases were then categorized into two groups according to sentence promise: those guaranteed "no state prison" by the court (126) and those given no such guarantee (176). A 99.2 percent agreement rate (125/126) between promise and disposition and a 97.6 percent agreement rate (123/126) between recommendation and sentence were found for the group promised no prison sanctions. In fact, only four cases prevented this group from achieving perfect congruence for promise, recommendation and sentence (in one case a defendant promised "no prison" was nonetheless sentenced to prison as per the probation officer's recommendation; in the other three cases involving defendants recommended for prison, the court kept its original promise of "no prison"). For the second

group--in which no promise was made--a 90.3 percent overall agreement rate between recommendation and sentence (159/176) was found, with an 88.1 percent agreement for non-jail dispositions (118/134) and a 97.6 percent agreement rate for jail dispositions (41/42).<sup>1</sup> The authors conclude from this data that "P.O.'s are influenced in their recommendations by knowledge of prior agreements between prosecution and defense."<sup>2</sup>

So convinced are Kingsnorth and Rizzo of this hypothesis that, echoing Blumberg, they urge future studies of the PSR's impact on sentencing be placed within the broader context of court administration, because:

...the autonomy of the P.O. in fully 40 percent of all cases that do not go to trial [i.e., those cases where a "no state prison" sentence has been promised] has been severely eroded by pressure on P.O.'s to function within the constraints imposed by guilty plea bargaining....The single most potent source of pressure is the judiciary which, committed to managerial efficiency within the court system, will assert the primacy of plea bargaining agreements over P.O. recommendations when those are in conflict, rather than permit the withdrawal of the guilty plea and the return of the case to the bargaining stage.<sup>3</sup>

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<sup>1</sup>Rodney Kingsnorth and Louis Rizzo, "Decision-Making in the Criminal Courts: Continuities and Discontinuities," Criminology 17 (May 1979), pp. 3-6.

<sup>2</sup>Ibid., p. 8.    <sup>3</sup>Ibid., p. 11

Borrowing Hagan's organizational perspective and Blumberg's bureaucratization of justice observation, the authors create a synthesis in arguing that "the probation officer is a member of a role set within a court system committed to the pursuit of managerial efficiency, i.e., the efficient processing of an ever-expanding backlog of cases...latent pressures on probation officers to 'go along' with plea bargaining agreements would be readily mobilized against 'deviant' officers."<sup>1</sup> Seen from this vantage point, Supreme Court decisions which have established that a plea bargain not kept is a conviction which can be overturned<sup>2</sup> are what explain the court's reluctance to follow P.O.'s recommendations for prison when no incarceration sentence has been promised: "they are not necessarily doing so because they are more 'lenient' but because they are oriented to norms of managerial efficiency and are reasserting the primacy of the plea bargain."<sup>3</sup> Thus, P.O.'s learn they have very little impact and "tailor their recommendations accordingly."<sup>4</sup>

Because of the sentence bargain's sacred status, they see only three alternatives to the present sentencing process for the probation system: 1) abolish plea bargaining (but most American criminologists counter that this would be inefficient and is a doomed proposal); 2)

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<sup>1</sup>Ibid., p. 9.

<sup>2</sup>See Santobello v. N.Y., 404 U.S. 257 (1971); McMann v. Richardson, 397 U.S. 759 (1970); and North Carolina v. Alford, 400 U.S. 25 (1970).

<sup>3</sup>Kingsnorth and Rizzo, "Decision-Making," p. 6.

<sup>4</sup>Ibid.

incorporate the P.O. into the plea bargaining process at an earlier stage (through use of pre-pleading investigations and by providing pre-trial services); or 3) abolish PSRs since "the consequences of such abolition would be negligible."<sup>1</sup> Launching into their final peroration, Kingsnorth and Rizzo sum up the past decade's universal displeasure with probation reports: "The presentence report's attempt to fit treatment to the criminal rather than punishment to the crime is a spurious exercise in treatment logic incompatible with equity in law and as such should be abolished."<sup>2</sup>

However, Kingsworth and Rizzo's conclusions are not supported by the data because their methodology is seriously flawed. First, only three variables were coded for each case (promise, recommendation, sentence), ignoring numerous other important factors (including both legal and non-legal variables such as custodial status, seriousness of crime, number of prior arrests, and social stability). And secondly, the plea bargain and recommendation were each coded as a dichotomous variable, a gross oversimplification which seriously skews the results of all the comparisons they present. In fact, closer scrutiny of the 176 cases in which no promise was made tends to give greater support to alternate explanations for why judges and P.O.'s agree so frequently on sentence (e.g., Carter and Wilkins' finding that each considers the same legal and extra-legal variables as overwhelmingly important). The reason is simple. The inexact coding of Kingsnorth and Rizzo rendered 13 cases within the "no

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<sup>1</sup>Ibid., p. 13.    <sup>2</sup>Ibid.



promise" group as anomalous, when the authors themselves note that their dichotomous coding 'may reflect a degree of conflict between P.O.'s and judges greater than actually exists.'<sup>1</sup> The authors erred when they reduced the congruence between recommendation and sentence in this group from 172 out of 176 (97.6 percent) to 159 out of 176 (90.3 percent) by coding 13 "probation denied" recommendations as recommendations against imprisonment when arguably they should have been considered as recommendations for jail. This extraordinary agreement in cases where defendants had in effect been promised nothing (60 percent of the court's workload in 'Western City'!) flies in the face of their argument in the same paper that there are few "obviously" prison or probation cases (they cite the San Francisco Project's finding that 1,232 recommendations showed a span of 50 percentage points between individual P.O.'s recommendations).

Since there is no organizational pressure to carry through on a sentence bargain in the no promise group, an identical 97.6 percent agreement rate for sentence bargains and for cases where no sentence promise is made deals a serious blow to the authors' argument that the goal of organizational efficiency causes more congruence.

#### Juveniles and Misdemeanants

There has been some research on the impact of probation reports in juvenile and misdemeanor courts over the years, but it seems meager compared to the emphasis in the literature on adult felony cases. Yonah Cohen's 1963 study of criteria employed by P.O.'s

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<sup>1</sup>Ibid.

in making juvenile case recommendations is of interest in that he found objective information to predominate over subjective data. Thus a typical report would be more apt to include a description of the crime and the defendant's family finances than to contain a discussion of the juvenile's personality and his family relationships, although the latter are considered all-important in a casework approach. Cohen concurs with this prejudice against social work oriented reports, arguing that juvenile reports should focus on information relative and pertinent to the decision being made by the judge and not on the proposed course of treatment.<sup>1</sup>

Seymour Gross, taking his cue from Carter and Wilkins, attempted to rank the variables most affecting a P.O.'s recommendation (by interviewing P.O.'s). The juvenile court P.O.'s ranking was found to be: 1) details of offense; 2) family background; and 3) prior arrests. Noteworthy here is that the same P.O.'s were then asked their perception of what the juvenile court considered most important. The results were only slightly dissimilar: 1) details of offense; 2) prior arrests; and 3) the juvenile's attitude. (P.O.'s therefore suspect judges of being more swayed by subjective transient factors such as "attitude," than by the more objective "family background"). In addition, both judges and P.O.'s considered the

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<sup>1</sup>Yonah Cohen, "Criteria for the P.O.'s Recommendations to the Juvenile Court Judge," Crime and Delinquency, no. 9 (1963), pp. 262-75.

juvenile's interests, activities and religion the least important.<sup>1</sup>

Probation officer James Davis' 1979 doctoral dissertation stands out as the first comprehensive overview of the sentencing decision in the lower criminal courts. From a random sample of almost a thousand misdemeanor cases in Brooklyn Criminal Court, Davis found that judges follow P.O.'s recommendations in 81 percent of the cases (793/979). Path and discriminate analysis of a number of legal and non-legal variables found that judges based dispositions on (in order of importance): 1) P.O. recommendations; 2) custodial status of defendant at time of plea; 3) prior arrests; 4) prior violation of a probation sentence; and 5) seriousness of offense. In a separate sample of 100 defendants sentenced without a PSR, Davis found judges relied most heavily on: 1) seriousness of offense; and 2) prior arrests. Finally, recommendations were found to rely most heavily on: 1) prior arrests; 2) custodial status; and 3) prior violations of a probation sentence. Not surprisingly, then, Davis found that defendants in detention with a history of many arrests were overwhelmingly recommended for jail sentences and usually received them.<sup>2</sup> Davis found the judicial sentence promise to be of minor significance in criminal court since "promises were loosely

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<sup>1</sup>Seymour Gross, "The Pre-Hearing Juvenile Report: The P.O.'s Conception," Journal of Research in Crime and Delinquency, no. 4 (1967), pp. 212-17.

<sup>2</sup>James R. Davis, "The Sentencing Dispositions of New York City Lower Court Criminal Judges" (Ph.D. dissertation, New York University, 1979), pp. 279-80.

constructed, with several alternatives, very flexible,"<sup>1</sup> with the nature of the promises most strongly affected by the defendant's custodial status. Davis found PSR recommendations to be so influential that he concluded (in a phrase that would probably cause critics such as Willard Gaylin to shudder): "this research implies that P.O.'s might do the sentencing in misdemeanor courts."<sup>2</sup>

Because misdemeanor and juvenile courts operate with a completely separate set of organizational procedures, goals and constraints, the findings of Davis and others are not transferrable to adult felony courts.<sup>3</sup>

#### What This Research Will Replicate

In devising my own research, I have decided to incorporate: 1) the San Francisco Project's rank order correlation methodology to test whether judges and P.O.'s consider the same variables most important in decision making; 2) John Hagan's and James Davis' path analyses of legal and extra-legal variables to determine their impact on recommendations and dispositions; and 3) Kingsnorth and Rizzo's comparison of promises, recommendations and sentences to determine if the court's goal of organizational efficiency outweighs the probation officer's judgments. Finally, I will also take into account the

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<sup>1</sup>Ibid., p. 263.    <sup>2</sup>Ibid., p. 284.

<sup>3</sup>For an excellent discussion of the more predominant role played by judges in sentence bargaining in lower criminal courts, see Joseph Hoane, "Strategems and Values: An Analysis of Plea Bargaining in Urban Criminal Court" (Ph.D. dissertation, New York University, 1978). Also see Casale, "The Plea Compromise Promise."

intervening variables in the sentencing process observed by Hogarth,  
which center around the actions of the sentencing judge.

### CHAPTER III

#### PUBLIC AND POLITICAL INQUIRIES INTO THE PRESENTENCE INVESTIGATION IN NEW YORK

##### The Early History of New York City Probation

Any analysis of the history of the public administration of probation agencies in New York City (and probably nationwide)<sup>1</sup> must start from one inescapable conclusion: probation has never been funded in a manner commensurate with its responsibilities. This lack of resources traditionally has been offered by the predominately rehabilitation-directed correctional theorists and practitioners who have held sway in this field for generations as the response to the recurring charge by more retribution oriented critics that probation just does not work. Regardless of the merits of the argument, there appears to be more evidence of probation underfunding in the lower courts than in the felony courts of New York City until the cataclysmic decline of the past decade. A few examples will illustrate this point.

In 1922, Chief City Magistrate William McAdoo, (a former New York City Police Commissioner) in a "Manual of Probation Work"

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<sup>1</sup>See Jim Atkinson, "The Proving Ground," Texas Monthly, June 1982, pp. 180-88, for a study of the Dallas Probation Department beset by all the ills afflicting New York City P.O.'s (e.g., 1,000 P.O.'s supervise 135,000 Texas offenders).

prepared for the 38 Magistrates' Courts scattered throughout the City (in effect, the forerunners of what are now New York City's family and lower criminal courts), reported that 91 P.O.'s supervised 13,741 offenders and prepared 17,352 presentence reports during the previous year.

This "enormous amount of work" caused "acute and massive administrative problems" because the probation staff was "limited and entirely inadequate in number and constantly overworked."<sup>1</sup> New York probation pioneer Edwin J. Cooley made the same complaint in 1923 when he wrote that "one of the commonest weaknesses in probation work is that most probation officers have more work than they can do well." Cooley, anticipating present P.O. union activism, added: "There is no greater duty incumbent upon probation officers in all communities than that of keeping constantly before the proper appropriating bodies, the need for an adequate staff, a just compensation and sufficient clerical help."<sup>2</sup>

Other plaintive wails of despair have permeated the professional probation literature in New York City during every decade since the 1920s. The federal probation system also experienced relative stagnation in staffing for the first two decades of its existence. (In 1931 there were 65 federal P.O.'s in the U.S., supervising 15,448 cases for an average caseload size of 237; by 1942

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<sup>1</sup>William McAdoo, 'Manual of Probation Work,' Magistrates' Courts of the City of New York, 1922, pp. 13-14.

<sup>2</sup>Edwin J. Cooley, 'Standards of Probation,' Magistrates' Courts of the City of New York, 1923, p. 5.

the caseload average was still an unmanageable 137.)<sup>1</sup> This appeared to be a universal phenomenon in community corrections until the post-World War II era in New York City when the separately administered county probation offices (which were controlled by the state judiciary) dramatically outstripped the probation offices serving the lower city courts (which were controlled by local autonomous probation administrators) in salary, prestige and professionalization. In fact, recognition of this administrative and qualitative disparity between the probation departments servicing the City's courts and those servicing the state (felony level) occasioned the first important modern study of probation's performance in New York City. When 1960 court reorganization legislation initiated the eventual merger of the probation bureaus of the Special Sessions and Magistrates' Courts (consolidated in 1962 to form the City's lower Criminal Courts), and the probation bureau of the Domestic Relations Court (consolidated with the Children's Court in 1962 to form the City's Family Courts) into a unified New York City Office of Probation, Mayor Wagner was prompted to appoint a committee to study why these "three probation systems had fallen markedly from the high esteem in which they were once held throughout the country."<sup>2</sup>

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<sup>1</sup>Victor H. Evjen, "The Federal Probation System: The Struggle To Achieve It and Its First 25 years," in An Introduction to the Federal Probation System (Washington, D.C.: U.S. Government Printing Office, 1976), p. A-13.

<sup>2</sup>The Mayor's Committee on Auxiliary Services to the Courts of New York City: Report (New York, 1961), p. 3.



The Mayor's Committee

In studying the deteriorating quality of probation services in the City courts, the Committee found understaffing to be "a situation of many years' standing" and concluded that "since 1930 there have been many protracted periods in which there was virtually no change in the number of probation officers, although the need for additional personnel increased greatly."<sup>1</sup> Furthermore, management of the City's probation system was found to be grossly inadequate: "probation officers are too often inadequately trained, overburdened with excessive caseloads, and hampered by a poverty of resources and the absence of any over-all planning, procedures and administrative structure."<sup>2</sup> The Committee placed part of the blame on the lower salaries in the city probation service which had "not been attracting high-level probation personnel."<sup>3</sup>

Although its mandate was to examine only probation services in the lower courts, the Mayor's Committee repeatedly turned to the county departments in its evaluations, finding there a model which the City should emulate. In virtually every qualitative comparison of job performances between the local and county courts, the felony court P.O.'s outdistanced their peers. In the preparation of presentence reports, for example, their findings (which I have condensed in Table 1) were derived from a comparative content analysis of 680 reports:<sup>4</sup>

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<sup>1</sup>Ibid., p. 52.    <sup>2</sup>Ibid., p. 5.    <sup>3</sup>Ibid.

<sup>4</sup>Ibid., p. 60-61.

TABLE 1

## MAYOR'S COMMITTEE COMPARISON OF COUNTY &amp; CITY PSR'S

Job Function	Rate of Accomplishment	
	County P.O.	City P.O.
Home Visits	61%	49%
Educational Contact	78%	55%
Employer Contact	82%	26%
Community Contact	86%	87%
Diagnosis of Offender	86%	51%
Analysis of Family Environment	90%	55%

In summarizing its survey, the Committee attributed the better performance of county probation to a "higher degree of skill" resulting in part from "a higher pay scale [which] attracts on the whole a more competent staff, many of whom have worked dilligently to raise professional standards in probation service."<sup>1</sup> Significantly, the Committee's conclusion that the lower court PSI "produces a collection of facts which are usable, but which have not been correlated or analyzed,"<sup>2</sup> like all its other unfavorable conclusions, refers only to the lower court probation services. However, over the years this phrase has reappeared time and again in other reports completed by other committees as proof of the long standing poor quality of PSRs in felony courts, suggesting perhaps a polemical bias against probation among politicians and the legal community which might help explain the miniscule funding so much in evidence.

After 1962, the underfunding, understaffing and mismanagement

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<sup>1</sup>Ibid., p. 46. "Salaries for P.O.'s in county courts are fixed by the judges of the county courts under their mandatory powers and are thus on the whole higher..."

<sup>2</sup>Ibid., p. 45.

prevalent in the lower court structure infected and then consumed the adult courts with the advent of the 1974 consolidation of all probation services in the city into a single mayoral agency, the Department of Probation, and the subsequent loss of one third of staff during New York's 1975 "fiscal crisis." Whereas during the period, 1945-1962, a position as a P.O. in county court was deemed the most prestigious, with fierce competition among federal and city P.O.'s (as well as state parole officers) for appointment to these better paying slots, there has now been a complete reversal of this pecking order, owing to shrinking municipal correctional budgets, with federal and state positions now recruiting most of their staff from the demoralized New York City Department of Probation.<sup>1</sup> In a recent letter to the State Legislative Committee on Expenditure Review, the former President of the City's Probation Officers' Union summarized this process:

In 1957, when I entered employment in the Kings County Court Probation Department, as a promotional opportunity after a few years experience in the then Magistrates Court Probation Bureau, the qualifications of staff and the salaries were the highest in the nation....The specialization of caseloads for drug-addicted

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<sup>1</sup>The state and federal correctional establishment has been better able to shield their budgets from the depredations of public and political pressures in the past decade. However, although professionalization of federal P.O.'s continues apace, its performance has also been criticized in the past decade. See U.S. General Accounting Office, Probation and Parole Activities Need to be Better Managed: A Report to the Congress (Washington, D.C.: General Accounting Office, 1977).

offenders, psychiatrically based offenders, the provision of special employment and referral services on an "in-house" basis, were all innovations emulated by other departments. As time went on, however, particularly with the consolidation of agencies within the City of New York and the elimination of differentials of qualification, experience, pay, and the equalizing-downward of delivery of services to the least-passable, probation itself as a professional field of employment and as a credible alternative to incarceration of offenders--have both become distasteful jokes.<sup>1</sup>

This "equalizing-downward" process in the quality of probation services, particularly in the preparation of PSR's in Kings County Supreme Court, will concern us later. For the moment it is sufficient to point out that chronic resource problems began to penetrate the county probation unit level at precisely the same time (1962) that county court judges themselves suffered a statutory diminution of their mandatory powers and prestige.<sup>2</sup> When one adds to the equation the crime explosion of the late 1960s, which dramatically increased the workload of the courts, all the ingredients for organizational change present themselves.

In fact, a 1977 study by Smith and Pollack of the reasons behind the increased use of plea bargaining in New York State courts

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<sup>1</sup>Letter of Ross L. Umans to N.Y.S. Chairman of Legislative Committee on Expenditure Review, A. Kremmer, 19 September 1982.

<sup>2</sup>Their powers of mandamus were stripped effective 1 September 1962, when state reorganization transformed the county court into the State "Supreme Court."

(97 percent of all convictions were a result of pleas in the peak years of the early 1970s)<sup>1</sup> found that between 1952 and 1974, while the felony workload of judges had increased six times, the number of judges had only doubled.<sup>2</sup> In addition, lengthier trials necessitated by the U.S. Supreme Court's expansion of due process rights and its imprimatur for plea bargaining helped spur the wider adoption of "sentence bargaining" as a bureaucratic refinement of plea bargaining to induce speedier dispositions. (An interesting ancillary question not raised by recent apologists for plea bargaining, who have convincingly demonstrated that guilty plea dispositions accounted for the majority of convictions in state courts since the second half of the nineteenth century, is: what percentage of pleas were sentence bargained prior to the 1960s?)

The fact that the five district attorney offices in New York City expanded dramatically at the same time that sentence bargaining gained ascendancy in county courts appears to add support to the theoretical perspective which posits a shift in de facto sentencing power from the judge to the assistant district attorney. To illustrate, when Eugene Gold became District Attorney of Kings County in 1968, his Office had a staff of 90 prosecutors and an annual budget of two million dollars. When Gold retired in December of 1981, he ruled a veritable empire of more than 300 ADAs and a 14 million

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<sup>1</sup>Hughes Committee, p. 14.

<sup>2</sup>Alexander Smith & Harriet Pollack, "The Courts Stand Indicted in New York City," pp. 252-61.

dollar annual budget.<sup>1</sup> Comparing these resources to the workloads of the courts and corrections in the same period is a sobering exercise but to date there is very little attempt in the literature to relate this power shift to less pedestrian perspectives, such as socio-economic trends.<sup>2</sup> Instead, the focus has been on dispositional modes in the daily courtroom processing of the workflow and sentencing disparity largely attributed to judges.

In fact, the periodic reports of political and legal committees, commissions and agencies have been uniformly lacking in any systematic overview of how organizational changes might have evolved from efforts to cope with the inefficient consequences of the extension of due process rights or how the imbalance in resources allotted to the police, prosecution, courts and corrections affects case processing.<sup>3</sup> Instead, there is a narrow preoccupation with

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<sup>1</sup>"Gold, Near Retirement, Asks Justice System Aid," New York Times, 9 August 1981, p. 47. Smith and Pollack ("Courts Stand Indicted," p. 257) note that in New York City, "the entire criminal justice system outside the Police Department receives only 1-1/2 percent of the city budget."

<sup>2</sup>Anthony Platt attempts a non-empirical overview from a radical perspective in his 1977 epilogue to The Child Savers, claiming that increased funding for the criminal justice system since the 1960s has been the result of governmental desires to repress dissent and cope with worsening economic situations. Platt's argument lacks substantive documentation and is too simplistic.

<sup>3</sup>F. D. Cousineau and S. N. Verdun-Jones come closest to such a perspective, criticizing the lack of research in this area, since prosecutorial bargaining practices have major implications "for the whole range of criminal justice agencies." See their monograph, "Evaluating Research into Plea Bargaining in Canada and the United States: Pitfalls Facing the Policy Makers," Canadian Journal of Criminology 21 (July 1979): 305.

what is inevitably labelled the "crisis in our courtrooms and jails." Scapegoating is common and procedural changes are advanced as palliatives until the next commission is appointed. This avoidance of larger questions and the failure to acknowledge the impact of public sentiment upon the funding and public administration of the politically sensitive institutions of social control renders these reports (prepared by lawyers and politicians absent input from public administrators and technocrats) remarkably similar, imbued as they are with what John Coffee elsewhere has labelled the legal community's "unconsciously egotistical vision of the legal process" and its "tendency toward a culture-bound vision of the legal system."<sup>1</sup>

#### The Hughes Committee

Thus, the New York State Joint Legislative Committee on Crime (the "Hughes Committee"), in its 1971 Report, took note of the "new practice in the criminal courts in New York City in response to case load pressures" --sentence bargaining--arising from the discovery of judges in felony courts that "pleas of guilty in any significant number cannot be obtained without sentence commitments in advance of the plea."<sup>2</sup> This practice was presented as simply the dubious consequence of judicial work load pressures and the solution offered was to restrict judicial discretion by enacting more regulations for plea bargaining into the Criminal Procedure Law. Such changes were

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<sup>1</sup>John Coffee, "Repressed Issues of Sentencing," p. 1044.

<sup>2</sup>Hughes Committee, p. 14.

enacted, with the result that fewer felony indictments were bargained down to misdemeanors, more defendants were incarcerated and sentence bargaining continued to remain the predominant means of obtaining dispositions.

The Hughes Report ensured its honored position in the subsequent literature on presentence investigations when it observed--absent any empirical validation--that "once a sentence commitment is made by a judge, the PSR is subtly tailored to justify the sentence." The Committee, anticipating Kingsnorth and Rizzo by eight years, concluded that "a very important component in the sentencing process is thus distorted to fit the exigency of having to keep the dispositions flowing."<sup>1</sup> (This observation appears to have been borrowed from Blumberg but he is not credited.) The Committee, again by inductive reasoning (absent any study of PSR's and relying only on interviews with judges and offenders),<sup>2</sup> concluded that the "subtle tailoring" of the PSR introduces distortion into the entire correctional process because the PSR is used for prison assignment and classification, for parole eligibility, and for community supervision purposes. Consistent with the recommendations of the 1967 Presidential Crime Commission and the American Bar Association Standards Committee, the Hughes Committee urged expanded use of

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<sup>1</sup>Ibid., p. 15.

<sup>2</sup>In a Staff Report on "Guilty Plea-Bargaining and Prisoner's Attitudes," March, 1971, N.Y.S. prisoners were found to be largely resentful of the bargaining process; 47 percent of Attica inmates were reported to feel the judge did not keep his sentence promise. Ibid., p. 7.



pre-pleading investigations and a reduced role for PSRs.<sup>1</sup>

In the same year that the Hughes Committee issued its influential report, another committee--the Interdepartmental Committee on Probation Reports of the Appellate Division<sup>2</sup>--surveyed the attitudes of 65 county court judges in New York City on PSR's. If one were to believe the Hughes Committee, this survey would be expected to indicate judicial consensus that the PSR is non-essential. On the contrary, almost every one of the 17 data elements of the PSR which the judges were asked to rate as either "essential," "desirable" or of "little value" was considered "essential" by an overwhelming majority of judges. This Committee concluded that "the judges, having failed to conclusively identify any items as being of 'little or no value,' all should be retained."<sup>3</sup> (Considered most essential were: 1) prior criminal history; 2) circumstances of offense; and 3) mitigating and aggravating circumstances.)

A third subcommittee (the Subcommittee on the Functioning of Probation, a task force formed from the state legislature's Subcommittee on Liaison with Public and Private Agencies) studied New York City PSRs in 1973, and, noting the great increase in workloads for P.O.'s, found the reports to be "water[ed] down [in] their informational content" and increasingly contained "unverified and

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<sup>1</sup>Hughes Committee, pp. 15-17.

<sup>2</sup>Interdepartmental Committee on Probation Reports of the Appellate Division, First and Second Departments, Report, 1971, p. 4.

<sup>3</sup>Ibid.

inaccurate information."<sup>1</sup> This sudden intense interest in New York City's PSRs was spurred by jail overcrowding caused by record numbers of indictments and convictions. Since a significant number of detainees were awaiting completion of PSRs,<sup>2</sup> many observers argued for the elimination of an expensive, time consuming step in the sentencing process, focusing narrowly on the lack of impact of the P.O.'s recommendation on "bargained for" sentences. At this time of jail and prison turbulence across the state, two reports, both prepared by law school students (for the New York City Board of Correction) enshrined this anti-PSR point of view in New York State. A decade later the probation community has yet to even attempt a response to this direct attack on the *raison d'etre* for the PSI. These two reports, combined with Kingsnorth & Rizzo's 1979 study, have served only to hand further ammunition to the legal community's attempt to exclude probation agencies from the sentencing process.

#### The Witztum Report

Ruth Witztum, then a student research associate for the

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<sup>1</sup>Subcommittee on Functioning of Probation for the Subcommittee on Liaison with Public and Private Agencies, The Role and Quality of Probation Services in New York City, Unpublished manuscript, 1973, pp. 25-34. The Judicial Process Commission, A Study of Probation, 1976, another unpublished manuscript, made many of the same non-empirical claims.

<sup>2</sup>Up until overwhelming numbers brought about a change in the practice in 1973, the Probation Department in county courts controlled the sentence calendar, scheduling sentences upon completion of the PSR. This practice naturally led to some abuse, including one instance known to this writer wherein a defendant remained detained for nine months waiting for a P.O. to complete the investigation (see Chapter VI).

Criminal Law Education and Research Center at N.Y.U. Law School, spent the summer of 1972 on a project which was to be immediately utilized by the New York City Board of Correction in its efforts to spur public policy changes to improve jail conditions and which would eventually be cited by all subsequent researchers in this field in New York (although rarely directly). Securing the probation administrator's approval (in Brooklyn Supreme Court), she conducted the first empirical study of the impact of PSRs on sentence bargaining. Testing two hypotheses--that the PSR has little impact on sentence bargaining and that a P.O. aware of the sentence promise is more apt to ratify the promise than his ignorant counterpart--she purported to find strong evidence for accepting both hypotheses. Witztum found that the PSR clearly influenced only 7.7 percent of bargained sentences, with the promise and sentence agreeing 90 percent of the time. In other words, the judge amended his sentence promise to follow the PSR's recommendation (a plea was withdrawn by the defendant who would not accept such an amended promise) in less than eight cases in a hundred.<sup>1</sup> Secondly, where the promise was known to the P.O., the recommendation agreed with the eventual sentence in 14.8 percent more cases than when no promise had been made, and an overall 70 percent agreement rate was found between recommendation and

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<sup>1</sup>The remaining 2.3 percent of the cases were those where promise, recommendation and sentence were all dissimilar.

promise.<sup>1</sup> Witztum reasoned that since in 70 out of 100 cases the PSR "merely endorses the plea bargain" and "in the majority of the remainder the changes it suggests are not of major significance" (i.e., recommending either a shorter or lengthier period of incarceration than that promised, or recommending processing of the defendant through a different correctional institution), then PSR's were "largely superfluous, at best verifying the judge's perceptions found at the time the guilty plea is taken...in any event the judge will most often honor the agreement as to sentence despite a contrary recommendation."<sup>2</sup> Witztum, not surprisingly then, urges making PSRs optional for sentence bargained cases in order to eliminate delays in sentencing and free up manpower to reduce supervision caseload sizes.<sup>3</sup>

Once again, however, we find methodological error invalidates many of Witztum's most salient findings. In selecting 300 odd cases for her study, Witztum introduced sampling error when she erroneously assigned 107 cases to the category of "no promise" on the assumption that no mention of a sentence promise in the probation case file or PSR was sufficient proof that no sentence promise had indeed been made by the court at the time of plea.<sup>4</sup> However, this is faulty

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<sup>1</sup>Ruth Witztum, "The Utilization of Presentence Reports in Kings County: An Analysis of the Value of Mandatory Presentence Reports for Plea Bargained Dispositions," Unpublished manuscript, November, 1972, pp. 17-32.

<sup>2</sup>Witztum, "Utilization of Presentence Reports," p. 29.

<sup>3</sup>Ibid., pp. 29-30.    <sup>4</sup>Ibid., pp. 9, 13.

reasoning. As a probation officer who examined case files in the same Kings County office for almost ten years, I can attest to the fact that P.O.'s frequently neglect to either ascertain or note in writing the details of a plea bargain. Some fail to do so because they claim they do not want their own recommendation or their supervisor's to be influenced by the bargain; others simply assume the details of the bargain reported by the defendant are correct but don't report them; and because some judges object to including mention of the bargain in the report, other P.O.'s omit mentioning it altogether. In addition, Witztum's reliance on probation's reportage of the plea bargain--often based on a defendant's statement to the P.O.--assumes accuracy when there is no reason to do so, since defendants sometimes misunderstand sentence promises and P.O.'s sometime misunderstand defendants. Furthermore, Witztum fails to empirically consider an alternate explanation for the 70 percent agreement rate between promise and recommendation, namely, the San Francisco Project's finding that judges and P.O.'s assign the same weight to the same legal and extra-legal variables in their decision-making. Finally, Witztum posits no value to the content of PSRs, virtually equating the recommendation with the report and ignoring the uses to which the PSR is put by other actors in the criminal justice system.

#### The Board of Correction

Relying heavily on the Hughes Committee Report and the Witztum Report, the New York City Board of Correction's 1973 Report (written by Carol Gerstl, another N.Y.U. law student) presented a much quoted

imprimatur of Witztum's research: "If 95 percent of all convictions are gained through guilty pleas and if in over half of these cases the sentence is determined prior to any investigation so that the report acts merely to confirm the already negotiated sentence, the City is expending a great deal of money for rubber stamps."<sup>1</sup> Foreshadowing the 1981 "PSI Crisis" episode, this report blames the PSR and its expanded mandatory use in the lower courts for overcrowding in detention facilities, neatly sidestepping the impact of the precipitous rise in arrests, convictions, and indictments, at a time when new procedural safeguards resulting from the Warren Court's rulings were also contributing to delays in dispositions. In a less than convincing argument, the report also dismisses the 1971 survey of county court judges described above (which found judges placed considerable value in PSRs), suggesting instead that the jurists were merely playing by the rules of the game in politely perpetuating the fiction which "assumes the smoothly functioning adjudicative system where sentence is not determined until after the PSR has been received by the judge."<sup>2</sup> The study then recommends, like Witztum, that PSR's be waived for cases involving sentence bargaining. In a revolutionary proposal which would pose more legal and ethical problems than it would solve, the article concludes with a suggestion that the

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<sup>1</sup>Carol Gerstl, "Presentence Reports: Utility or Futility?" Fordham Urban Law Journal, no. 2 (1973-74), p. 41. Kingsnorth & Rizzo found 40 percent of plea bargained cases to contain sentence bargains. Like Witztum, their sample was drawn from the year 1972, but a continent away.

<sup>2</sup>Ibid., pp. 34-37.

admittedly understaffed probation department perform pre-pleading investigations on every defendant in felony court prior to conviction!<sup>1</sup>

#### The Economic Development Council

In 1977, a citizen's group funded by the private sector, the Economic Development Council, produced an "Organization Report on the New York City Department of Probation" after conducting some 200 interviews of probation staff. However, the usefulness of the Report is marginal at best, because the Task Force was unaccountably denied "access to case records, observations of case worker interviews and...raw material"<sup>2</sup> and was specifically "not permitted to examine...presentence records."<sup>3</sup> In a methodological leap of faith, the Report first allows that "without hard information on the actual impact of PRSs on the sentences imposed by judges, it is difficult to assess their real worth,"<sup>4</sup> but then nevertheless proceeds to evaluate the PSR based on interviews of dubious reliability with P.O.'s and administrators:

A substantial part of each report merely repeats or embellishes upon information already in the court papers. For example, a major felony repeat offender, age 35, whose sentence and plea has already been agreed upon, might be the subject of an 8 page single

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<sup>1</sup>Ibid., pp. 46-53.

<sup>2</sup>Economic Development Council, Organization Report on the New York City Department of Probation (New York, 1977), p. iv.

<sup>3</sup>Ibid., p. 72.    <sup>4</sup>Ibid., p. 44.

space PSR which includes 3 pages of his past criminal record (already in the NYSID printouts) and such "social" information as his high school education, past employment, early family life and personal drinking habits.<sup>1</sup>

The E.D.C. "study" then questions the value of assigning "substantial resources" in adult courts to investigations, noting "many unit supervisors and branch chiefs...seriously questioned the value of PSIs," while "many P.O.'s and their supervisors...have little confidence in the influence of PSRs--an attitude which affects their morale and perhaps even the work product."<sup>2</sup>

There are a number of points to make here. First, the claim that the PSR merely repeats information about the defendant's criminal record already known to the court is a serious distortion of the truth. The authors fail to mention that the NYSID printouts (an acronym for New York State's computerized criminal "identification and data system") available to the judge contain no details of the arrest and often lack dispositional data, two shortcomings remedied by the PSR (see Chapter VI for a discussion of judicial reaction to deleting this data). They also ignore the consistent findings of both critics and apologists of present sentencing practices that a defendant's prior criminal record is invariably the first or second most important factor weighed by sentencing judges. Secondly, "social" information on defendants promised state prison sentences has utility for prison

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<sup>1</sup>Ibid.    <sup>2</sup>Ibid.



officials and the parole process. The E.D.C.'s blithe assurance that "the State correctional authorities reportedly perform their own investigations and classifications" and that the "use of the investigation's report by other agencies, an ancillary benefit, has...been more 'potential' than actual,"<sup>1</sup> is quite simply, not true. Proof of the "ancillary" value of PSRs was provided anew in 1981 when pro forma PSRs (instituted to quickly process defendants out of overcrowded detention centers--see Chapter VI) caused numerous complaints by correctional and parole officials. In fact, parole officers rely heavily on PSRs in conducting their own pre-release reports, which focus only on residence and employment prospects. Thirdly, the reported low morale of probation investigators might not be a product of their perceived lack of impact but due to other factors (such as low pay, overwork and sagging prestige) affecting their self evaluation.

In the final analysis, the E.D.C. makes an excellent suggestion when it contrasts an uncited "state sampling reported by the State Division of Probation in which sentence promises were changed about 20 percent of the time after receipt of a PSR" with "other informal estimates--as low as 5 percent"<sup>2</sup>--and calls for an empirical six month study of PSR's in Supreme Court, supplemented by a polling of judges to find out "what causes changes in prior sentence promises."<sup>3</sup> This exemplary proposal continues to gather dust nine years after the fact.

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<sup>1</sup>Ibid.    <sup>2</sup>Ibid.    <sup>3</sup>Ibid., p. 67-69.

As the 1970s wore on, public pressure for a more retributive, incapacitating response to continuing high violent crime rates led to numerous amendments to New York State's indeterminate sentencing structure, limiting plea bargaining and increasing penalties for drug dealers and second and third offenders (1973), violent and juvenile offenders (1978) and fixing longer minimum state prison terms (1978).<sup>1</sup>

#### The Morgenthau Committee

Against such a backdrop and amid escalating dissatisfaction with sentencing disparity in New York State, Governor Carey in 1978 appointed the Executive Advisory Committee on Sentencing (the "Morgenthau Committee") to "evaluate the effectiveness of the existing laws relating to imprisonment, probation and parole in achieving sentencing goals."<sup>2</sup> The Committee found a sentencing system "marked by inconsistency and unjustifiable disparity," partly because the "vast discretion" exercised by judges was "nearly immune from review" and partly because "the penal law presents no coherent set of goals to guide the sentencing decision."<sup>3</sup> The blame for disparity

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<sup>1</sup>See New York State, Chapter 481 of the Laws of 1978; Penal Law, Sections 10.00, 30.00, 60.10 and 70.05; N.Y.S. Criminal Procedure Law, Sections 1.20, 180.75, 190.71, 210.43, 220.10, 300.50, 330.25, 720.10, 725.00, and 725.20. See also Joan Edith Nufield, "The Allocation of Sentencing Power in New York State, 1964-1970," (Ph.D. dissertation, State University of New York, Albany, 1979), p. 180-212, which details the first step in this process, the 1 September 1967 amendments in the penal law which decreased the discretion of the parole board by collapsing maxima-minima.

<sup>2</sup>Morgenthau Committee, Report, p. ii.

<sup>3</sup>Ibid., p. vii.

was also imputed to the usurpation of sentencing powers by parole boards and to the "mechanical, inaccurate and unfocused" PSR,<sup>1</sup> which "fails to provide the basis for informed use of judicial discretion, or to bring the sentencing decision the order and structure which the penal law itself lacks."<sup>2</sup>

Like previous critiques of the PSR, the Morgenthau Committee's Report not only blames PSRs for contributing to sentencing disparity, but simultaneously labels them superfluous to the sentencing decision because of bargained sentences. Clearly, the reports cannot be both at the same time, but this logical inconsistency appears not to have been recognized by the Committee. Variations on this basic contradiction permeate the entire Committee's treatment of probation investigations (analysis of this confusion suggests a final paradigm for classification of the literature on the PSR presented below), reflecting quite accurately a basic confusion which has been introduced into the literature during the past decade.

Decrying the "all or nothing" dichotomy in sentencing (incarceration or probation), one of the Committee's key proposals called for expanded utilization of "intermediate dispositions-- including restitution, day fines and community service."<sup>3</sup> To this end the Committee called for "encouraging and developing these community-based programs on a state-wide basis" by making "a single state agency responsible" for creating them.<sup>4</sup> The dearth of

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<sup>1</sup>Ibid., p. 37.    <sup>2</sup>Ibid., p. 38.

<sup>3</sup>Ibid., p. xv.    <sup>4</sup>Ibid., p. 149.

sentencing alternatives and the resultant use of probation as a "catch-all disposition,"<sup>1</sup> were both attributed to one salient factor: presentence reports; and to remedy the problem the Committee recommended that the investigative function be stripped from the probation agency entirely.

Furthermore, the Committee attacked PSRs in general because they "do not describe treatment alternatives nor--even more important--do they state whether the offender needs probation services," which leads to overuse of probation "for offenders who need no supervision and for whom another community sanction...would be more appropriate."<sup>2</sup> Thus the Committee claimed that "insufficient attention is paid to assessing the needs of potential candidates for probation or determining what programs could best meet those needs. As a result, community sanctions other than probation have never been energetically or systematically developed across the state."<sup>3</sup> Here, the Committee is clearly presenting a prescription for a treatment oriented report. In fact, it recommends that the presentence investigation function should be "prepared by court investigators," and not by P.O.'s, for two interrelated reasons.

First, it argues such a change would allow probation

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<sup>1</sup>Ibid., p. 100.

<sup>2</sup>Ibid., p. 97. Yet in the Committee's Appendix, a survey of judges (pp. 242-46) found "most judges, but not all, say the PSR or the Probation Department does inform them (of suitable alternative programs of non-incarceration sentence)."

<sup>3</sup>Ibid., p. 102.

departments to concentrate on doing the real work of probation:

"providing social services to probationers."<sup>1</sup> Yet, in urging such a radical step, the Committee nowhere asks (let alone resolves) the question of how "court investigators" will be better able to assess the treatment needs of offenders. If the PSI is to be conducted by court functionaries, how are they to develop treatment plans when pressured by judges to sculpt reports to conform to organizational pressures? (The Committee, with perhaps unintentional irony, argued that investigators "responsible to the Chief administrative judge" would be more "responsive to the needs" of the courts.)<sup>2</sup> Indeed, elsewhere the Committee complains that probation spends too much of its resources servicing the courts when it should be servicing probationers, without recognizing the organizational and theoretical pressures which made this preeminent concentration on presentence reports inevitable. But despite all this lip service to "treatment," the Committee's prescription for the presentence report completely jettisons the rehabilitative reasoning presented above:

A presentence report...should primarily present information relating to the offender's criminal history and facts relating to the offense. It would include an indication of the applicable guideline sentence and elucidate any factors which might suggest that a sentence outside the guidelines would be appropriate.<sup>3</sup>

Such a proposal is based on the Committee's belief that the

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<sup>1</sup>Ibid., p. 148.    <sup>2</sup>Ibid., p. 147.    <sup>3</sup>Ibid., p. 148.

"nature of the current offense and prior criminal history are the most important determinants" in assessing any sentence,<sup>1</sup> particularly under the revised "justice model" system of sentencing guidelines and presumptive parole which they envisage. This type of report, the Committee suggests, would eliminate extraneous variables from interfering in the sentence recommendation: "...individual P.O.'s make [recommendation] decisions on an ad hoc basis...[F]actors such as the probation department's own supervisory caseload and its perceptions of the judge's customary sentencing practices may strongly influence P.O.'s recommendations."<sup>2</sup>

So strongly does the Committee feel about these unwarranted considerations impinging on sentencing that it offers as another reason for transferring PSR production to court investigators the following strong words: "[We] are also convinced that probation departments should not be afforded the opportunity to determine the size of their own caseloads through their recommendations regarding who and who would not be placed on probation."<sup>3</sup> One might be likely to conclude from the above discussion that the Morgenthau Committee posited much power of influence in the report and its recommendation. Paradoxically, it argued from the opposite perspective when it suited its purpose:

...the presentence report is seldom more than a prolix offender biography which recites facts having little relevance to the sentencing decision. Other features of the report, notably the offense description and criminal record, are largely drawn from

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<sup>1</sup>Ibid., p. 37n.    <sup>2</sup>Ibid., p. 38.    <sup>3</sup>Ibid., p. 148.

the essentially duplicate information in the prosecutor's file...[t]he reports [have been found to be] lacking in necessary sentence and treatment recommendations.<sup>1</sup>

Finding the reports "often irrelevant to the sentencing decision to be made," the Committee argued that sentence bargaining severely undermined their utility,<sup>2</sup> and, without integrating such a proposal into their other prescriptions, they recommended "more extensive use of preplea reports."<sup>3</sup>

The Committee's findings are based primarily on the previous studies which we have detailed earlier. It quotes liberally from the non-empirical Economic Development Council's study and uses other similarly tainted sources (Board of Correction report, Witztum, Mayor's Committee, Hughes Committee). The only examples it cites to justify its proposal that probation not be allowed to determine its own intake (by manipulating recommendations) are the 1927 and 1938 New York State Crime Commissions, both of which refer to the New York City Court of Special Sessions, then a misdemeanor court, which was under fire from the public and politicians alike for granting too many probation sentences in 1926!<sup>4</sup>

Perhaps the most glaring methodological weakness of the Morgenthau Committee's overview of probation can be found in its utilization of the only original empirical data it generated--a survey

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<sup>1</sup>Ibid., p. 37.    <sup>2</sup>Ibid., pp. 37-38.    <sup>3</sup>Ibid., p. 149.

<sup>4</sup>Ibid., p. 197n. Its Appendix Survey finds only 23 percent of judges and 17 percent of prosecutors feel P.O.'s might "sometimes" be swayed in their recommendations by caseload considerations. In

of the actors in the plea bargaining process conducted by Louis Harris in late 1978. In the main body of its report, the Morgenthau Committee states: "criminal justice practitioners throughout the state--and particularly in New York City-- question the accuracy of the reports"<sup>1</sup> and then refers the reader to the Appendix for validation. On the contrary, the Appendix reveals: "Most judges and prosecutors believe information in the presentence reports to be generally accurate."<sup>2</sup> And, further: "[f]ew judges and prosecutors, downstate or upstate, criticize the report as usually inaccurate. Only 10 percent of downstate judges and 17 percent of downstate prosecutors find the PSI to be only sometimes accurate."<sup>3</sup> And lastly: "Most judges and prosecutors believe the reports are 'almost always' or 'usually' accurate" while "many defense attorneys question the reports' accuracy" although they admit "they are less likely to challenge information on the defendant's background--perhaps to emphasize mitigating factors or to make an argument for probation."<sup>4</sup>

Elsewhere in the main body of their Report, the Committee complained that "the offense description and criminal record" features

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fact, this is one of the more spurious suggestions in the entire Morgenthau Report since it seriously distorts the entire thrust of probation history in this regard. Probation has consistently fought to make probation a selective sentence and to weed out those offenders for whom it would not be appropriate. Indeed, the PSI was originally developed for this very reason, as noted in Chapter I above. The impetus to use probation indiscriminately comes from other quarters--from judges and ADA's who use probation as a dumping ground to avoid troublesome or risky prosecutions or to avoid difficult sentencing decisions.

<sup>1</sup>Ibid., p. 37.    <sup>2</sup>Ibid., p. 225.    <sup>3</sup>Ibid., p. 228.

<sup>4</sup>Ibid., pp. 227-28.



of the report were worthless rehashes<sup>1</sup> of information already known to the participants. But Louis Harris' summary of his survey on presentence investigations is, in many ways, the direct opposite of the Committee's reported findings, providing us with yet another example of a government body refusing to be confused by the very facts it had collected:

In sum, most judges and prosecutors feel that the presentence investigation reports are generally accurate; provide valuable information, particularly on the defendant's prior record; should contain sentence recommendations by trained P.O.'s...<sup>2</sup>

Furthermore, the emphasis which New York PSRs place on a defendant's "legal history" is, in fact, largely justified by the following finding of the Harris survey:

Almost half the judges and prosecutors list the defendant's prior record as the 'one item of information most valuable to you' [in the PSR]. The survey reveals that the length or seriousness of the defendant's prior record is important to judges in several respects. Judges indicate that the prior record is the most likely reason they might decide not to impose probation as a sentence and is the major reason judges give for not following a prosecutor's sentence recommendation.<sup>3</sup>

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<sup>1</sup>Quoting in full the paragraph from the E.D.C. report we quoted above on p. 80--and if the reader will remember, the E.D.C. source was a disgruntled probation supervisor's unsupported feeling.

<sup>2</sup>Ibid., p. 239.   <sup>3</sup>Ibid., p. 226

But if the sentence bargain is arranged at plea and if the PSR merely "repeats or embellishes upon information already in the court papers,"<sup>1</sup> then why would judges and prosecutors value such "rehashes" so highly? The answer, we suggest, is that the PSR often provides more detail, more analysis and more verification of the defendant's prior record than what was available to the sentence bargain participants at time of plea. One obvious example is information on subsequent arrests and convictions not reported in the computerized printouts which date from inception of the present prosecution and therefore do not reflect arrests that occurred while the defendant was awaiting trial. Other examples: details of past crimes; details of out-of-state and out-of-city convictions and arrest histories; details on federal arrests frequently omitted from "rap" sheets; details on parole and probation supervision; etc.<sup>2</sup>

Another case in point involves probation officers' recommendations which the Committee (as per Witztum) rated as useless and flawed. But the survey participants did not express this view at all:

The most important reason why judges and prosecutors favor specific sentence recommendations in the presentence investigation

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<sup>1</sup>Economic Development Council, p. 44.

<sup>2</sup>An ancillary finding of the survey was that "prosecutors are three times as likely as judges to list family and job background as the most valuable item of information in the presentence report (30 percent vs. 6 percent in NYC)" while the reverse proportion was found regarding the value placed on description of the offense, with judges more likely than prosecutors (by a ratio of 32 percent to 17 percent in NYC) to find this information of great value. Morgenthau Committee, Report, p. 226.

reports is the belief that those who conduct the investigation are more familiar with the defendant's background and the circumstances surrounding the commission of the crime...only 6% of judges complain about the quality of report preparation or personnel as a reason (for not wanting recommendations).<sup>1</sup>

It is true that Harris found defense attorneys to be 'much more likely than others to question the quality of the reports or the P.O.'s who prepare them.'<sup>2</sup> This holds true for every question in the survey. Their displeasure might be an indication of support for Blumberg's contentions that judges use PSRs and P.O.'s as "crutches" in imposing sentence. But it might also indicate the defense attorney's disgruntlement at being "left out of the action." The investigating P.O. is least likely to contact the defendant's lawyer because, unlike the judge's court file, the assistant district attorney's prosecution file and the police officer's arrest file, the attorney has no hard information to offer. This also means that since the defense counsel's familiarity with the details of the crime are limited by whatever discovery motions and the defendant's statements have garnered prior to the plea, the attorney is likely to be presented the fullest account of the crime only minutes before sentencing is imposed--when the PSR is made available by the court. Unlike the P.O. however, the defense counsel has rarely interviewed the complainant or the arresting officer or researched details of previous arrests and so will be at a disadvantage in arguing

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<sup>1</sup>Ibid., pp. 230-31.    <sup>2</sup>Ibid.

mitigation on the facts of the crime. Thus, the attorney will be more likely to concentrate on the social background of the report in arguing mitigation or in casting doubt on the report's "validity," since his client's social circumstances are least likely to be known to the ADA, and most likely to be familiar to defense counsel.

In any event, the anti-probation animus of the Morgenthau Committee is further elucidated by a study of its portrayal of the plea bargaining process. In perhaps the best description of the practice of sentence bargaining in New York City felony courts today, the Committee compares the process to the method of settling a civil lawsuit prior to trial:

...the prosecutor, defense attorney and judge act as a surrogate jury; by assessing the evidence in relation to the seriousness of the offense and the defendant's prior record, they arrive at a charge and sentence agreement which they deem to be appropriate in light of what they could reasonably expect to happen if the case proceeded to trial.<sup>1</sup>

In such a system the image of a magisterial above-the-battle judge poring over PSRs in order to arrive at a proper disposition would, of course, be absurd. But just as absurd is the Committee's attempt to absolve prosecutorial decision-making from any share of the blame for the sentencing disparity it so loathes. The Harris survey, for instance, found that "about half of the (polled) prosecutors held the belief that their sentence recommendations were 'almost always' or

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<sup>1</sup>Ibid., p. 27.

'usually' equivalent to the final sentence."<sup>1</sup> Yet, how prosecutors arrive at their recommendations received scant attention from the Committee, which preferred to utilize the artificial and spurious device of a "simulation approach" whereby judges--unencumbered by defense attorney arguments, ADA or probation recommendations--were asked to read randomly chosen PSR's and then impose the best sentence.<sup>2</sup> Would the incredibly disparate results have been any less disparate if prosecutorial decision-makers were administered a comparable instrument? Since the Committee failed to do so, we can not answer that question.

In addressing the related subject of long-standing judicial reluctance to supervise prosecutorial discretion, law professor Abraham Goldstein points out that traditional unchecked prosecutorial powers have resulted in: "the distorting effect of inaccurate pleas;" misleading defendants who plead to lesser charges but who are often sentenced for the "real" offense, rather than the adjudicated one; and relying on ad hoc "correctional factors as a basis for choosing or retaining a charge," thereby frustrating "the effort to make sentencing more rational by relying on...presentence reports."<sup>3</sup> Indeed, the leading legal scholar in this area, Albert Alschuler, has noted that prosecutors are usually "unaware of information that even a routine pre-sentence investigation would have uncovered."<sup>4</sup>

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<sup>1</sup>Ibid., p. 193.    <sup>2</sup>Ibid., p. 193.

<sup>3</sup>Goldstein, The Passive Judiciary, pp. 44, 60, passim.

<sup>4</sup>Albert W. Alschuler, "The Trial Judge's Role in Plea Bargaining," Columbia Law Review 76 (1976): 1059.

Finally, another compelling argument for the utility of presentence reports can be found in the Harris survey's discussion of judges' opinions on prosecutorial recommendations:

Judges whose sentences do not always coincide with the prosecutor's recommendations were asked [why]...many judges cite mitigating circumstances of the case. One judge cited, "the facts and feel of the case." Another cited, "factors revealed in the presentence report, of which the prosecutor is unaware." Several judges expressed a concern that the prosecutor's recommendations are often too severe a sentence, "not taking all these (mitigating) factors into consideration." Another judge commented that "the prosecutor nearly always recommends incarceration in every case. I personally believe I should attempt to take into account...the individual case."<sup>1</sup>

In assessing the bias of the Morgenthau Report it is interesting to note that in its survey of the "actors" in the plea bargaining process, it excludes what Susan and Leonard Buckle have referred to as "the only non-lawyer professional in a lawyer dominated community"<sup>2</sup>--the probation officer.

The Morgenthau Committee's recommendations constituted one of four independent proposals made during a five year span to strip the PSR function from probation and transfer it to the courts or to a

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<sup>1</sup>Morgenthau Committee, Report, p. 193. Ibid.

<sup>2</sup>Susan R. and Leonard Buckle, Bargaining for Justice: Disposition and Reform in the Criminal Courts (New York: Praeger Publications, 1977), p. 153.

not-for-profit agency. In 1977, the New York State Division of Criminal Justice Services promulgated as part of its criminal justice standards that "[p]resentence investigation and ROR investigation should be handled by an independent agency under the jurisdiction of the courts separate from the probation department."<sup>1</sup>

A committee of criminal lawyers from the New York bar, in a report on the New York City court system, also argued that probation understaffing and underfunding made transfer of the PSR function to the courts a sensible suggestion.<sup>2</sup>

#### The Correctional Association

The most recent call for the removal of probation departments from the sentencing process comes from a 1982 report of the Correctional Association of New York, the major focus of which was the "crisis in our jails and prisons."

In a case of the blind leading the blind, the Correctional Association cites the Morgenthau Committee citing the Economic Development Council citing some disgruntled probation supervisors as "evidence" that PSR's "concentrate on superficial background information and criminal histories and generally do not attempt to formulate a specific post-conviction program."<sup>3</sup> In a charge lifted

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<sup>1</sup>New York State Division of Criminal Justice Services, "State Standards and Goals for Criminal Justice Corrections," Albany, N.Y., 1977.

<sup>2</sup>"For the Record," The Chief (New York City civil service newsweekly), 31 July 1981, p. 4.

<sup>3</sup>Correctional Association of New York, The Prison Population Explosion in New York State : A Study of the Causes and Consequences with Recommendations for Change (New York, 1982), p. 71.

whole cloth from the Morgenthau Report, the Association complains that PSRs do not inform judges of suitable non prison programs for offenders, but praises the purported success of "client specific planning models" which are prepared by the Legal Aid Society in New York City in order to "set out a program for [the offender] designed to ensure the future lawful conduct of the defendant and to serve the interests of others...such as the defendant's family and the victims of the crime."<sup>1</sup> The Association thus urges transfer of the investigative function to court administrators or a public benefit corporation, since it feels "a prerequisite for an effective presentence and pre-plea investigation system is the removal of this function from already overburdened departments."<sup>2</sup>

#### The PSR in New York: A Summary

It appears that recent overviews of the PSR in New York have confounded and misused prior studies of the subject for polemical reasons in an effort to: 1) accommodate the judiciary by urging that the PSI function be subsumed under the court administration; and 2) seize greater control of a device which could be used to better regulate jail and state prison intake. These issues will be explored at greater length in Chapter VI in connection with the 1981 jail overcrowding crisis in New York City.

Finally, it will be useful to point out in tabular form the basic dichotomy which exists in the recent literature on this topic, noting that a focus on sentencing disparity and P.O. decision-making

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<sup>1</sup>Ibid., p. 72.    <sup>2</sup>Ibid., p. 74.



usually employs federal courts as the paradigm, while an emphasis on the futility of PSRs because of sentence bargained dispositions is always associated with research on the state court level. Our review clearly illustrates that these two paradigms are mutually exclusive, although many writers continue to inappropriately combine the two because of an unfamiliarity with the day to day work flow of the different courts. This ignorance of the many informal rules which hold sway in the sentencing process accounts for some of the erroneous findings in this field to date.

TABLE 2

## SUMMARY OF PSR LITERATURE

<u>STUDY</u>	<u>Federal Courts: Disparity/Discretion &amp; P.O. Decision-Making</u>	<u>State Courts: PSR's Futility</u>	<u>Data Base</u>
San Francisco Project	Yes		300 PSR's & Decision Games
John Coffee	Yes		Review of Lit.
Willard Gaylin	Yes	No*	Interviews with Judges
Abraham Blumberg		Yes	Observation
Witztum Report <sup>+</sup> -		Yes	300 PSR's
Kingsnorth/Rizzo <sup>+</sup> -		Yes	300 PSR's
Board of Correction <sup>+</sup>		Yes	Review of Lit.
Correct'l Ass'n. <sup>-</sup>		Yes	Review of Lit.
Econ. Develop. Council		Yes	Interviews w/P.O.'s
Morgenthau Committee <sup>+</sup> -	Yes <sup>o</sup>	Yes	Interviews w/Judges, ADA's
Hughes Committee <sup>+</sup>	Yes <sup>o</sup>	Yes	Interviews w/ Inmates
Wilkins & Carter	Yes		Decision Games
Wood & Sparks	Yes		Review of Lit.
Hogarth/Hagan	Yes (Canadian)		PSR's

\* Both state and federal judges interviewed.

<sup>+</sup> Urges increased use of PPI's (pre-pleading investigations).

<sup>-</sup> Urges probation be divested of investigative function in order to concentrate on supervision.

<sup>o</sup> Based on study of state courts.

## CHAPTER IV

### RESEARCH DESIGN AND METHODOLOGY

#### Hypotheses and Definitions

Blumberg, Kingsnorth and Rizzo, Witztum and others argue that presentence reports have little impact on the sentencing judge-- not because of the reports' assertedly 'mechanical, inaccurate and unfocused' nature<sup>1</sup> and 'deficient techniques of fact-gathering'<sup>2</sup>--but because once the plea and the accompanying sentence have been bargained, the parties involved (judge, defense attorney and assistant district attorney), intent on 'moving things along,' are loathe to amend the sentence promise lest they jeopardize the plea. Secondly, amending the sentence promise would also run counter to the United States Supreme Court's dicta in the McMann, Alford, and Santobello decisions that a plea bargain not kept is a conviction which can be reversed. Thirdly, it is argued from a purely bureaucratic perspective that the courtroom participants in the plea bargaining process are reluctant to amend the sentence promise based solely on a report delivered by a 'non-lawyer professional'--the probation officer.

Based on my daily experience as a probation officer for more

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<sup>1</sup>Morgenthau Committee, Report, p. 37.

<sup>2</sup>Frankel, Criminal Sentences, p. 33.

than ten years, there is certainly much to support such arguments. However, I am also aware of many cases where the plea bargain has broken down or the sentence promise has been amended, based principally on the efforts of an "in-depth" presentence investigation by the probation officer. I suggest two hypotheses to test the arguments pertaining to the PSR's futility:

- H<sup>1</sup>= The court is more likely to agree with a presentence report which recommends a sentence to probation than it is to agree with a presentence report which recommends prison, because a judge is more likely to amend a promised sentence to a less severe outcome than a more severe outcome due to the primacy of legal constraints.
- H<sup>2</sup>= A high quality presentence report has a significant impact upon the actual sentence imposed for convictions wherein a specific sentence is promised by the court at the time of plea.

On the other hand, Coffee, Cohen, Hagan and others have argued that the PSR contributes to sentencing disparity because of unchecked P.O. discretion in framing the PSR. In addition to the PSR, however, critics have identified legal, extra-legal, organizational and extraneous variables as sources of sentencing disparity, such as sex, race, financial/employment status, custodial status, type of legal representation, judicial temperament, publicity, and defendant recalcitrance.

In order to test whether the impact of the PSR is overshadowed by demographic/legal variables contained within it, I have framed the following hypotheses:

- H<sup>3</sup>= The PSR's recommendation and the court's sentence are strongly correlated with the severity of the offense, criminal history, and custodial/employment status of the defendant.

- H<sup>4</sup>= The PSR's recommendation and the court's sentence are not correlated with sex, age, race, legal representation, or financial status of the defendant.
- H<sup>5</sup>= Sentences which are not correlated with sentence promise, or PSR recommendation or ADA recommendation are explained by extraneous variables.

Lastly, our statistical analysis will be supplemented by case studies of those dispositions in which promise, recommendation and sentence appear to be anomalous. Whenever possible, plea minutes were obtained and the probation officer and assistant district attorney assigned to each case were interviewed to supplement the written record in an effort to identify extraneous variables not controlled for in this study.

### Methodology

There were 3,177 PSIs assigned to probation officers by Brooklyn Supreme Court judges during calendar year 1979. (About 150 modified PSIs were also completed for other jurisdictions, primarily involving defendants residing in Brooklyn but convicted in other states; these cases were eliminated from consideration).

Since I decided to study each PSI in depth, extract over 40 variables for each case, and computerize the data, it would have been prohibitively time consuming to select the entire universe of Brooklyn Supreme Court PSIs for analysis. Therefore, I used a random sampling technique to chose 283 cases for the study group and 57 cases for the control group. These 340 cases represent 10.7 percent of the PSIs requested by the Court for the year.

The probation branch in question assigns a case number to each

judicial order for investigation as it is received. To choose my sample, I obtained a listing in numerical sequence of every PSI assigned and arbitrarily selected the eighth PSI assigned during 1979 as the first candidate for selection. Thereafter, I chose every eighth number until I had accumulated 353 numbers. I then obtained the corresponding indictment numbers for each of these 353 cases from the clerk's log. Armed with this list of indictment numbers, I attempted to locate every judge's file for these cases in the record room of Brooklyn Supreme Court in order to obtain the plea minutes and note the case processing particulars of each case. If the case file did not contain a transcript of the plea elocation, I later attempted to obtain these details from the corresponding assistant district attorney's file. If the court folder or assistant district attorney's file indicated that no sentence promise had been made at the time the plea was entered -- or that the conviction was the result of a trial, the case was selected for inclusion in the control group.

Because of the unavailability of court, ADA or probation case folders, 43 cases had to be eliminated, leaving a total of 310 cases. Because of the low number of cases accumulated at that point for the control group (only 27, of which 15 were trials and 12 were pleas with no sentence promise), I randomly selected 20 additional trial convictions for inclusion in the control group from a list of trial cases noted in the probation log and located each of the folders. I then was forced to peruse 280 more randomly selected court files before I could locate 10 additional cases wherein a defendant had pled guilty but received no sentence promise. The final sample of 340

cases was then analyzed to determine whether they were truly representative of the universe of PSRs:

TABLE 3  
COMPARISON OF SAMPLE WITH POPULATION

	Sample	Population <sup>3</sup>
	N=340 (12.1%)	N=2,803 (100.0%)
Conviction by Plea	N=304 (89.3%)	N=2,523 ( 90.1%)
Conviction by Trial	N= 36 (10.7%)	N= 280 ( 9.9%)
Predicate Felony Offender	N= 43 (12.6%)	N= 287 ( 10.3%)*
Youthful Offender	N= 53 (16.1%)	N= 317 ( 11.3%)*
Plea Withdrawn	N= 15 ( 4.4%)	N=Not Recorded**
<u>By Disposition</u>		
Discharge/Fine/Other	N= 14 ( 4.3%)	N= 221 ( 7.9%)
Probation	N=149 (45.8%)	N= 789 ( 28.1%)
Jail Term***	N= 53 (16.3%)	N= 234 ( 8.3%)
State Prison	N=104 (32.0%)	N=1,559 ( 55.6%)

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\*Pro-rated for King's County based on reported City-wide share.

\*\*My research of probation records found a total of 75 pleas withdrawn during calendar year 1979, or 2.4% of all dispositions.

\*\*\*Includes those sentenced to a period of probation following a jail commitment.

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The sample is difficult to compare with the total population for a number of reasons. First, the statistics compiled by the State from Kings County do not include misdemeanor convictions, which

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<sup>3</sup>New York State Department of Criminal Justice Services, New York State Criminal Justice Processing, Felony Offenders Disposed in 1979 (Albany, 1982), pp. 13, 136-37.

represent almost eight percent of the sample. Since a prison sentence is impossible for a misdemeanor conviction, this would appear to account for some of the under-representation of prison sentences in our sample. For example, Probation records indicate 3,177 convictions were recorded for the year. The 1,559 prison sentences recorded by the State would thus represent 49.1 percent of this total, in contrast to the 55.6 percent share of felony dispositions only. However, the difference between our sample and the population, even adjusted for the omission of misdemeanor convictions in the prison category (32.0% versus 55.6%) is still significant. Moreover, probation sentences and youthful offender adjudications appear to be over-represented in the sample. The reason for this is unclear. A sampling error might have favored selection of defendants in the study group for whom a prison or jail sentence was not mandatory (e.g., files for defendants sentenced to probation might have been more available for selection than files for imprisoned defendants because of appeals or subsequent indictments pending among this latter group of presumably more criminally active defendants):

TABLE 4  
PROPORTION OF MANDATORY JAIL/PRISON CASES

	<u>Incarceration Not Mandatory</u>	<u>Incarceration Mandatory</u>	<u>Total</u>
Promise Made (Study Group)	248 (88%)	35 (12%)	283 (100%)
No Promise Made (Control Group)	<u>35 (61%)</u>	<u>22 (39%)</u>	<u>57 (100%)</u>
Total	283 (83%)	57 (17%)	340 (100%)



On the other hand, the distribution in our sample, while appearing to be lopsided in favor of non-mandated sentences, might reflect reality in one sense. The control group would be expected to contain a greater proportion of mandatory prison cases because of the trial defendants within that sample (trial convictions usually are associated with more serious charges while plea bargains usually entail, by definition, some form of charge reduction in return for a guilty plea).

Neither the court administration, the State, nor the Probation Department maintained statistics in 1979 which would establish the absolute number of defendants who were convicted of offenses requiring incarceration sentences. However, it is known that in 1980, Kings County Supreme Court sentenced 52 percent of probation-eligible offenders to probation, compared to a City-wide average of 44 percent.<sup>1</sup> Another finding by the New York State Department of Correctional Services--which found that 21 percent of state prison inmates in 1979 were convicted of crimes for which probation sentences could have been imposed<sup>2</sup>--suggests that the disparity in our sample between mandatory and non-mandatory sentences (83% vs. 17%), if caused by sampling error, at least errs on the side of relevance.

A precoded research instrument (see Appendix) was used to

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<sup>1</sup>Unpublished New York State Division of Probation study, referenced in agency memorandum of 18 January 1982, "Proposed 3-Tier Reimbursement."

<sup>2</sup>Executive Advisory Commission on the Administration of Justice ("The Liman Commission"), "Report on Proposals Under Consideration to Address Prison Population Growth and Overcrowding," (March 1982), p. 12.

extract 45 variables from each probation case folder selected. In addition to plea bargaining details, probation and prosecutorial recommendations and sentencing data, other identified legal and extra-legal variables noted in the literature as possibly influential in the sentencing decision were also obtained. These included: the defendant's sex, age, race, employment, marital, citizenship and social status (demographic, or "extra-legal" variables); and the defendant's prior arrest, conviction and community supervision record, custodial status, the type of defense counsel assigned, the status of any co-defendants, the severity of the offense and other case processing data (legal variables).

The recommendation for each PSR is written by the supervising probation officer (S.P.O.), with the recommendation of the probation officer writing the report treated as an intra-departmental document, and not submitted to the court. In examining all 340 files however, we could not locate a single P.O. recommendation which did not agree with the S.P.O.'s recommendation. This is not surprising. Any disagreement between P.O. and S.P.O. is resolved in-house through a conference with the Branch Chief. Rather than involve superiors in such matters, P.O.'s and S.P.O.'s usually thrash out their differences and arrive at a consensus recommendation.

Interviews with P.O.'s, S.P.O.'s, the Branch Chief and my own experience indicate there is rarely any disagreement which is not resolved below the Branch Chief level. (This practice differs substantially in federal court, where the P.O. submits the sentence

recommendation to the court after consulting with the supervisor.)

In collecting data on promises, recommendations and sentences, 13 discrete categories were created with probation broken into four separate categories: "straight" probation (i.e., a term of probation supervision with no incarceration, fine or special condition added), "shock" probation (i.e., a jail term followed by probation supervision), probation with a fine imposed and probation with a special condition imposed (the last category frequently entails a restitution order or a condition that the defendant enter a drug/alcohol/psychiatric treatment program).

In addition, although the N.Y.C. Department of Probation discontinued a practice of recommending specific terms of imprisonment in 1975, data on the length of a prison term promised and actually imposed was collected, in order to determine whether the PSR had any influence on the length of incarcerative sentences.

Finally, youthful offender ("Y.O.") adjudication is a device sometimes used by the court to induce guilty pleas by softening the blow of conviction for younger defendants. I collected data on youthful offender promises, recommendations and adjudications, as an additional means of measuring the PSR's impact more precisely.

Of particular importance, content analysis of each PSR was conducted in order to frame an index of thoroughness for each investigation. Thus, each report was skimmed in order to determine if: 1) the arresting officer or the complainant for the current offense had been contacted; 2) dispositions were obtained on prior

arrests; 3) school records or employment verification had been obtained; 4) parents or spouse of the defendant had been interviewed; and 5) the report contained a concluding evaluation of the defendant's recidivism/rehabilitation potential. A scale of thoroughness was then constructed with a value of one (1) assigned for each of five facets of an investigation completed, and a value of zero for each component not completed. The score for each PSR was then tallied and divided by five: a score of 1 on such an index indicates highest quality and a score of 0 indicates lowest quality. Scores of 1, and .8 were collapsed and considered to be of high quality, while scores of .6, .4, .2 and 0 were also compressed and considered to be of low quality. Low quality reports were hypothesized to have little impact on the court, even in cases where the judge is unlikely to read more than the supervising probation officer's one page recommendation, because it was conjectured that the S.P.O.'s recommendation would be more persuasive in high quality cases than in perfunctory reports, which contained little new information of any interest. For the purposes of this study, I will assume the validity of the findings of the 1966 Federal study of the Northern District of California and many other surveys which report that "some data are dominant as aids to decision making, notably the current offense [our thoroughness component #1 above], prior record [our #2 above], and measures/indicators of stability [our #3 and #4 above]."<sup>1</sup> These findings also conform to common sense.

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<sup>1</sup>Carter and Wilkins, "Some Factors in Sentencing Policy," pp. 513-14.

All of the data was thereafter transferred onto key-punch cards, loaded onto tape and processed through a mainframe computer. The Statistical Package for the Social Sciences software was then utilized to analyze the data. Later this same data was loaded onto a microcomputer and analyzed using other statistical software.

A multivariate analysis of the data was performed to test the validity of the following path diagrams:

DIAGRAM 1

HYPOTHESIZED PATH MODEL FOR CONTROL GROUP  
(No Sentence Bargain)

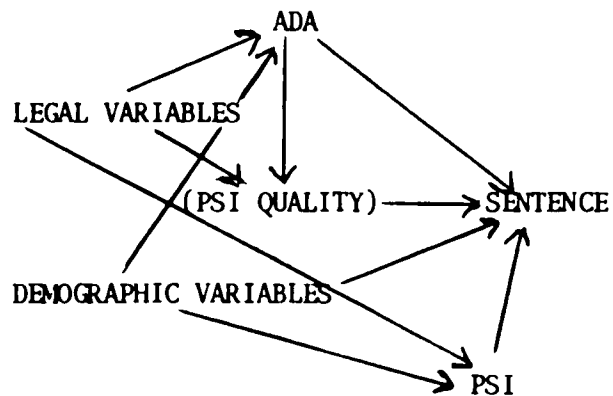
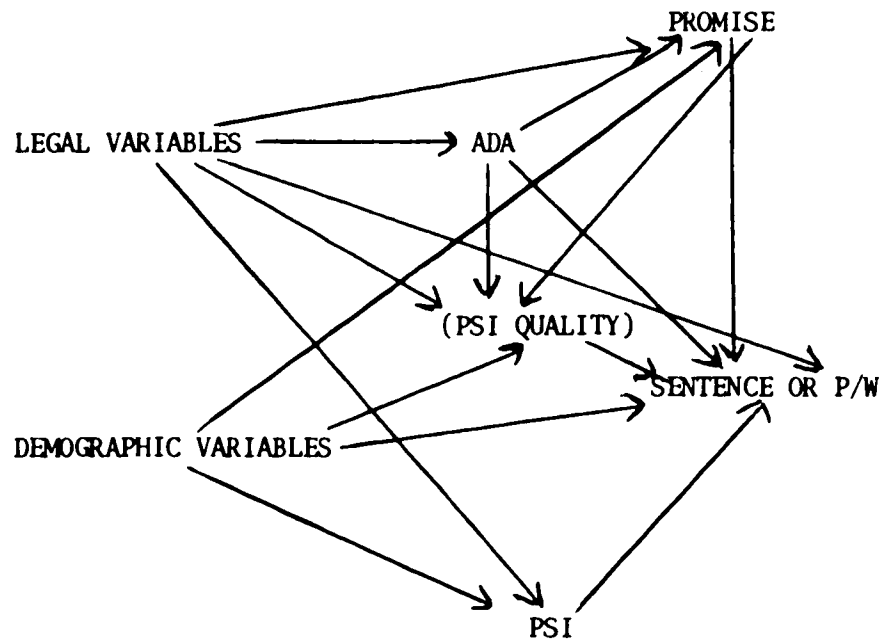


DIAGRAM 2

HYPOTHESIZED PATH MODEL FOR SAMPLE  
(Sentence Bargain)



## CHAPTER V

### FINDINGS

#### Univariate Analysis

In Table 5, the demographic characteristics of the study and control groups are presented. Sample 1 consists of 283 defendants who pled guilty in Brooklyn Supreme Court and were promised sentences of either probation, discharge, fine, city jail (or combination thereof) or state prison. The control group represents 57 defendants who pled guilty but did not receive a sentence promise or who were convicted after trial and faced sentences ranging across the same spectrum of dispositions.

The defendants are largely young black and Hispanic males, unemployed, single American citizens and from the lower class. The control group is significantly older than the study group, owing to the legal factors associated with trial convictees discussed below. Finally, the overwhelming majority of processing agents are male, except for the probation officer, who in 70 percent of the cases was female (however, the supervising probation officer was a male in fully 79 percent of the cases).

TABLE 5

DEMOGRAPHIC CHARACTERISTICS				
Sample 1 (Sentence Promise Made) (N=283)			Control Group (No Sentence Promise Made) (N= 57)	
Variable	Number	%	Number	%
SEX				
-Male	266	94.0%	56	98.2%
-Female	17	6.0%	1	1.8%
AGE				
- Under 19	103	36.4%	11	19.3%
- 19 & Older	180	63%	46	80.7%
- Mean Age	24.0		26.7	
- Median Age	19.5		24.8	
- Mode	17		18	
RACE				
- Black & Hispanic	233	82.3%	45	78.9%
- White	50	17.7%	12	21.1%
CITIZENSHIP				
- USA	258	91.2%	50	87.7%
- Alien	24	8.4%	7	12.3%
- Unknown	1	.4%	0	--
EMPLOYMENT				
- Unemployed/ Incarcerated	190	67.1%	40	70.2%
- Employed/ Student	93	32.9%	17	29.8%
FINANCIAL STATUS				
- Welfare/ Lower Class	160	56.5%	32	56.1%
-Working/ Middle Class	123	43.5%	25	43.9%
MARITAL STATUS				
- Married	31	11%	11	19.3%
- Single	252	89%	46	80.7%



TABLE 5 - Continued

Variable	Sample 1		Control Group	
	Number	%	Number	%
SEX of P.O.				
- Male	83	29.3%	23	40.4%
- Female	200	70.7%	34	59.6%
SEX of Counsel				
- Male	252	89.1%	52	91.2%
- Female	19	6.7%	5	7.0%
- Unknown	12	4.2%	1	1.8%
SEX of ADA				
- Male	219	77.4%	44	79.0%
- Female	35	12.4%	8	14.0%
- Unknown	29	10.2%	5	7.0%
SEX of Judge				
- Male	274	96.8%	55	96.5%
- Female	9	3.2%	2	3.5%
SEX of S.P.O.				
- Male	220	77.7%	49	86.0%
- Female	63	22.3%	8	14.0%

In Table 6, the legal characteristics of the sample are presented. The study group consists largely of first offenders convicted of probation eligible property crimes (class "D" and "E" felonies), usually within six months of indictment, on bail or released in their own recognizance (ROR), with a significant prior history of arrests and community supervision, represented by legal aid and court appointed ("18b") attorneys, and prosecuted by the Supreme Court Bureau of the District Attorney's Office (the "all-purpose" bureau which handles those indictments not referred to other specialized bureaus within the Office, such as the Economic Crime, Narcotics, Major Offender, Sex Crimes and Rackets Bureaus). The majority of these offenders have no co-defendants.

TABLE 6

## LEGAL CHARACTERISTICS

Variable	Sample 1 (Sentence Promise Made) (N=283)		Control Group (No Sentence Promise Made) (N= 57)	
	Number	%	Number	%
<b>CUSTODIAL STATUS of Defendant</b>				
- Bail/ROR	188	66.4%	25	43.9%
- Detention	95	33.6%	31	54.3%
- Fugitive	0	--	1	1.8%
<b>PRIOR ARRESTS</b>				
- None	48	17.0%	8	14.0%
- 1 to 3	99	34.9%	20	35.1%
- 4 to 10+	136	48.1%	29	50.9%
<b>PRIOR FELONY CONVICTIONS</b>				
- None or Y.O.	252	89.1%	43	75.4%
- One or More	31	10.9%	14	24.6%
<b>YOUTHFUL OFFENDER ELIGIBILITY</b>				
- Eligible	73	25.8%	5	8.8%
- Eligible if Mitigation Found	40	14.1%	9	15.8%
- Ineligible	170	69.1%	43	75.4%
<b>CONVICTION MODE</b>				
- Plea	283	100%	21	36.8%
- Trial	0	--	36	63.2%
<b>TIME ELAPSED, INDICTMENT TO CONVICTION</b>				
- 2 Months	105	37.1%	2	3.5%
- 2 to 6 Months	95	33.6%	13	22.8%
- 6 to 12 Months	49	17.3%	26	45.6%
- 12 Months	34	12.0%	16	28.1%
<b>CHARGE REDUCTION</b>				
- None	60	21.1%	26	45.6%
- One Below Top Count	171	60.4%	19	33.3%
- Two or More Below	52	18.4%	12	21.1%

TABLE 6 - Continued

<u>Variable</u>	<u>Sample 1</u> <u>Number</u>	<u>%</u>	<u>Control Group</u> <u>Number</u>	<u>%</u>
<b>SEVERITY OF OFFENSE</b>				
- Class A, B or C Felony	64	22.6%	25	43.9%
- Class D or E Felony	203	71.7%	23	40.4%
- Class A Misdemeanor	16	5.7%	9	15.7%
<b>TYPE OF OFFENSE</b>				
- Property Crime	147	51.9%	13	12.7%
- Violent Crime	78	27.6%	36	63.2%
- Weapon/Drug Possession	58	20.5%	8	14.1%
<b>COURT PART (39 Judges)</b>				
- Conference	78	27.6%	3	5.3%
- Other	205	72.4%	54	94.7%
<b>TYPE of DEFENSE COUNSEL</b>				
- Legal Aid	145	51.2%	20	35.1%
- "18b"	72	25.4%	15	26.3%
- Retained	66	23.3%	22	38.6%
<b>TYPE of ADA</b>				
- Supreme Court Bureau	227	80.2%	37	64.9%
- Specialized Bureau	56	19.8%	20	35.1%
<b>TYPE of SUPERVISING P.O.</b>				
- SPO #1	63	22.3%	8	14.0%
- SPO #2	67	23.7%	12	21.1%
- SPO #3	83	29.0%	12	31.6%
- SPO #4	59	20.8%	17	29.8%
- Other	12	4.2%	2	3.5%

The Control Group differs from Sample 1 in a number of categories which reflect the predominance of trial convictees. Thus, the Control Group is more likely to be in detention, charged with violent crimes, represented by retained attorneys, and convicted of more severe offenses, with a longer case processing time than Sample 1.

TABLE 6 - Continued

<u>Variable</u>	<u>Sample 1</u> <u>Number</u>	<u>%</u>	<u>Control Group</u> <u>Number</u>	<u>%</u>
<u>PRIOR EXPERIENCE OF</u> <u>DEFENDANT WITH PROBATION/</u> <u>PAROLE SUPERVISION</u>				
- None	183	64.7%	35	61.4%
- Lower Courts	64	22.6%	10	17.5%
- Felony Level	36	12.7%	12	21.1%
<u>UNDER PROBATION/PAROLE</u> <u>SUPERVISION AT ARREST</u>				
- Yes	52	18.4%	6	10.5%
- No	231	81.6%	51	89.5%
<u>STATUS OF CODEFENDANT</u> <u>AT TIME OF SENTENCE</u>				
- No Codefendant	201	71.0%	39	68.4%
- Charges Still Pending	57	20.1%	7	12.3%
- Previously Sentenced	25	8.9%	11	30.3%
<u>HOW P.O. OBTAINED DETAILS</u> <u>OF PLEA BARGAIN</u>				
- Not applicable (i.e., trial)	-	--	36	63.2%
- Not Indicated	48	17.0%	5	8.8%
- From Court or ADA	103	36.4%	8	14.0%
- From Defendant	132	46.6%	8	14.0%

The details of the plea bargain noted in the PSI case file were more likely to be obtained from the defendant than from the court or ADA. I found such information to be accurate in 90 percent of the cases compared against ADA and court records, with inaccuracies usually minor in nature. For instance, the P.O. noted a promise of probation reported by the defendant when the actual promise was probation and a fine. (In 1980, a new form was developed by the N.Y.C. Probation Department for the court's use in ordering PSI's, which includes specific details on the nature of any sentence promise.)

In Table 7, data concerning the quality of the PSR's is presented, with the data aggregated to form an index in Table 8. Fully two-thirds of the reports were found to be of high quality (i.e., containing a quality index of .8 or higher), with the P.O. most likely to have obtained dispositions of all prior arrests and to have interviewed the community member closest to the defendant. The reports were least likely to contain statements from the arresting officer or complainant.

TABLE 7  
QUALITY OF THE PRESENTENCE INVESTIGATIONS

Variable	Sample 1 (N=283)		Control Group (N= 57)	
	Number	%	Number	%
<u>ARRESTING OFFICER OR COMPLAINANT CONTACTED</u>				
- Yes	158	55.8%	39	68.4%
- No	125	44.2%	18	31.6%
<u>DISPOSITIONS OF PRIOR ARRESTS OBTAINED*</u>				
- Yes	255	90.1%	56	98.2%
- No	28	9.9%	1	1.8%
<u>SCHOOL OR EMPLOYER CONTACTED</u>				
- Yes	213	75.3%	41	71.9%
- No	70	24.7%	16	28.1%
<u>FAMILY MEMBER/ROOMMATE OF DEF. INTERVIEWED</u>				
- Yes	236	83.4%	46	80.7%
- No.	47	16.6%	11	19.3%
<u>EVALUATION PRESENTED OF DEF.'S FUTURE ADJUSTMENT</u>				
- Yes	191	67.5%	35	61.4%
- No	92	32.5%	22	38.6%

\*For those cases involving defendants with no prior arrests (N=56), a substituted criterion--obtaining a copy of the police ballistics/laboratory report for weapon/drug possession cases, or obtaining a synopsis of the indictment from the ADA--was employed.

TABLE 8

QUALITY INDEX  
(An average of 5 components  
listed above for each PSR)

- Poor (0)	3	1.1%	0	--
- Minimal (.2)	18	6.4%	2	3.5%
- Low Avg. (.4)	30	10.6%	5	8.8%
- High Avg. (.6)	44	15.5%	12	21.1%
- Low Impact	95	33.5%	19	33.4%
- Good (.8)	97	34.3%	21	36.8%
- Excellent (1)	91	32.2%	17	29.8%
- High Impact	188	66.5%	38	66.6%

#### Tabular Analysis

In Table 9, a cross-tabulation of the sentence promised by the court at the time of plea by final disposition, is presented for the study group. (We eliminated those 35 cases where an incarceration sentence was mandated by law.) The promises and sentences are listed in descending order of severity, with the least severe consisting of conditional or unconditional discharge, the most severe consisting of state prison and a line separating non-incarceration from incarceration promises.

There is exact correspondence between promise and sentence in 193 of the 248 cases, for a 77.8 percent agreement rate between promise and sentence. For the 55 remaining cases, 14 (or 5.6%) received less severe sentences than originally promised, 28 (or 11.3%) received more severe sentences than originally promised, and 13 cases

(or 5.2%) resulted in the withdrawal of guilty pleas, for an aggregate 11.1 percent of cases wherein the judge amended or dissolved the sentence promise.

TABLE 9  
PROMISE BY SENTENCE

PROMISE	SENTENCE (N=248)									Tot.
	P/W	Disch	Fine	Prob	Prob+ SpCon	Prob+ Fine	Prob + Jail	Jail	Prison	
Disch		5		(1)						6
Fine			5	(1)						6
Prob.	9	[2]	[1]	104	(16)	(2)	(3)	(2)	(3)	142
P+SpCon						2				2
P+ Fine						4				4
P+ Jail					[1]	[3]		17		21
Un.Incar							[1]	2		3
Jail	2				[1]		[1]	15		19
Prison	2			[1]	[1]			[2]	39	45
Total	13	7	6	108	23	6	22	21	42	248

Promise = Sentence = 193 (77.8%)

Sentence = More Severe = 28 (11.3%) (indicated by ( ))

Sentence = Less Severe = 14 (5.6%) (indicated by [ ])

Plea Withdrawn (P/W) = 13 (5.2%).

Collapsing this table into a dichotomous comparison of incarcerative ("in")/non-incarcerative ("out") promises and sentences (treating probation with a jail term as an incarcerative sanction, and eliminating withdrawn pleas from consideration while including the 35 mandatory sentence cases) reveals a higher rate of congruence:

TABLE 10  
PROMISE BY SENTENCE (FULL DICHOTOMOUS MODEL)

PROMISE	SENTENCE (N=270)		Total
	In	Out	
In	112 (94.1%)	7 (5.9%)	119 (100%)
Out	8 (5.3%)	143 (94.7%)	151 (100%)
Total	120	150	270

Only 15 cases, or 5.5% of the 270 in the sample, received sentences that either eliminated (5.9%) or added (5.3%) incarcerative sanctions originally promised. Eliminating further the 35 cases in the study group whose incarceration was mandatory, produces the following result:

TABLE 11  
PROMISE BY SENTENCE (IN/OUT FOR NON-MANDATORY CASES)

PROMISE	SENTENCE (N=235)		
	In	Out	Total
In	77 (91.7%)	7 (8.3%)	84 (100%)
Out	8 (5.3%)	143 (94.7%)	151 (100%)
Total	98	150	235

In this cross-tabulation, the likelihood of judges to amend "in" promises with less severe ("out") sentences (8.3%) rather than the converse (5.3%) is more evident, since the elimination of mandatory incarceration cases reduces the number of "in" promises (from 119 to 84) but does not effect the number of "out" sentences associated with such promises (7).

In Table 12, a cross-tabulation of the judge's promised sentence by the PSR recommendation is presented for the same group, adding the 13 plea withdrawn cases and providing the same expanded categories detailed in Table 9.



TABLE 12

## PROMISE BY RECOMMENDATION

RECOMMENDATION (N=248)

PROMISE	Disch.	Fine	Prob	Prob+ SpCon	Prob+ Fine	Prob+ Jail	Unsp. Incar	Jail	Pris.	Total
Disch.	2		(3)	(1)						6
Fine	[2]	4								6
Probat.	[4]	[3]	92	(14)	(1)	(1)	(17)		(10)	142
P+SpCon				2						2
P+ Fine		[1]	[1]		2					4
P+ Jail			[3]	[2]		5	(9)		( 2)	21
Un. Incar							3			3
Jail			[3]	[1]			9	3	( 3)	19
Prison			[5]				9		31	45
Total	8	8	107	20	3	6	47	3	46	248

Promise = Recommendation = 162 (65.3%)

Recommendation = More Severe = 61 (24.6%) (indicated by ( ))

Recommendation = Less Severe = 25 (10.1%) (indicated by [ ])

Of the 248 cases where a recommendation was made, 162 (or 65.3%), agreed with the promise made; 61 recommendations (or 14.6%), were more severe; and 25 (or 10.1%), were less severe than the promise.

Collapsing this data into an "in/out" dichotomy reveals the following (again eliminating the 35 mandatory prison/jail cases):

TABLE 13

## PROMISE BY RECOMMENDATION (IN/OUT FOR NON-MANDATORY CASES)

<u>PSR RECOMMENDATION (N=248)</u>			
PROMISE	In	Out	Total
In	77 (87.5%)	11 (12.5%)	88 (100%)
Out	28 (17.5%)	132 (82.5%)	160 (100%)
Total	105	143	248

Here a much greater congruence of promise with recommendation is found than in Table 12 (209, or 84.2%, of the 248 cases in Table 13, versus 162, or 65.3% in Table 12). However, the 39 cases (15.7%) in Table 13 for which recommendation disagrees with promise is more than twice the number of cases (15, or 6.4%) for which sentence disagrees with promise (Table 11). Moreover, PSR's are more apt to disagree with promises on the side of more punitive sanctions: 17.5% (or 28) of the 160 cases promised "out" sentences in Table 13 resulted in incarceration recommendations, but P.O.'s recommended the converse ("out" when "in" was promised) in only 12.5 percent (or 11) of the 88 cases: P.O.'s recommendations were thus much more likely to conflict with "out" sentence bargains than judges were likely to amend such bargains:

TABLE 14

## VARIANCE OF PROMISE/SENTENCE VS. PROMISE/RECOMMENDATION

<u>"In" Promise with "Out" Sentence</u> 7 (8.3%) of 84 Promises	<u>"In" Promise with "Out" Recommendation</u> 11 (12.5%) of 88 Promises
<u>"Out" Promise with "In" Sentence</u> 8 (5.3%) of 151 Promises	<u>"Out" Promise with "In" Recommendation</u> 28 (17.5%) of 160 Promises
<u>Total Variance</u> 15 (6.4%) of 235 Promises	<u>Total Variance</u> 39 (15.7%) of 248 Promises

Comparing the recommendation with the eventual sentence produced the cross-tabulation presented in Table 15.

TABLE 15

## RECOMMENDATION BY SENTENCE

SENTENCE (N = 248)

RECMDTN.	P/W	Disch	Fine	Prob	Prob+ SpCon	Prob+ Fine	Prob + Jail	Jail	Prison	Tot.
Disch.		4	(1)	(3)						8
Fine			5	(1)		(2)				8
Probat.	6	[2]		86	(4)	(1)	(2)	(5)	(1)	107
P+SpCon		[1]		[2]	15	(1)	(1)			20
P+ Fine				[1]		2				3
P+ Jail							6			6
Unsp.In.	3			[9]	[3]		[11]	11	11	48
Jail							[1]	2		3
Prison	4			[6]	[1]		[1]	[3]	30	45
Total	13	7	6	108	23	6	22	21	42	248

Recommendation = Sentence = 172 (70.1%)

Recommendation = More severe sentence = 22 (8.9%)(indicated by ( ))

Recommendation = Less severe sentence = 41 (16.5%)( " " " [ ] )

Plea Withdrawn (P/W)= 13 (5.2%)

In fully 70 percent of the cases, recommendation agreed with sentence, occupying a median position between the congruence of promise with sentence (78%), and the agreement of promise and recommendation (65%).

Adding the 35 mandatory incarceration cases to Table 9 (and eliminating one case which contained no recommendation) changes the variance very little: the study group reflects complete agreement between PSR and eventual sentence in 72.0 percent of the cases (203 out of 282), with the PSR more likely to have recommended less severe sanctions (41, or 14.5%) than more severe dispositions (22, or 7.8%) in cases where disagreement is found.

Collapsing Table 15 into a dichotomous cross-tabulation (eliminating withdrawn pleas and mandatory sentence cases) reveals an

overall agreement rate of 88% (207 out of 235 cases), with the court more likely to follow non-incarcerative (94%) than incarcerative (80%) recommendations:

TABLE 16  
RECOMMENDATION BY SENTENCE (IN/OUT FOR NON-MANDATORY CASES)

RECOMMENDATION	SENTENCE (N=235)		Total
	In	Out	
In	76 (80%)	19 (20.0%)	95 (100%)
Out	9 (6.4%)	131 (93.6%)	140 (100%)
Total	85	150	235

To summarize, our study group of cases wherein the court possessed sentencing discretion, when examined for variation across the complete spectrum of possible dispositions, shows significantly more deviation between promise and sentence (22%), promise and recommendation (35%) and recommendation and sentence (31%) than when examined in simple dichotomous terms (6%, 16% and 12%, respectively):

TABLE 17  
NUMBER & PERCENTAGE OF DISAGREEMENT  
FOR PROMISE/RECOMMENDATION/SENTENCE

	Dichotomous Analysis (N=235)*	Full Analysis (N=248) **
PROMISE BY SENTENCE	15 (6%)	55 (22%)
PROMISE BY RECOMMENDATION	39 (16%)	86 (35%)
RECOMMENDATION BY SENTENCE	28 (12%)	76 (31%)

\*The 13 cases involving withdrawn pleas are excluded (since the plea bargain was dissolved), except for promise by recommendation (n=248).

\*\*The 13 cases where pleas were withdrawn are included in these calculations as part of the variance.

It is the contention of this dissertation that the full impact of the PSR on sentencing is more properly assessed by considering all possible sanctions. Although it may be argued that there is little substantive difference between a promise of probation and a sentence of probation with a special condition added, such an outlook dismisses the importance of restitution and drug treatment programs that can frequently impart real meaning to a probation sentence, satisfy complainants and protect the community. Moreover, as mandatory sentencing laws have come to account for a greater proportion of the court's calendar over the past decade, some judges--to escape a perceived harshness in dealing with defendants whose crimes might be mitigated by special circumstances detailed in the PSR--have adopted jail terms of up to six months, followed by probation supervision, as a means of satisfying the incarceration requirement. Finally, there are a broad range of felony offenses for which either a jail or prison term is possible. In such cases, substituting a jail term for a promised prison sentence when the PSR indicates the less severe sanction might be more appropriate, would serve to divert deserving offenders from overly harsh sentences.

In order to determine whether the PSR's sentence recommendation could account for the 55 amended sentence promises in our sample, we examined each of these 55 cases and found the following composite picture:

TABLE 18

## SUMMARY OF AMENDED SENTENCE PROMISES

- 1) Promise  $\neq$  Sentence = PSR Recommendation = 24  
 2) Promise  $\neq$  Sentence  $\approx$  PSR RECOMMENDATION = 18

PSR Influence = 42

- 3) Promise  $\neq$  Sentence  $\neq$  PSR Recommendation = 12  
 4) Promise = Recommendation  $\neq$  Sentence = 1

Anomalous Cases = 13

Total = 55

For category #2 in Table 18 above, we included cases wherein the PSR recommended either a less severe or more severe sanction than promised and the judge amended the sentence promise in the same direction, although not in an exact one to one correlation (e.g., promise = state prison; recommendation = probation; sentence = jail term & probation). Thus, the PSR would appear to have had some influence on 42 of the 55 amended promises. But what of the third category, where there was no correlation between any three variables? Interestingly enough we found 7 of these 12 cases involved cases where pleas were withdrawn, despite agreement between promise and PSR recommendation. Two judges were involved in six of these cases. Three were pleas before Judge "X," who attributed two of the withdrawn pleas to the PSR during an interview I conducted two months later.

In the first instance, a 37 year old male, employed part-time with a history of four prior arrests, two of which resulted in misdemeanor convictions, released on his own recognizance since his arraignment for criminal sale of marijuana, pled guilty following the

ADA's agreement to reduce the final charge from a class D to a class E felony and concur with the court's promise of five years probation. However, the PSR, although recommending probation, quoted the defendant's assertion to the P.O. that he had earned \$100 a week for the past year--including the two months since his arrest--by selling marijuana. The Judge then told the defendant at sentencing that he believed six months in jail, followed by 4-1/2 years probation, was a more appropriate sentence in order to effect the defendant's "forced resignation" from his drug dealing. The defendant did not agree and accordingly was permitted to withdraw his plea. (The case was later assigned to a trial part where the defendant was sentenced to probation; the judge who imposed the sentence stated that he was satisfied that "if the probation department recommended probation despite this fellow's drug involvement, I felt that the sentence should stand--but I told this man at sentencing that if he ever sold marijuana while on probation, I'd send him to state prison for the 'max'").

In the second instance, Judge "X" promised a detained 18 year old, with a history of 10 prior arrests but no felony convictions, a sentence of one year in jail, consecutive to the one year jail term he was presently serving, in return for his plea to third degree burglary, a class D felony (the ADA having agreed to reduce the original charge, second degree burglary, if the defendant agreed to the sentence promise). The PSR recommended "a sentence to custody,"

which was not in conflict with the promise, but unaccountably to Judge "X," in light of the defendant's lengthy criminal record, the PSR also recommended a youthful offender adjudication, which had not been part of the sentence promise. The defendant's attorney, upon learning of the Y.O. recommendation, urged its adoption. When the Judge refused, the defendant demanded to withdraw his plea. He was permitted to do so, despite Judge "X"'s right to maintain the original agreed-to promise, because he wanted to discuss the Y.O. recommendation with the Probation Department. (Later, the defendant was sentenced to a one year concurrent jail term by Judge "X," with Y.O. adjudication denied.)

In the third case involving Judge "X," a bailed 19 year old defendant with 4 prior arrests and no convictions, was permitted to plead guilty by the ADA to attempted second degree robbery, a class D felony, and two counts below the top count of the indictment,, which rendered him eligible for a promised probation sentence. The PSR, which found the defendant possessed of "much potential," recommended probation as well. Yet, the ADA, at the sentence hearing, recommended a state prison term of 1 to 3 years. Judge "X" asked the ADA to read the PSR. After doing so, the ADA was asked whether he still recommended a prison term be imposed. The ADA repeated his original recommendation. Whereupon, Judge "X" asked what additional material had come into the ADA's possession since his "magnanimous" consent to the much reduced final charge, a reduction which required approval by the ADA's supervisor, under procedural guidelines then in effect in



the Brooklyn DA's Office. The ADA responded that the nature of the offense and the defendant's prior arrest history were the basis for the recommendation. The Judge, incensed by the ADA's "ex parte" recommendation, then dissolved the bargain. (Later, the defendant was sentenced to probation, as promised, by Judge "X" despite the ADA's continuing recommendation for state prison.)

The three cases which involved Judge "Y" are more difficult to assess in terms other than judicial temperament. We interviewed ADA "P," who prosecuted all three cases, which were remarkably alike: each defendant pled guilty to a charge one class below the top count of the indictment in return for a promise of probation, promises with which the PSR concurred. Yet the pleas were all withdrawn, only to be re-instated on future dates before the same Judge, who sentenced all three to probation. ADA "P" identified Judge "Y"'s pique at the defense attorneys, all of whom were retained, as the reason for the withdrawn pleas. In two cases, the bailed defendants and their counsel arrived late for sentencing and in the third instance, the retained attorney insisted on adjournment of the sentencing hearing to allow his appearance in another court on the same day. In all three instances, Judge "Y," ironically an ex-defense attorney with a reputation as a "defense oriented" jurist, according to ADA "P," dissolved the plea bargain as a "lesson" to the attorneys. (The possibility that these plea withdrawals were actually staged by Judge "Y" at the request of counsel to obtain their legal fees from defendants before final disposition was imposed was discounted by ADA

"P," who suggested that "Judge "Y" would have been more likely to adjourn sentencing in such a case. "I think he just didn't like these attorneys--one in particular was very abrasive.")

As for the remaining plea withdrawn case in this category, Judge "Z" dissolved a plea bargain, at the request of the ADA, which would have resulted in a "zip to seven" state prison term when the defendant, subsequent to plea, agreed to cooperate with "an on-going investigation conducted by the Office of the District Attorney." (The defendant was later sentenced by the same Judge to probation, against the recommendation of the PSR, which continued to recommend state prison.)

Of the five remaining cases wherein the eventual sentence differed from both the original promise and the PSR recommendation, the PSR itself contained information which had an impact in two cases, the ADA's recommendation had an impact in two cases and an intervening variable--the arrest of the defendant subsequent to plea for another offense--was influential. In one case, involving a sentence promise and PSR recommendation of probation, the PSR contained documentation that the defendant's burglary had caused \$51 damage to the complainant's property, whereupon a special condition of probation that the defendant pay \$51 restitution was added.

In another case, involving a promise and PSR recommendation of state prison for rape (although the defendant was eligible for a Y.O. adjudication which would have permitted a probation sentence), the PSR reported that the complainant was glad that the defendant had pled

guilty, because she "would never have been able to testify in an open court room." According to the ADA prosecuting this case, the defense attorney--after reading the PSR--related this disclosure to the defendant, "a 'skel' who really knew how to manipulate the system," who promptly demanded to go to trial. To save the conviction, the Judge then called upon the ADA to make a mitigation statement which would have allowed the defendant to escape a mandatory state prison sentence, in return for the defendant's consent to an amended sentence of one year in jail.

Of the two cases involving influential ADA recommendations, one involved a defendant who was cooperating with the prosecution, whereupon the promised sentence of one year jail was amended to two months jail and 58 months probation, despite the PSR recommendation of jail; the other involved a defendant promised a jail term of "no more than 9 months" and recommended by the PSR for "commitment to the New York City Department of Correctional Services." The Judge, however, a former bureau chief in the Brooklyn DA's Office, agreed with the ADA's recommendation of two months jail and 58 months probation.

Finally, there was one case (category #4 above) in which the Judge promised "a term of incarceration," the PSR recommended the same, but the final disposition was 2 months jail, followed by 58 months probation. Since neither the plea minutes nor the PSR mentioned probation as part of an intended/recommended sentence, we interviewed the P.O. and S.P.O. who wrote the report and recommendation respectively to determine if they could shed some light

on the disposition. We learned that the defendant, a 46 year old male on bail with a history of five prior arrests (including one prior felony conviction which occurred more than 10 years before the present offense, thus making him eligible for a non-incarcerative sentence), with a full-time job, had been convicted of operating a motor vehicle while intoxicated. He had been arrested twice before for the same offense. However, when the PSR verified that his employment supported two children, the Judge, reluctant to sentence him to a year in jail, contacted the supervising probation officer to ask if he would recommend a less severe sentence. The S.P.O. defended his recommendation in light of the defendant's recidivistic drunk driving. The Judge's reluctance to amend the sentence without consulting the S.P.O. was attributed by the S.P.O. to press coverage at the time in the press regarding perceived unwarranted leniency for drunk drivers by the courts, and this Judge's desire (considered to be prosecution-oriented by the S.P.O.) to "protect his reputation" should the defendant be re-arrested on probation for vehicular manslaughter. Thus, this disposition would appear to be attributable to the influence of the PSR, despite its contrary recommendation.

To recapitulate, our analysis of the 55 cases where promised sentences were amended reveals the following:

TABLE 19  
CAUSES FOR AMENDED SENTENCE PROMISES

Attributable To PSR	Attributable To ADA	Attributable To Extraneous Variables	Total
<u>47 (85.4%)</u>	<u>4 (7.3%)</u>	<u>4 (7.3%)</u>	<u>55 (100%)</u>

Thus, in 55, or 22 percent of the 248 cases in our sample wherein the court possessed sufficient discretion to amend the sentence promise, the bargain was either amended or dissolved; and the PSR appears to have played a significant role in amending 47, or 19 percent of the 248 sentence bargains studied.

#### Conclusion of Tabular Analysis

A dichotomous analysis of the judge's promise (P), recommendation (R) and the eventual sentence (S) for the 235 cases in Sample 1 where the judge possessed "in/out" discretion and actually imposed a sentence, revealed the following:

TABLE 20  
PROMISE AND RECOMMENDATION BY SENTENCE

	S=IN	S=OUT	TOTAL
P = IN			
R = IN	70	1	71
P = OUT			
R = OUT	2	125	127
Subtotal	72	126	198 (84.3%)
P = IN			
R = OUT	7	6	13
P = OUT			
R = IN	6	18	24
Subtotal	13	24	37 (15.7%)
Total	85	150	235 (100%)

In 198 out of the 235 cases (84.3%), the promise and recommendation agreed on either an "in" or "out" disposition. And in 195 out of those 198 cases (98.5%), the promise, recommendation and sentence were equivalent. The three anomalous cases where the court substantially changed its promise, despite a concurring

recommendation, were attributable to: 1) an intervening variable (the defendant was returned on a bench warrant for failure to appear for sentencing, having been re-arrested subsequent to the promise, which was probation, and the recommendation, which was also probation, with the result that he was sentenced to a one year jail term concurrent with the similar sentence imposed for the conviction on the re-arrest); 2) the influence of the PSR (promise = probation; recommendation = probation with the special condition that the defendant, who was discovered by the P.O. to be injecting "speedballs," i.e., a mixture of cocaine and heroin, enter drug treatment; sentence = a jail term of 60 days, followed by 58 months probation, a sentence which the defendant preferred to either outpatient drug treatment or dissolution of the plea bargain); and 3) the combination of another intervening variable and information in the PSR (the defendant was promised probation and jail, recommended for state prison and sentenced to probation--after agreeing to cooperate with the D.A.'s Office--with a special condition that he cooperate with counseling for his alcohol abuse noted in the PSR).

Of the remaining 37 cases, the court amended its "in" promise to grant an "out" sentence recommended by the PSR on six occasions and amended an "out" promise to impose a recommended "in" sentence on six occasions, for a total 12 cases in the dichotomous analysis for which the PSR is presumed to have had an impact on an amended sentence promise. It is noteworthy that six defendants agreed to "in" sentences when "out" dispositions had been promised. Combined with

the two anomalous cases already noted above, there were eight defendants out of 151, or 5.3 percent, who were sentenced to some form of incarceration despite non-incarcerative promises. Conversely, there were seven defendants out of 84, or 8.3 percent, who were sentenced to non-incarceration sanctions despite incarceration promises. This suggests that judges are more likely to amend incarceration promises, given the reluctance of defendants to accede to jail/prison terms which did not form part of the sentence bargain agreement. Moreover, defendants would appear to be amenable to avoiding promised incarceration sentences. Our research indicates however, that there are some defendants who preferred to serve short jail terms that were not promised rather than withdraw their pleas, and a handful who preferred to serve their bargained for jail/prison terms rather than accept substituted sentences involving five years of probation supervision.

To summarize, there was an overall agreement between recommendation and sentence in 207 out of 235 cases, or 88.1 percent. In 12 of the 207 cases, or 5.8 percent, the sentence represented a significant amendment of the plea bargain. Of the 28 cases where the sentence did not follow the recommendation, 25 represented adherence by the court to the plea bargain, with judges (and defendants) much more likely to resist jail/prison recommendations that were contrary to probation/fine/discharge promises (rejecting such recommendations in 18 out of 24 cases) than judges were to agree with more lenient recommendations and to obtain acceptance by defendants to recommended

"out" sentences when jail/prison terms had been promised (accepting such recommendations in 6 out of 13 cases).

Thus, a dichotomous analysis of the sentencing process presented in Table 21 reveals that 17 percent of the time (40 out of 235 cases), there is disagreement between the promise, recommendation and sentence and in those 40 instances examined, the court is twice as likely to follow through on its original promise (25) than to amend the sentence bargain as per the recommendation (12), with the remaining anomalous cases (3) attributable to an intervening variable (re-arrest), data in the PSR (defendant preference for short-term jail than long-term drug program) or a combination thereof (prosecutorial intervention and acceptance of counseling recommended by the PSR).

TABLE 21

## SUMMARY OF DICHOTOMOUS ANALYSIS

	SENTENCE ("In"/"Out")		Total
	Same As Promised	Different	
P = R	195 (S=P=R)	3 (S $\neq$ P & S $\neq$ R)	198 (84.3%)
P $\neq$ R	25 (S=P)	12 (S=R)	37 (15.7%)
Total	220 (93.6%)	15 (6.4%)	235 (100%)

In conclusion, there is a considerable difference in estimating the influence of the PSR on sentencing, depending on whether the full spectrum of sanctions or the basic "in"/"out" dichotomy is analyzed. In the former analysis, 19 percent of all sentence bargains appear to have been affected by the PSR, but in the latter, more limited comparison, only 6 percent--at best--of the sentence bargains appear to have been amended as a result of the PSR. Although it is my contention that all gradations of sentences imposed should form the



basis for study, dichotomous analysis does validate our first hypothesis, that judges are more likely to amend "in" promises in favor of "out" recommendations, than the converse.

A cross-tabulation of the quality of PSR by sentence for those cases in which the PSR recommendation differs from the sentence promise was performed in order to determine if the PSR quality was significantly better for amended promises attributable to the PSR, than for those cases wherein the court declined to amend the promised sentence.

For the 47 cases previously identified as influencing amended sentence bargains (see page 129), the PSR quality index was found to have an average value of .81, while the 33 cases in which the court maintained the plea bargain despite contrary recommendations were computed to have a significantly lower average index value of .73. Moreover, for those 12 cases in which the dichotomous "in"/"out" sentence bargain was presumed to have been influenced by the PSR, the average index value was found to be an impressive .83.

Thus, there would appear to be some evidence that higher quality PSRs have more of an impact on sentencing. It is also possible that well researched reports are more likely to result in an independent assessment of the proper sanction for the subject under investigation--an assessment which would be more forcefully argued in the S.P.O.'s recommendation--than would be the case for perfunctory reports in which the P.O. and S.P.O. would be more likely to endorse the sentence bargain in the absence of any significant information to

contribute to the court.

#### Comparison With Prior Studies

Witztum claimed that PSRs were primarily used in Kings County Supreme Court--and by extension, throughout New York City--as rubber stamps for usually inviolate sentence bargains. Although her findings resemble mine in terms of the percentage of agreement between promise, recommendation and sentence, she concludes that an amended plea bargain rate of approximately 21 percent--which she concedes is attributable to the PSR--is not significant enough, either quantitatively or qualitatively, to justify the expenditure of resources and case processing delays involved in producing PSR's. Kingsnorth and Rizzo reported significantly less variance between promise, recommendation and sentence in their "Western City" study but argued in a similar vein that PSRs merely ratify the sentence bargain.

I have pointed out in earlier chapters some of the methodological errors in these studies, most of which were essentially cross-tabulations of two independent variables with the dependent variable (sentence). In order to conduct a more sophisticated analysis involving multiple regression, which attempts to sort out and control for the effect of interrelated independent variables upon a dependent variable, it is necessary to identify those factors which are most influential in the sentencing decision.

TABLE 22

## COMPARISON OF TABULAR FINDINGS

Percentage of Agreement

<u>STUDY</u>	<u>Promise &amp; Recmndtn.</u>	<u>Promise &amp; Sentence</u>	<u>Recmndtn. &amp; Sentence</u>
California* (probation)	--	--	96% 81% (prison)
San Francisco* (probation)	--	--	96% 81% (prison)
Canada (Hagan)	--	--	80%
"Western City"*	98%	99%	98%
Brooklyn (1972)	69%	73%	79%
Brooklyn (1979) (Dichotomous)	65% (84%)	78% (94%)	69% (88%)

\*Dichotomous study.

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Hagan and the San Francisco Project both identified variables contained within the PSR which exerted significant influence on the judge and P.O. and helped to explain the perceived high degree of agreement in sentencing outcomes. In Table 23, I have isolated those variables common to both this study and the San Francisco Project to determine both within and between group rankings and correlations. (All variables are interval type, except for race, sex and codefendant, which were recoded as dummy variables.)

TABLE 23

SPEARMAN RANK ORDER CORRELATION OF VARIABLES  
MOST IMPORTANT FOR JUDGES AND PROBATION OFFICERS

Sample 1 (N=235) vs. San Francisco Project (N=300)

<u>Variable*</u>	<u>SAMPLE 1</u>			<u>SAN FRANCISCO**</u>	
	<u>Promise</u>	<u>Rec.</u>	<u>Sentence</u>	<u>Rec.</u>	<u>Sent.</u>
1. Custodial Status	1	1	1	2	2
2. Offense	2	2	2	3	1
3. Arrests	3	4	3	1	3
4. Employment	4	3	4	5	4
5. Financial Status	5	5	5	4	5
6. Type of Counsel	8	6	6	7	7
7. Sex	6	11	9	8	8
8. Marital Status	11	9	10	6	6
9. Race	10	8	8	10	11
10. Age	9	7	7	11	10
11. Codefendant	7	10	11	9	9

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\*Only variables common to both studies were utilized in computing rank order correlation. Those included are consistently identified in the literature as the most important.

\*\*As noted in Chapters II and III above, there is no sentence bargaining in federal courts. Thus, there is no rank for promise here.

Utilizing the Spearman formula for the rank orders presented above, I constructed the matrix presented in Table 24.

These results reveal striking correlations within each group of recommendation with sentence: .96 for Brooklyn and .95 for San Francisco. Although comparison across studies would appear to indicate less correlation, with the Brooklyn promise to San Francisco sentence correlating the highest (.83) and the Brooklyn recommendation to San Francisco recommendation correlating the lowest (.75), the Kendall test for measuring the association of ranks indicates a very high correlation among the five ranks of eleven variables presented in

TABLE 24

## SPEARMAN CORRELATION COEFFICIENT MATRIX

	<u>Sample 1</u>			<u>San Francisco Project</u>	
<u>SAMPLE 1</u>	<u>Promise</u>	<u>Rec.</u>	<u>Sentence</u>	<u>Rec.</u>	<u>Sentence</u>
Promise	--	.76	.83*	.79*	.83*
Recmdtn.	.76	--	.96*	.75	.81*
Sentence	.83*	.96*	--	.77	.81*

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<u>SAN FRAN.</u>					
Recmdtn.	.79*	.75	.77	--	.95*
Sentence	.83*	.81*	.68	.95*	--

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\*Significant at the .01 level. (All values significant at the .05 level.)

Table 15. In fact, the correlation of concordance for the set of five ranks was computed to be .87, which is significant at the .01 level.<sup>1</sup> These findings suggest that judges and probation officers in both localities agree on the significance of certain variables in arriving at sentencing decisions. The very close rank order correlation coefficients for promise and recommendation with sentence (.99 and .98) in the sample group also suggests that there is little "shaping" of the PSR to conform to the promise.

#### Path Analysis

Based on my review of the literature, my experience as a probation officer and analysis of the correlations of variables to the sentencing outcome, I conducted a path analysis of the sample data in

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<sup>1</sup>Michael Kendall, Rank Correlation Methods (London: Griffin, 1948), chap. 6 passim.

an attempt to validate the second, third and fourth hypotheses enumerated in Chapter IV. In addition to the eleven independent variables listed in Table 23, I utilized twenty other variables in constructing and testing hundreds of multiple regression equations (never using more than 23 variables in any given equation).

Although it is accepted practice in conducting path analysis research to dichotomize interval variables, I selected a strategy of dichotomizing only those independent variables which had skewed distributions. For example, although "D.A. Bureau" had seven possible values--corresponding to the seven different Bureaus prosecuting cases in the Brooklyn District Attorney's Office--fully 80 percent of the cases (Table 6) fell in one category, "Supreme Court Bureau" (wherein most street crimes are prosecuted), while none of the remaining six values had an aggregate proportion larger than four percent. Thus, I recoded "D.A. Bureau" as a dummy variable, assigning a value of "1" to the "Supreme Court Bureau" and a value of "0" to the other specialized bureaus (wherein homicides, sexual, economic, organized and narcotic crimes receive more vigorous prosecution). Moreover, Cohen (1983) has convincingly demonstrated that graduated variables, once dichotomized, result in "a loss of one-fifth to two-thirds of the variance that may be accounted for on the original variables, and a concomitant loss of power equivalent to that of discarding one-third to two-thirds of the sample."<sup>1</sup>

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<sup>1</sup>Jacob Cohen, "The Cost of Dichotomization," Applied Psychological Measurement 7 (Summer 1983): 253.

In this study, the most important variables--promise, recommendation, sentence, number of arrests/felonies, charge severity, custodial status, penal law classification, etc.--are all graduated, with a value of "1" signifying least severe and subsequent values ("2" through "9" for dispositional variables) signifying increasingly less favorable characteristics/outcomes.

The assistant district attorney's sentence recommendation was also added to the multiple regression equations I formulated. Although no sentence recommendation was made by the ADA in more than half of the cases, this was not surprising, since it was common practice in 1979 for ADAs in the Supreme Court Bureau to voice their views on sentencing at the time of the plea, rather than at disposition. In fact, it is possible to argue that the ADA's recommendation is in fact a disguised sentence promise, in as much as the ADA is instrumental in structuring the promise by either consenting to the concomitant charge reduction and/or setting the sentencing parameters within which the court operates. Under the New York State Criminal Procedure Law, no plea of guilty to less than the entire indictment can be entered without the District Attorney's consent. In any event, the ADA's viewpoint on sentence is usually communicated to the court during the (bench) conference which normally precedes the entering of the guilty plea. Therefore, it is difficult to conceptualize the ADA's sentence recommendation, if formally announced or submitted to the judge at sentencing (which frequently is the case for indictments prosecuted by specialized bureaus within the office),

as an event subsequent to the plea which influences the sentence.

Multiple regression equations, testing the path model presented on page 106, and using forward selection to allow for inclusion of the most significant predictive independent variables (at the .05 level, with significance at the .001 level indicated by an asterisk) produced the models which follow.

In the Tables presented below, " $R^2$ " is the regression coefficient, also referred to as the coefficient of determination, which reflects the linear fit of the model--i. e., the square of the simple correlation coefficient between the observed value of the dependent variable and the predicted value of the dependent variable from the regression line. "Beta" is the standardized partial regression coefficient or weight, which expresses the change in the dependent variable due to the change in the independent variable, with other variables held constant.<sup>1</sup>

TABLE 25

## INDEPENDENT VARIABLES PREDICTING CUSTODIAL STATUS

<u>Independent Variables</u>	<u><math>R^2</math></u>	<u>Beta</u>
1. No. of Prior Arrests	.28	.53*
2. Severity of Charge	.40	.35*
3. Type of Counsel	.44	.22*
4. Sex of Defendant	.46	-.15
5. Type of Judge (Trial or Conf.)	.47	-.10

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\*Significant at the .001 level.

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<sup>1</sup>Maria J. Norusis, Advanced Statistics Guide (New York: McGraw Hill, 1984), pp. 17-27.



The number of prior arrests has a large effect on custodial status: defendants with the fewest arrests in our sample were likely to be on bail or ROR'd, with recidivists jailed. In fact, 28 percent of all the variance in custodial status is predicted, or explained, by arrest history alone. Charge severity is another important factor, with an effect of .35 accounting for 12 percent of custodial variance. The type of legal representation is also a significant indicator of pre-dispositional status, with an effect of .22, explaining four percent of the variance. The sex of the defendant is the only demographic variable related to custodial status--the negative correlation (-.10) indicates that female defendants are more likely to be at liberty than their male counterparts. Finally, defendants pleading guilty in conference parts are more apt to be incarcerated than defendants later convicted before trial judges (prior to the start of trial, of course, since all dispositions in our

TABLE 26

## INDEPENDENT VARIABLES PREDICTING PROMISE

<u>Independent Variables</u>	<u>R<sup>2</sup></u>	<u>Beta</u>
1. Custodial Status	.19	.43*
2. D.A. Bureau	.25	.25*
3. Type of Offense	.30	.23*
4. Prior Supervision History	.33	.18
5. Y.O. Adjudication Promised	.34	.12
6. Timespan (# months to plea)	.36	.14
7. Type of Judge	.37	.14
8. Penal Law Class. of Offense	.39	.13
9. No. of Prior Felonies/Y.O.'s	.40	.12

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\*Significant at the .001 level.

study group were plea bargained). These findings are somewhat similar to previous studies, particularly the criminal court study conducted by Davis (see Chapter II, p. 57).<sup>1</sup>

Table 26 indicates that custodial status is the most powerful predictor of the sentence bargain, explaining 19 percent of the variance, with a moderately high effect of .43. There is much evidence in the literature that aside from the correlation of severity of the offense with dispositional outcomes, defendants who are "out" at the point of conviction tend to stay "out," while those in detention are more likely to stay there. Indeed a common scenario I encountered in the course of interviewing hundreds of detained defendants involved tacit recognition of this unwritten law of case processing: having served some three or four months in detention in the expectation of a better deal, unavailability of complainants or possible acquittal, certain defendants weigh the potential risk of continuing toward trial against a proffered jail sentence and finally plead to a one year jail term (if the deal still holds)--a "bullet" in the parlance of "court speak" in New York City--since good time and time served combine to reduce the penalty to less than a half of what it might have been had the same bargain been struck at the outset of prosecution.

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<sup>1</sup>James Davis, "Sentencing Dispositions," pp. 99-101.

The significance of prosecutorial policy is suggested by the second variable selected in the equation, "D.A. Bureau," which also reflects the relative gravity of the offense, since garden variety strong arm robberies do not ordinarily qualify for "Major Offender" treatment. The type of crime (recoded as violent, property, or gun/drug possession) also has an impact on the promise, as would be expected intuitively. The other variables, which acting together with the afore-mentioned factors explain 40 percent of the sentence bargain, are all legal in nature: prior community supervision and felony or Y.O. adjudication histories; the timespan from indictment to conviction; the type of judge; the promise of youthful offender adjudication; and the penal law classification of the conviction (ranging from Class "A" to "E" felonies, in descending order of gravity, and "A" misdemeanors).

TABLE 27

## INDEPENDENT VARIABLES PREDICTING RECOMMENDATION

<u>Independent Variables</u>	<u>R<sup>2</sup></u>	<u>Beta</u>
1. Custodial Status	.29	.54*
2. Promise	.41	.37*
3. Penal Law Class. of Offense	.47	.26*
4. Prior Supervision	.49	.16
5. Sex of Defendant	.51	.14
6. Y.O. Recommended	.52	.11
7. Violation of Probation Filed	.53	.11

Custodial status also explains a greater proportion of the P.O.'s recommendation (29 percent) than the promise (12 percent), and is a stronger predictor of probation's recommendation than the court's

promise, which is not surprising, given the practical constraints on prosecutors and judges in structuring plea bargains. In other words, P.O.'s can afford to be more swayed by legal variables which speak more to the underlying offense or prior community supervision adjustment than to the bargained adjudication. Thus, while both the promise and recommendation are affected by the lack of a prior probation/parole supervision record, the recommendation is also influenced by the lack of a violation of such supervision, i.e., P.O.'s are more apt to recommend less severe sentences for defendants who have no history--or a successful history--of prior supervision.

The penal law classification of the offense for which the defendant has been convicted is a more significant predictor of a P.O.'s decision-making than a judge's for the opposite reason: there are a number of cases for which an "out" sentence was not permissible under the criminal procedure or penal law unless there were a youthful offender adjudication or a finding by the court that an incarceration sentence would not be "in the best interests of justice." In such cases, "out" promises are given with a caveat that the PSI does not uncover countervailing negative material or that the PSR's recommendation concurs with the lenient promise. In such instances, a negative PSR would merely conclude that the sentence to jail was mandated by law. But the court might nonetheless follow through on the "out" promise because the negative material uncovered might be interpreted as not being of sufficient gravity to jeopardize the bargain. However, in framing the recommendation, P.O.'s are more

influenced by their own assessment of whether ameliorating youthful offender treatment is warranted, as opposed to the court's promise of same, and might recommend "out" sentences for youthful defendants they consider salvagable, or who have previously succeeded on probation supervision. Such arguments are sometimes convincing enough to result in amendments of an "in" promise by the court.

Finally, the sex of the defendant is the only extra-legal variable influencing the P.O.'s decision-making in our study group, with female defendants more likely to be recommended for less severe sentences than males. There is considerable evidence in the literature that favorable outcomes for female convictees is related to the fact that females are more apt to be convicted of non-violent crimes which carry less of a penalty exposure. Indeed, of the 17 female defendants in our sample, only one was convicted of a violent offense (arson), who was nonetheless recommended for probation and received it.

TABLE 28

## INDEPENDENT VARIABLES PREDICTING SENTENCE

<u>Independent Variables</u>	<u>R<sup>2</sup></u>	<u>Beta</u>
1. Recommendation	.57	.75*
2. Sentence Bargain	.71	.45*
3. Custodial Status	.73	.17
4. D.A. Bureau	.74	-.10
5. Penal Law Class. of Offense	.75	.10
6. Timespan	.75	.08
7. Y.O. Promised	.76	.08

The model presented in Table 28 explains 76 percent of all the

variance in sentencing, with the PSR recommendation accounting for 57 percent of the variance alone. The beat weight of .75 is significantly large and almost twice the value of the independent variable with the next strongest effect, the sentence bargain, which explains an additional 14 percent of the variance in sentencing outcomes. The other five variables, taken together, account for an additional five percent of the variance in sentence, and, significantly, they were all found to be predictors of the promise as well. Penal law classification and custodial status were the only variables which were found to be significantly related to the promise, recommendation and sentence.

The models presented above would appear to support the tabular analysis which found that promise, recommendation and sentence were in agreement in the majority of cases, but that incongruities were largely attributable to the presentence investigation. The models are also in agreement with most prior studies which have analyzed sentencing (absent the promise as an independent variable, however) and found the nature of the offense, prior record and custodial status to be the most crucial determinants of felony dispositions.<sup>1</sup>

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<sup>1</sup>See Leslie T. Wilkins et al., "Sentencing Guidelines: Structuring Judicial Discretion" (Washington, D.C.: U.S. Department of Justice, 1978); Susan Welch and Cassia Spohn, "Evaluating the Impact of Prior Record on Judges' Sentencing Decisions: A Seven-City Comparison," Justice Quarterly 3 (December 1986): 389-90; and Brian Frost and William M. Rhodes, "Structuring the Exercise of Sentencing Discretion in the Federal Courts," Federal Probation 37 (September 1973): 9-13. Carl F. Wiedemann and Karl-Heinz Lilienwald ("A Study of Severity of Sentence at the Bronx County

Utilizing the path coefficients derived from the equations above, a full path model for the sample of 235 cases is presented in Diagram 3. Custodial status, through its direct and indirect effects transmitted to sentence, has an aggregate path coefficient that is slightly higher (.77) than the direct effect of the recommendation on sentence (.75), while the aggregate path coefficient value of promise to sentence is slightly lower (.73).

#### The Quality of the PSI as a Factor in Sentencing

In the path models developed, the quality of the presentence investigation was found to have no significant effect on the recommendation or sentence. (The quality of the PSI itself was found to be effected most by the sex of the P.O., with females more likely to submit high quality reports than males; more thorough PSI's were also found to be associated with incarcerated, younger defendants.) However, the quality of the PSI was found to be influential in sentencing outcomes when the sample was analyzed utilizing bifurcated and dichotomous strategies.

First, retaining the full range of interval values for the dispositional variables, the sample was split into two discrete categories for the dependent variables of recommendation and sentence.

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Supreme Court Using Multivariate Methodology," paper presented at the Annual Meeting of the Criminal Justice Statistical Association, Winter Park, Florida, February 1980) found custodial status to be the most influential factor in regressing a number of legal and extra-legal variables found in presentence reports against the sentencing decision in Bronx Supreme Court in 1975.

DIAGRAM 3

FULL PATH MODEL FOR SENTENCE BARGAINED CASES (N=235)

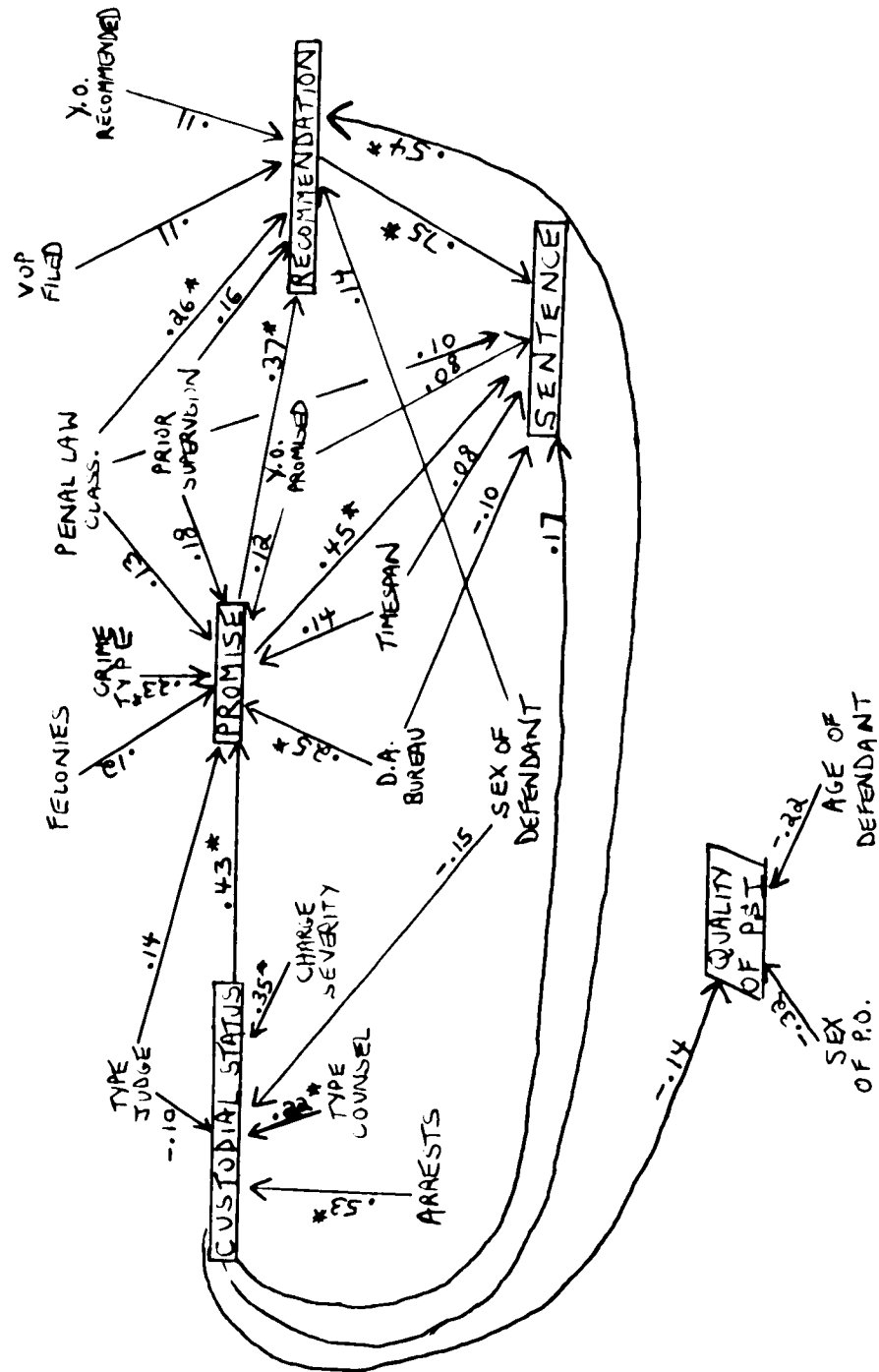
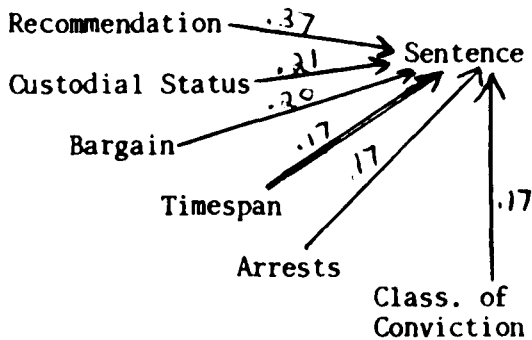
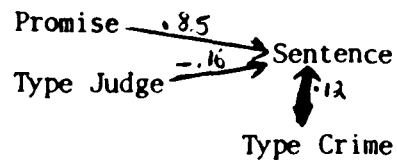




Diagram 4 indicates the path model found when the dependent variable, sentence, is analyzed for cases where defendants were recommended for probation, discharge or fine (A) and for defendants who were recommended for some form of incarceration (B).

DIAGRAM 4

## PATH MODEL BIFURCATED BY RECOMMENDATION

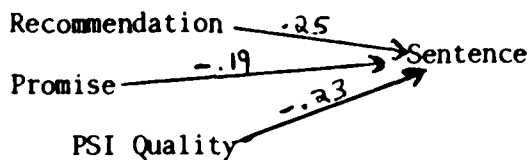
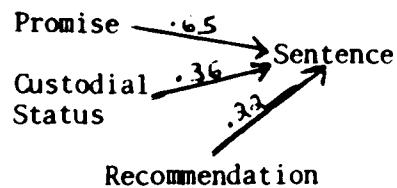
A. Recommendation = Out OnlyB. Recommendation = In Only

In this analysis, "out" recommendations are almost twice as significant in predicting sentence, while "in" recommendations have no predictive power at all, indicating further support for the hypothesis that judges are more likely to amend "in" promises in favor of "out" recommendations than the converse.

This finding is further underscored by a bifurcated analysis of the sample by disposition itself. In Diagram 5, the recommendation is clearly seen as interacting with promise to reduce the severity of non-incarcerative sentences, since the recommendation is positively correlated and the promise is negatively correlated with sentence, the dependent variable. Moreover, as the quality of the PSI decreases, the

DIAGRAM 5

## PATH MODEL BIFURCATED BY SENTENCE

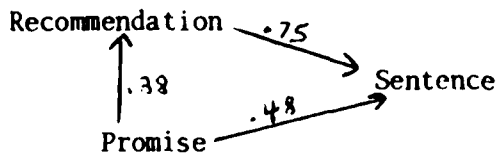
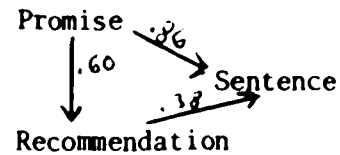
A. Sentence = Out OnlyB. Sentence = In Only

"out" sentence is more likely to be less severe (i.e., there is less likelihood of sentences being amended by adding restitution or special conditions to the bargained disposition, absent a thorough investigation). Incarcerative dispositions, however, are controlled by the promise and custodial status (i.e., promises of jail were related to sentences of jail; promises of prison were related to sentences of prison; etc.).

These findings led to the second strategy: dichotomizing promise, recommendation and sentence as dummy variables (recoding all incarcerative values as "0" and all non-incarcerative values as "1"); and bifurcating the sample by the PSI Quality Index (see Table 8, page 118). By segregating those cases with an index value greater than .6 from those cases with an index value less than .6, two equal groups were formed, and promise and recommendation were regressed against sentence (and each other) for each group, as shown in Diagram 6.

DIAGRAM 6

PATH MODEL FOR BIFURCATED DICHOTOMOUS SAMPLE:  
PSI QUALITY BY SENTENCE

A. Best PSI'sB. Worst PSI's

These results reveal recommendation as the most significant predictor of sentence when the PSI has been thoroughly conducted, while the promise controls both recommendation and sentence in cases where the PSI has been minimally or poorly conducted. This finding seems to confirm the hypothesis that presentence investigations of high quality have an important impact on sentencing, while perfunctory investigations result in recommendations that merely "go along" with the promise. (As noted above, such dichotomization sacrifices considerable power; a larger sample would be needed to confirm this finding.)

Control Group Tabular Analysis

Analysis of the 57 cases in which no sentence bargain was stipulated at the time of the plea was conducted to determine any significant differences from the sample group. Table 29 presents a cross-tabulation of the PSR recommendation by the actual disposition imposed by the court.

TABLE 29  
RECOMMENDATION BY SENTENCE (CONTROL GROUP)

SENTENCE (N = 57)										
REC.	P/W	Disch.	Fine	Prbtn.	P+SpCon	P+Fine	P+Jail	Jail	Prison	T/S
Disch.		2								
Fine			1					(1)		
Prbtn. 1				11		(1)			(2)	
P+SpCon					2					
Incar. 1				[1]			[1]	1	1	1
Jail							[1]	2		
Prison									27	
Tot.	2	2	1	12	2	1	2	4	30	1

Plea Withdrawn = 2 (For percentages below, N = 55)

Recommendation = Sentence = 48 (87.2%)

Recommendation = More severe than sentence = 3 (5.5%) (See [ ])

Recommendation = Less severe than sentence = 4 (7.2%) (See ( ))

There is considerably more congruence between the recommendation and sentence in the control group: 87 percent versus 73 percent for the sample (see Table 15; withdrawn pleas were not counted for either group in calculating percentages). This high agreement is obviously a reflection of the large share of mandatory imprisonment cases in the control group--almost 40 percent--which frustrates any in-depth analysis.

#### Path Analysis for the Control Group

Table 29 summarizes the findings when custodial status, recommendation and sentence are each regressed against the same set of independent variables utilized for the study group (never utilizing more than six independent variables in the same equation because of

the small sample size--also, promise and certain other variables related thereto are not applicable to this group by definition).

TABLE 30

## PREDICTIVE INDEPENDENT VARIABLES (NO PROMISE)

A. <u>Predictors of Custod. Status</u>		$R^2$	Beta
1. Arrests		.20	.44*
2. Severity of Charge		.28	.29
B. <u>Predictors of Recommendation</u>			
1. Arrests		.23	.43*
2. Penal Law Class. of Offense		.42	.44*
C. <u>Predictors of Sentence</u>			
1. Recommendation		.58	.76*
2. Penal Law Class. of Offense		.63	.26

As we found with the sentence bargain sample, the custodial status is correlated with the number of prior arrests and the severity of the charge. These two factors explain 28 percent of the variance in the control group's custodial status, versus 40 percent in the study group. The determinants of the PSR recommendation in the control group are the the number of prior arrests and penal law classification of the conviction. The latter independent variable was also found to be one of the predictors of the study group's recommendation, where it explained six percent of the variance, as opposed to 19 percent of recommendation's variance here; the number of prior arrests, however, was not found to be significantly associated with the recommendation of the study group, unlike the finding presented in Table 29.

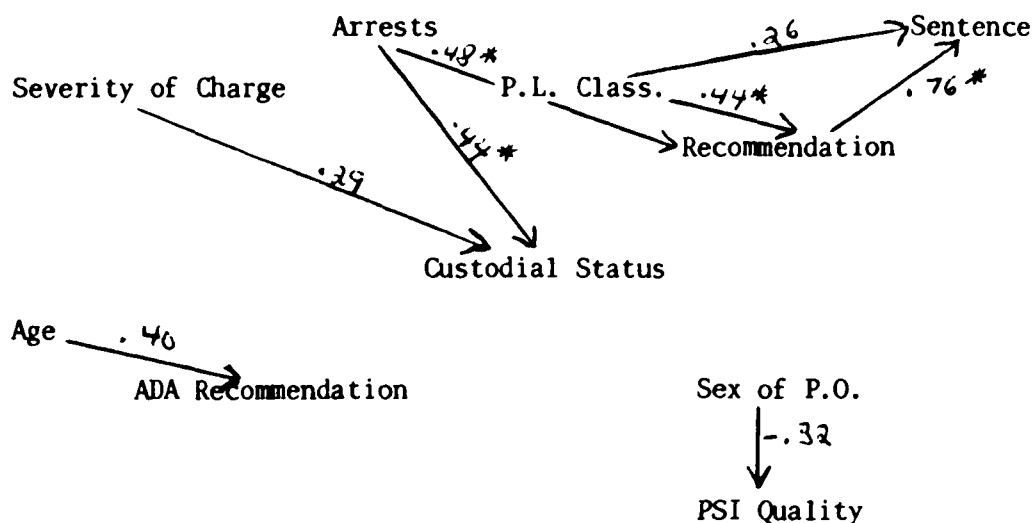
Finally, the variation in sentence explained by the PSR recommendation for those defendants convicted after trial or who pled

guilty in the absence of a sentence bargain, was found to be almost equivalent to that found for the study group: 57 percent for the former and 58 for the latter. (The beta weight values were also equivalent: .76 for the control group, compared to .75 for the study group.) Significantly, if the recommendation is removed from the equation, the penal law classification of conviction controls the sentence ( $R^2=.31$ ; Beta=.56\*). The only other independent variable selected as explaining a significant proportion of the sentencing variance in the absence of the recommendation is the quality of the presentence recommendation ( $R^2=.06$ ; Beta=.23).

Thus, path analysis of the control group sentencing outcome appears to confirm the significance of the presentence recommendation for judicial decision-making. Diagram 7 presents the full path model for the control group.

DIAGRAM 7

PATH MODEL FOR CASES DISPOSED WITHOUT A SENTENCE BARGAIN (N=57)



### Summary of Findings

Tabular and content analysis of 248 cases wherein the sentencing decision was subject to the widest range of judicial discretion confirms the hypothesis ( $H^1$ ) that "out" recommendations have more influence than "in" recommendations which are contrary to the sentence promise. In nearly one out of every five cases, the presentence report appears to have played an important role in amending the sentence promised by the court during the plea negotiation, and judges were found more likely to impose amended non-incarcerative sanctions than the converse because such a favorable change for a defendant will usually not jeopardize the plea.

There is less evidence that suggests high quality reports have more overall influence in amending sentence promises than low quality reports ( $H^2$ ). However, better quality investigations appear to have a significant impact in predicting "out" dispositions, regardless of the sentence promised, and dichotomous analysis of sentencing suggests that poor quality investigations predict the plea bargain will control disposition, while high quality investigations predict the PSR recommendation as the controlling variable for the sentencing decision.

Analysis of a control group--wherein no sentence promise was made--appears to confirm the primacy of the PSR recommendation as a crucial determinant of sentencing outcomes.

There is strong evidence to accept the hypothesis that recommendation and sentence are largely determined by legal variables

(H<sup>3</sup>), and that sex, alone among the demographic variables, has any discernible relationship to the sentencing outcome (H<sup>4</sup>), which is likely an artifact of female defendants' correlation with less serious crimes, compared to males.

Finally, this study found some evidence that suggests extraneous variables can sometimes be crucial to a sentencing decision--but the number of such cases appears to be few (H<sup>5</sup>). The actual sentence imposed is overwhelmingly predicted by the presentence report's recommendation, followed by the sentence bargain. Custodial status, prosecutorial specialization, penal law classification of the conviction, timespan from indictment to conviction, and a promise of youthful offender adjudication are also related to the dispositions of Brooklyn felony court judges.



## CHAPTER VI

### IN CONCLUSION: THE 1981 PRESENTENCE INVESTIGATION CRISIS AND WHAT IT REVEALED.

#### Introduction

The findings presented in Chapter V suggest that in a significant number of cases, judges rely on presentence reports to fine-tune sentence promises and to dissolve plea bargains which appear to be inappropriate when measured against information and/or recommendations within the PSR. Most judges polled for their opinion on the value of PSRs have also consistently rated them as essential to their sentencing decisions.<sup>1</sup>

In 1981, a series of events affecting New York City's criminal justice system offered more evidence of the importance of PSRs to the judiciary and corrections. As we shall see, the City's Criminal Justice Coordinator, and to a lesser extent the Probation Department's own management, in attempting to deal with a jail overcrowding crisis, operationalized the long-standing argument that the PSR was rendered inconsequential by: sentence bargaining; reduced judicial discretion; and other sources of information available to correctional decision-makers (see Chapter III). However, the City's effort

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<sup>1</sup>See the Harris Survey presented in the Morgenthau Committee, Report, pp. 230-31

was rebuffed within six months and a status quo ante bellum restored as the result of the unforeseen disruption of post-conviction operations which the evisceration of the PSR engendered.

### Origins of the Crisis

In the aftermath of state legislation which mandated incarceration sentences for violent, armed, juvenile and repeat offenders (and prevented post-indictment charge reduction to non-violent offense categories for violent offenders), local and state correctional facilities reached capacity in 1980. Also contributing to the lack of space was an increase in crimes reported to the police, arrests and indictments. In fact, indictments filed in New York City rose 15 percent during 1980 and then increased again the following year, which represented the high-water mark for the reported occurrence of index crimes in New York City--more than 725,000, up 17 percent from 1979.<sup>1</sup> The Supreme Courts in the City were thus confronted with a backlog of 10,000 indictments as 1981 began, amidst a 20 percent increase in new indictments during the first quarter, prompting an emergency transfer of civil court judges to the criminal term by New York State's Chief Judge.<sup>2</sup>

In early 1981, the New York State Correction Commission found

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<sup>1</sup>"City Felonies Last Year Rose Much Slower Than in 1980," New York Times 27 February 1982, p. 28; "Serious Crimes Nearing Record in New York," New York Times 18 November 1980, p. 1; and "Crime Index for NYC 60% Over Nation's for Six Months," New York Times 7 December 1980, p. 1.

<sup>2</sup>"37 Civil Judges Will Assist City in Felony Trials," New York Times 19 March 1981, p. 1.

that all state and local facilities for sentenced and detained adults were either at or above capacity. It ordered the three counties closest to New York City (Westchester, Nassau and Suffolk) to reduce their jail populations or face civil suits and, in March, it gave the City 10 days to develop a plan to relieve the jail overcrowding which had led to 9,200 inmates being held in a system geared to house a maximum of 8,300.<sup>1</sup> The Commission did not have to threaten the City with court action, however--a suit had already been brought in federal district court by the Legal Aid Society's Prisoner's Rights Project, which contended that the overcrowded conditions constituted cruel and unusual punishment under the Eighth Amendment.

Judge Morris Lasker (U.S. Southern District of New York), in response to the original litigation brought in 1973 during a period of similar congestion, had ordered the closing of the deteriorating Manhattan House of Detention for Men ("the Tombs") in 1974 and its inmates transferred to other facilities. When the Adolescent Detention and Reception Center population on Riker's Island doubled in 1980, with the overflow assigned to the House of Detention for Men, the Prisoner Rights Project brought another suit. The City responded with a plan to sell the Riker's Island facility to the State, with the State in turn building eight new jails for the City throughout the boroughs. Judge Lasker granted the City time to complete the negotiations, but when the deal fell through in mid-1980, he threatened to take steps to relieve the congestion if the City did not

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<sup>1</sup>"Overcrowded City Jails Present a Tangle of Problems," New York Times 12 March 1981, p. B3.

act.<sup>1</sup>

In an attempt to ward off judicial intervention, the City: 1) obtained agreement from the State to accept the transfer of 90 inmates serving weekend sentences; 2) requested the City's Chief Administrative Judge to conduct bail reviews of 1,800 inmates whose bail had been set at \$1,000 or less; 3) planned the addition of prefabricated housing units to its major facility, Riker's Island, which would increase its capacity by 600; and 4) ordered probation officers to submit PSRs within two weeks of conviction, rather than the customary four to six week interval, regardless of the actual sentence date set by the court.

Of all the actions planned or actually undertaken by the City to deal with the crisis, the fourth measure produced the most positive results, but not without modification of the initial PSI speed-up directive and fierce resistance from the judiciary. In the end, however, none of the City's measures, including its attempt to eviscerate the PSR, could stem the steadily increasing numbers of detainees and Judge Lasker's eventual action in November of 1983 which forced the City to release 611 inmates. And despite institutionalized productivity gains within the Probation Department during the past five years and an excellent track record in submitting PSRs within shortened time frames (made possible by the expenditure of millions of dollars in staff overtime), as of this writing the City's jails remain overcrowded, Judge Lasker continues to loom large in the City's

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<sup>1</sup>"U.S. Judge Who Shut Tombs Seeks Meeting on Deteriorating Jails," New York Times 23 May 1980, p. B1.

consciousness and other remedies that will forestall another federal intervention are vigorously pursued. (The City's 1987 strategy involves siphoning honor inmates onto refurbished ferry boats moored at Riker's Island to free up more secure cells.)

### The PSI Speed-Up

1981 was not the first time that the PSI was identified as a major bottleneck in inmate processing during times of jail overcrowding. In 1973, at the recommendation of the Board of Correction, county courts completely eliminated the practice of adjourning sentencing sine die for detained convictees. This custom had formerly given P.O.'s in some courts (particularly Kings County) the discretion of calendaring sentencing proceedings upon completion of PSRs. (There is evidence that such discretion had led to abuse by some habitually tardy P.O.'s, according to veteran probation supervisors in Kings County Supreme Court.) Similarly, in the late 1960s and again in the early 1970's, probation branches serving the felony courts in New York City had utilized "pro forma" PSRs (i.e., reports which contained condensed legal and social histories) to deal with an enormous increase in indictments and subsequent convictions during that period. However, such modifications were implemented with the cooperation and direction of the county court administrators to whom chief probation officers were then answerable. With the consolidation of county probation offices into a unified City agency in 1974, probation administrators were now controlled by the executive branch and thus, 1981 represented a new organizational alignment which

pitted an antagonistic municipal administration (frequently critical of the judiciary) against court administrators resentful of being "scapegoated" by other actors in the criminal justice system during a period of increasing public alarm over an increase in crime. In the middle of these combatants stood the Probation Department.

In February of 1981, in response to the pending federal litigation, the Criminal Justice Coordinator's Office began to examine ways to reduce jail overcrowding and thereby render the lawsuit moot. Research of Correction Department records identified approximately 1,000 inmates who had been convicted in felony and misdemeanor courts and were awaiting sentence. It was felt that the average elapsed time of eight weeks separating conviction from sentence date was largely attributable to PSR production and that if the reports could be produced within two weeks, this population could be effectively halved within six months, even allowing for other delays, if the judiciary could be persuaded to cooperate.

Accordingly, on 10 March 1981 the Probation Department issued a staff directive which instituted the following changes: 1) PSRs for all jailed defendant's were to be submitted to the court within 10 working days of conviction, regardless of sentence date set by the judge; 2) pro forma reports were to be submitted for all jailed defendants convicted of "D" and "E" felonies who were not promised state prison or probation sentences; 3) the legal history section, wherein prior and subsequent arrests and convictions (and details of each) are presented was to be eliminated and in its stead, the

computerized New York State Identification and Information System (NYSIIS or, later, NYSID) printout of the defendant's arrest history was to be stapled to the PSR with any open dispositions to be updated by hand on the actual computer paper; 4) PSRs for all bailed defendants were to be submitted within two weeks to promote calendaring efficiency; 5) the Correction Department would automatically bus detained inmates to court holding pens within 72 hours of conviction to allow P.O.'s to conduct multiple interviews of PSR subjects in rapid succession, eliminating the need for P.O.'s to visit convictees in any other correctional facility; and 6) P.O.'s were to be authorized to accumulate a maximum of 20 hours overtime a week to complete PSRs.

This directive met with immediate resistance from P.O.'s, with the union leader widely quoted in the press that "a two-week investigation is no investigation at all," complaining that "[t]he Mayor does not know what a presentence report entails."<sup>1</sup> Later, when the United Probation Officers' Association (UPOA) sued the City in Manhattan Supreme Court to reinstall the traditional four week time frame for PSRs, the Criminal Justice Coordinator maintained that P.O.'s could "do a reasonable job within a two week period," while the Probation Department's Deputy Commissioner admitted that there were "definite problems" with the new schedule but that only "in some

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<sup>1</sup>"2-Wk. Probation Report a Laugh: Union Leader," New York Daily News 10 March 1981, p. 15.

cases," would two weeks not be enough time to complete a PSR.<sup>1</sup>

This same Deputy Commissioner, in reaction to staff resistance, convened a task force to review the new PSI procedures. Composed of representatives of all levels of probation staff, the task force was scheduled to meet four times during the Summer of 1981, but because of a disastrous first meeting which ended in acrimony over perceived "after the fact" input from line officers to changes already institutionalized, it was decentralized to the county level, as each probation branch was encouraged to forge their own procedures within established criteria to fine-tune the speed-up.

As a member of this task force, I was told by the Deputy Commissioner that the pro forma PSR should be viewed as not just a stop-gap measure but as "the wave of the future," since "probation is no longer in the business of treatment primarily, but rather serving as a secondary social control agent."<sup>2</sup> This viewpoint in essence identified the primary use of PSRs as diagnostic devices and, arguing that the medical model no longer appertained, concluded that they could be modified so as to fulfill the statutory requirement, itself viewed as an artifact of the treatment-oriented view of sentencing. This rationale advanced by probation administrators represented a ratification of the previous decade's denunciation of PSRs as

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<sup>1</sup>"Probation Union May Sue to Nullify Keating Order," The Chief, 28 July 1981, p. 3.

<sup>2</sup>Interview with Kevin Benoit, Deputy Commissioner for Planning, N.Y.C. Probation Department, 17 June 1981.



meaningless in the sentencing decision because of plea bargaining, while at the same time endorsing the justice model of corrections which holds that interposition of rehabilitation treatment concepts in a coercive context lends itself to abuse, the avoidance of which outweighs any potential benefits. Such a synthesis however, ignores the "social control" contribution PSRs can make to sentencing, as demonstrated by our study of their impact in Brooklyn Supreme Court. It is instructive to note in this context that the principal architect of the speed-up, the Mayor's Criminal Justice Coordinator, like his predecessor and successors, was a former assistant district attorney (who later was appointed to the bench by the Mayor and ironically now is an administrative judge).

Thus, the only ally for line P.O.'s discouraged by administrative dismissal of PSRs as moribund survivors in a system geared more toward efficient than individualized justice, was the judiciary.

#### Judicial Reaction

From the outset, court administrators and individual judges were critical of the revised PSI process. This was partially attributable to their perception that the Koch administration had once again set up the judiciary as "the fall guy" for systemic conditions that reduced the efficiency of the courts in general, and contributed to jail overcrowding in particular. In a testy exchange in the Spring of 1981, the Deputy Chief Administrative Judge of the city's court

system--which is funded and managed by the State--refuted the Mayor's charge that the courts could reduce overcrowding through bail review, claiming that such reviews were already institutionalized and new reviews could not produce "dramatic results," since judges would continue to use the same bail criteria, regardless of overcrowding.<sup>1</sup> Later, when the City was forced to release over 600 detainees by Judge Lasker, Mayor Koch blamed the lack of court cooperation for the politically embarrassing outcome, claiming that judicial foot-dragging prevented expeditious case processing.

But the major reason for judicial resistance was the resultant reduced content and quality of the PSRs--a reduction which a State audit in May of 1981 confirmed.<sup>2</sup> In testimony before the New York State Assembly Codes Committee, a number of New York City Supreme Court judges claimed that the new PSRs were "lacking in proper sentencing information," "too skimpy," and led to sentencing delays to obtain more information, since judges did not want to risk imposing improper sentences on the basis of "wholly inadequate" reports.<sup>3</sup>

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<sup>1</sup>"Panel In Conflict Over Jail Release," New York Times, 9 June 1985, pp. 1, 46.

<sup>2</sup>New York State Legislative Commission on Expenditure Review, State Division of Probation Programs Program Audit (Albany, June 1982), p. 29.

<sup>3</sup>Ibid. Also see, "Judge Assails City Agency on Its Presentence Reports," New York Times 14 October 1981, p. 29; and "Justice Aides in Dispute Over Lag in Sentencing," New York Times 3 October 1981, p. 29.

My interviews and contacts with Brooklyn Supreme Court judges during this same period indicated that this response reflected not merely irritation over the lack of consultation by the City in drafting the new format, but also arose out of a genuine concern that defendants would be improperly sentenced. Most judges reacted with particular vehemence to the substitution of NYSID printouts for the formerly detailed legal history section, pointing out that NYSID arrest records were already available to the court, the ADA and defense counsel at the time of plea. What they needed most was a "fleshing out" of these arrests, verification of prior felony convictions and dispositions of the arrests listed, the last component being frequently absent from the computerized listings. The Probation Department had thus institutionalized a dubious reform suggested four years earlier by the Economic Development Council, later highlighted by the Morgenthau Committee, without ever researching its validity.

A Probation Department memorandum (dated 24 July 1981) relates the judicial reaction to the "revisions in PSI protocol:"

....the feedback we have received from the judiciary clearly indicates that a revision of the original guidelines is in order at this time. Judges have complained that the NYSID reports they received were often illegible and even when legible they were too often sketchy and uninformative. The Judges have therefore insisted that we no longer attach the NYSID sheets to our PSI reports. They want us to resume our former practice of including all the NYSID sheet information within the body of the PSI report.

This will, of course, include the dispositional data on all arrests. Additionally, the Judges have complained that they have found the disposition data alone is inadequate and they have therefore requested that we [return to providing] them with brief thumbnail sketches of significant prior arrests.<sup>1</sup>

Although the legal history section was restored to the PSR, criticism continued to pour in from other actors in the system who were beginning to feel the effects of the March reforms. Thus, in a letter dated 7 August 1981, the State Director of the Division of Probation (the agency which provides half of the funding for the City's probation system and monitors local compliance with State rules and regulations) appealed to the Mayor's Criminal Justice Coordinator to revise the City's PSR policy in light of the many complaints he had received from other agencies in the justice system:

We must all understand that the PSR is not only used by the courts for sentencing, but by the New York State Department of Correctional Services in classifying inmates and by the New York State Division of Parole in parole decision-making. I am enclosing copies of letters received from both of these agencies during the past week complaining about PSI's from New York City.

It appears that with the arrival of the new inmates, a large number of them are being classified to maximum security by the

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<sup>1</sup>Memorandum from Al Garfinkel, Deputy Commissioner, Management Services, Department of Probation, to Kevin Benoit, "Revisions in PSI Protocol," 24 July 1981.

classification committee due to the lack of necessary information which would ordinarily be contained in the presentence investigation. This creates problems in attempting to secure the necessary bedspace....we must now develop a format for PSI's that will meet the needs of both the courts and the other agencies that rely heavily on PSI's for decision-making.<sup>1</sup>

Thus, on 20 August 1981, as the result of continuing complaints, the City acceded to the demands of court, correctional, parole and probation administrators and scrapped the short-lived "Condensed Generic PSI Report."<sup>2</sup>

In the end, despite a further lengthening of the PSR turn-around time for jailed defendants from two to three weeks, the Probation Department and the judiciary both responded with alacrity to the jail overcrowding crisis. Of 1,130 jailed defendants awaiting sentencing in March, 1981, only 30 remained unsentenced six months later.<sup>3</sup> Despite the speedy processing of these defendants, most of whom received prison terms (the State Department of Correction, beset by similar overcrowding, was joined to the federal suit as a co-defendant for failure to take speedy delivery of such inmates from

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<sup>1</sup>Letter from Thomas J. Callanan, Director of N.Y. State Division of Probation, to Robert Keating, N.Y.C. Criminal Justice Coordinator, 7 August 1981.

<sup>2</sup>Memorandum from Townsend Barnett, Deputy Commissioner, Adult Court Services, to Kevin Benoit, Al Garfinkel, Assistant Commissioners, Branch Chiefs, et al.

<sup>3</sup>N.Y.S. Legislative Commission, State Division of Probation Audit, p. S-3.

the City), overcrowded jails remained the norm throughout the city, state and federal correctional systems for the next two years. (Ironically, the state's request to lease federal prison space in July of 1981 was rejected by the Bureau of Prisons because its own population was nearing capacity).

Finally, in the Fall of 1983, with the City's inmate population nearing 11,000 in a system with a capacity of 10,300 and no remedy in sight, Judge Lasker capped the population, forcing the City to release 611 pre-trial inmates. The Department of Correction screened its population and released the "least dangerous" detainees, which, according to its criteria, consisted of those with the lowest bail and/or charged with non-violent crimes. A number of these releasees were subsequently re-arrested (one on the subway ride home from Riker's Island) and almost one in five subsequently failed to appear in court. Publicity surrounding these events caused a public uproar (despite assurances that the percentage of releasee absconders was almost equivalent to the general pre-trial failure to appear rate) and prompted a 16 month inquiry by the State Investigation Commission.

The Commission's six members issued three separate reports in June of 1985, which sharply disagreed in apportioning blame for the episode. Three commissioners blamed a lack of coordination among the component agencies of the criminal justice system and recommended the creation of "a true interagency criminal-justice system on a statewide level" modeled after the U.S. Department of Justice which emphasized planning, "coordination, communication and cooperation." This report,

authored by Charles Hynes, a former prosecutor, envisioned the pooling of state and local correctional resources to better manage overcrowding and, while acknowledging the need for the judiciary to remain independent of political control, criticized the lack of judicial cooperation with the City as "an extreme example of judicial noninvolvement."<sup>1</sup>

Two other commissioners, in a report authored by Bernard Smith, former Suffolk County District Attorney, rejected the Hynes call for a statewide unified justice system because it threatened the autonomy of local district attorneys and blamed the defense of the federal suit presented by the City Law Department for failing to emphasize the proactive measures which New York undertook to deal with the overcrowding. The Smith report also recommended: short and long range planning by correction agencies; State cooperation in accepting "state ready" prisoners; and "expedited production of probation reports" to "speed up the sentencing process and...allow for an earlier delivery of prisoners to the state."<sup>2</sup> This report also recommended exploring "the current trend towards privatization of correction facilities, on both a state and local level."<sup>3</sup> The third report, by Commissioner Thomas Culhane, a former police officer, blamed the City for not building more jail cells: "For four years

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<sup>1</sup>Temporary State Commission of Investigation, Report on Release of New York City Inmates (New York: June, 1985), p. 15.

<sup>2</sup>Ibid., p. 5.    <sup>3</sup>Ibid., p. 8.

they did nothing until the patience of Judge Lasker was exhausted."<sup>1</sup> Of all the reports, Culhane's was the most sympathetic to the judiciary, praising its resistance to bail reduction as a solution to the problem and declaring that "judges...must never consider an overcrowding problem when imposing sentence. The length of incarceration should be based on the severity of the crime and not influenced by a governmental failure to provide the necessary jail space."<sup>2</sup>

Both the Smith and Culhane reports were adamant in their opposition to the Hynes proposal for unification of the justice system. Culhane argued that the system, despite the competition of its constituent agencies with their "countervailing interests," nonetheless "achieved honest results because of its built in checks and balances."<sup>3</sup> Smith encapsulated in one question the larger problem which the crisis posed--and which any consideration of endemic correctional underfunding must address--"How do you coordinate a system that was never meant to be coordinated and, indeed, should remain constitutionally divorced?"<sup>4</sup>

#### The Changing Function of The Presentence Investigation

Despite a continuing trend across the United States during the

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<sup>1</sup>Ibid., p. 9.    <sup>2</sup>Ibid., p. 11.    <sup>3</sup>Ibid., p. 19.

<sup>4</sup>"Panel in Conflict," p. 46.



past decade toward adoption of the justice model of corrections, which favors uniformity and fairness in the processing of offenders, and attendant limitation of sentencing and parole-granting discretion, the presentence report has survived, even in those jurisdictions where parole and the indeterminate sentence have been abolished. Although its prevalence has traditionally varied widely from state to state, half of the 50 states require a PSR before imposition of a felony or probation-eligible sentence.<sup>1</sup> Thus, while the PSR's utility for correctional institutions, parole boards and parole officers diminishes (although 36 states still retain an indeterminate sentencing structure, according to the most comprehensive recent survey conducted in 1985),<sup>2</sup> it still provides significant assistance to its primary user, the sentencing judge, since some jurisdictions which have adopted sentencing guidelines and fixed penalties are now using the PSR as the instrument for determining aggravating or mitigating circumstances that allow deviation from legislatively prescribed sanctions.

In 1984 the Congress enacted sweeping reforms of Title 18 of the U.S. Code affecting criminal procedure ('The Comprehensive Crime Control Act of 1984'). In effect, the new legislation, which will

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<sup>1</sup>American Bar Association, Standards Relating to Sentencing Alternatives and Procedures (New York: Institution of Judicial Administration, 1968), pp. 202-3.

<sup>2</sup>Shane-DuBrow, et al., Sentencing Reform in the United States, pp. 282-83.

begin to take effect in late 1987, phases out parole over a five year period and severely limits the indeterminate sentencing scheme that has predominated in federal jurisprudence for half a century. In fact, presently (and until the newly created Federal Sentencing Commission's guidelines are approved by Congress), only a handful of offenses are considered probation ineligible in federal court, principally those "punishable by death or by life imprisonment."<sup>1</sup> And unlike most states, there is no "predicate felony" statute on the federal level, with the result that second and third felony offenders still are eligible for non-incarceration penalties.

At recent hearings of the Sentencing Commission in U.S. District Court for the Southern District of New York, the Commission discussed the revised role of the P.O. in the sentencing process as a "fact finder" concentrating on gathering information related to the offender's legal history and the details of the crime.<sup>2</sup> Under a point system which assigns fixed weights to certain variables, the predominant emphasis will be on the present offense and prior criminal record, with social history and rehabilitative potential relegated to very minor importance in the scoring system that will determine sanctions and their severity.

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<sup>1</sup>Rule 32(e), Rules of Criminal Procedure, Title 18, United States Code.

<sup>2</sup>Hearing, 21 October 1986, U.S. Courthouse, Foley Square, New York.

In this justice model of sentencing, the P.O.'s major role during the PSI might very well consist of mediating an agreement between the Assistant U.S. Attorney and defense counsel to resolve conflicting arrest, court and correctional data present in the record. In fact, the Administrative Office of the U.S. Courts envisages the P.O.'s major function under the new system, as indeed it has always been, will be to advise the court on the appropriate sentence. In so doing, the P.O.'s discretion will be limited by the guidelines and the PSR will undoubtedly be subjected to much more rigorous analysis by defense attorneys. While a social work trained P.O.'s analysis of an offender's social history is more susceptible to challenge--given the inexact nature of the social sciences--it seems likely that the P.O.'s expertise in ferreting out court and correctional data will continue to give the PSR an important role to play, even in a justice model-oriented sentencing process.

Victim Impact Statements: Another  
Important Component of the PSR

There has also been a growing trend since the 1970's to make the criminal justice system more responsive to victims. This has evidenced itself in the assignment of more female police officers and prosecutors to sex abuse cases, and in the establishment of victim service agencies as adjuncts of prosecutorial agencies, to cite two popular examples. In addition, administrative changes in court and prosecutorial case processing,

with many jurisdictions assigning the same judge and/or prosecutor from arrest (or indictment) to disposition, has produced an ancillary benefit of allowing complainants to track progress of the case more readily (and avoid multiple interviews with newly assigned prosecutors), in addition to speeding adjudication of the case.

As part of this trend, many states as well as the Congress, have enacted legislation requiring that "victim impact statements" be made available to the sentencing judge. In most instances, the PSR has been mandated as the vehicle through which this statement is to be delivered. Thus, in 1982, New York State amended its Criminal Procedure Law to require inclusion in the PSR of "the consequences of the (felony) offense for the victim, including the extent of the physical injury or economic loss and the amount of restitution sought by the victim."<sup>1</sup> Despite the fact that PSR's in New York City have traditionally contained a "complainant's statement" section (since at least the 1920's),<sup>2</sup> the new law was widely reported as an innovation. Indeed, Elizabeth Holtzman's successful 1981 campaign for the post of Kings County District Attorney highlighted the need for the judiciary to be more responsive to victims in their sentencing decisions. And publicity attending the signing of the new law by the Governor emphasized that the PSI had previously dealt 'with the

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<sup>1</sup>Chapter 612 of the New Laws of 1982, amending New York State Penal Law Section 1.05 and Criminal Procedure Law Section 390.30.

<sup>2</sup>New York City Department of Probation, Manual for Presentence Investigations, 1975 edition, p. 15.

convicted felon, not the victim."<sup>1</sup>

This episode, and many others previously discussed, illustrate the viewpoint, predominant among criminal justice managers and the political community, of the PSR and probation itself as a "treatment" oriented vestige of the medical model of corrections. On the other hand, the legal community often assails the PSR and probation for a lack of client-oriented rehabilitation plans and being too closely allied with the prosecutorial viewpoint.

Such contradictory criticisms can be seen as by-product of popular displeasure with a judiciary perceived as too dispassionate and too independent in an era of rising crime, while at the same time reflecting increasing judicial discomfort over the introduction of justice model concepts into a probation community engulfed by record numbers of supervisees and the lack of individualization such case loads dictate. In response, "privately commissioned" PSR's have become more commonly used by the defense bar, but have failed to usurp probation in this sphere because of the private PSR's inherent advocacy function.<sup>2</sup>

Yet, the PSR remains resilient, as a fine-tuning mechanism for sentence bargains, as an arbiter of sentencing guideline formulas, as a case management tool for correctional agencies, and as a vehicle

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<sup>1</sup>"New Law to Aid Victims," New York Daily News 10 August 1982, p. 5.

<sup>2</sup>Thomas Rodgers and Thomas Gitchoff, "The Privately Commissioned Pre-Sentence Report: A Multi-Disciplinary Approach," 2 Criminal Justice Journal (Spring 1979): 271-79.

for providing some measure of victim and offender catharsis in an often times impersonal bureaucratic setting.

### Conclusion

This dissertation, in attempting to determine the impact of PSR's on sentencing decisions, has found confirmation for its salutary effect on plea bargains. Since sentence bargains are frequently engineered without due consideration to the plethora of options available to the court beyond the basic dichotomous decision of whether to incarcerate or release an offender, the PSR is frequently used to adjust such bargains, most often within the limits of change which can be accommodated without jeopardizing the plea, but also, in a surprising number of cases the PSR leads to substantial modification of, or dissolution, of the sentence bargain. It has found that in New York, probation is often bloodied by the countervailing pull and push of executive and judicial branch tensions. And our study suggests that despite dramatic changes in the sentencing process since the presentence investigation was born, including the ascendancy of prosecutorial influence in determining the final parameters of most convictions, itself an outgrowth of public support for a more incapacitation oriented justice system, the presentence report will remain a necessary ancillary tool of any sentencing or correctional scheme that does not regard its deviant population as "entirely fungible."

Indeed, as David Rothman predicted in a 1983 essay which traced the history of sentencing reform in the United States, the momentum for determinate sentencing appears to have slowed considerably within the past year, and it is not altogether clear as of this writing whether the U.S. Sentencing Commission's proposed reforms will survive congressional review.

But whether discretionary power is shifted to other actors in the system or remains in its more visible judicial guise, we can only hope, with Professor Rothman, that the ascendancy of the quantitative analyst and "the search for mathematical precision in sentencing"<sup>1</sup> will yield to a realization within the criminal justice community that rigid formulas, much like the "treatment modalities" of previous generations, promise much more than they can ever hope to deliver.

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<sup>1</sup>David J. Rothman, "Sentencing Reform in Historical Perspective," Crime and Delinquency 29 (No. 4, 1983): 646.

## APPENDIX A

Pre-coded Research Instrument

## I. Identifying Information

- a) Probation Case No. \_\_\_\_\_  
 b) Indictment No. \_\_\_\_\_

## II. The Defendant

- 1) Case No. \_\_\_\_\_  
 (Column 1, 2, 3)

- 2) Sex: Male Female  
Col. 4/1 Col. 4/2

- 3) Age: \_\_\_\_\_  
Col. 5, 6

- 4) Race: Black Hispanic White Oriental Arap  
7/1 7/2 7/3 7/4 7/5

- 5) Marital: Single Married Consensual Divorced  
8/1 8/2 8/3 8/4

- Separated Widowed Engaged  
8/5 8/6 8/7

- 6) Employment: Unemployed F/T P/T Student Retired  
9/1 9/2 9/3 9/4 9/5

- Housewife Armed Forces Incarcerated  
9/6 9/7 9/8

- 7) Economic: Welfare Working Poor Working Class  
10/1 10/2 10/3

- Middle Class Upper Middle Upper Unknown  
10/4 10/5 10/6 10/7

- 8) Citizenship: U.S.A. Registered Alien Naturalized  
11/1 11/2 11/3

- Illegal Alien Unknown  
11/4 11/5

## III. Youthful Offender Data

- 9) Y.O. Eligibility: Eligible Ineligible Eligible if  
12/1 12/2 12/3

- 10) Y.O. Promise: Promised Not Promised Not Applicable  
13/1 13/2 13/3

- 11) Y.O. Recommendation (S.P.O.): Grant Deny None  
14/1 14/2 14/3



12) Y.O. Disposition: Granted Denied N/A  
15/1 15/2 15/3

## IV. Legal Variables

13) Custodial Status: R.O.R. Bail Detention Doing Time  
16/1 16/2 16/3 16/4

Convicted In absentia Returned  
16/5 16/6

In residential treatment facility  
16/7

14) Arrest Record: None 1 to 3 4 to 6 7 to 9 10 or  
17/1 17/2 17/3 17/4 17/5

15) Felony Convictions: None 1 felony 2 felonies 1 Y.O.  
18/1 18/2 18/3 18/4

1 fel. & 1 Y.O. 2 fels. & 1 Y.O.  
18/5 18/6

3 felonies 4 or more  
18/7 18/8

16) Conviction Type: Plea before trial Plea during trial  
19/1 19/2

Trial by Jury Trial by Judge  
19/3 19/4

17) Time Elapsed : 2 mths. or less 2-6 mths. 6-12 mths.  
 (Indictment to 20/1 20/2 20/3  
 conviction) 12-18 mths. 18-24 mths. 24+ mths.  
20/4 20/5 20/6

18) Charge Reduction: None 1 class down 2 down 3 down  
21/1 21/2 21/3 21/4

19) Conviction Class: "A" felony "B" felony "C" felony  
22/1 22/2 22/3

"D" felony "E" felony "A" Misdem  
22/4 22/5 22/6

20) Specific Offense: \_\_\_\_\_  
 23, 24

<u>Retained</u>	<u>Not indicated</u>
25/4	25/5

<u>Supreme Court</u>	<u>Sex Crimes</u>	<u>Narcotics</u>
26/5	26/6	26/7

Special Prosecutor  
273

Family Court	Same sentence	More severe
27/6	27/7	27/8

Less severe sentence  
27/1

<u>All 3</u>	<u>2 out of 3</u>	<u>Parole</u>	<u>Any Pr</u>
28/4	28/5	28/6	

<u>Federal</u>	<u>None</u>
25/3	22/9

No VOP (prob.) Pending	No VOP
29/3	29/4

Supervision Terminated Prior to Off  
29/5

Not Applicable  
29/6

26) Counsel:

30, 31, 32

27) A.D.A.: \_\_\_\_\_ 33, 34

28) Judge: \_\_\_\_\_ 35, 36

29) P.O.: \_\_\_\_\_ 37, 38

30) S.P.O.: \_\_\_\_\_ 39

#### VI. The Promise

31) Plea Info.: Obtained from def. From Court or P.A.  
40/1 40/2

No mention Not Applicable  
40/3 40/4

32) Judge's Promise: \_\_\_\_\_ 41, 42

33) If jail/prison Promised: \_\_\_\_\_  
(Length) 43, 44

#### VII. The Recommendations

34) A.D.A. Recommendation: \_\_\_\_\_ 45, 46

35) If jail/prison Recommended: \_\_\_\_\_  
(Length) 47, 48

36) S.P.O. Recommendation: \_\_\_\_\_ 49, 50

#### VIII. The Disposition

37) Sentence: \_\_\_\_\_ 51, 52

38) If jail/prison sentence: \_\_\_\_\_  
(Length) 53, 54

39) If plea withdrawn (A): Eventually sentenced by same judge  
55/1

Eventually sentenced by different  
55/2

Not Applicable  
55/3

40) If plea withdrawn (4): Eventual sentence same as prom  
56/1

Sentence more severe      Less sev  
56/2                              56/3

Not Applicable  
56/4

IX. Pre-Sentence Report Quality Index

41) Police or C/W Contacted?      YES      NO  
57/1                              57/2

42) Prior Dispositions Obtained?      Yes      No  
58/1                              58/2

43) School/Employer Contacted?      Yes      No  
59/1                              59/2

44) Community Contact?      Yes      No  
60/1                              60/2

45) Prognosis/Final Evaluation?      Yes      No  
61/1                              61/2

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Joseph G. Enright served as a probation officer in New York City's state and federal courts for ten years before his appointment as Deputy Coordinator of the Arson Strike Force in 1984. In 1986, he joined the new management team of New York City's Parking Violations Bureau, as the Executive Assistant to the General Counsel. A graduate of Manhattan College, where he earned a Bachelor of Arts degree cum laude in History in 1969, he commenced his graduate studies at the John Jay College of Criminal Justice in 1979. The recipient of the Arthur Niederhoffer Memorial Fellowship and the John Jay College Alumni Award, he has published articles on probation enforcement and arson suppression.