III. The Sentencing Commission and Temporary Advisory Sentencing Guidelines

Statutory charges:

"d. Creation of a sentencing commission to prondgate advisory sentencing guidelines for use by judges when imposing a bifurcated sentence.

e. Development of temporary advisory sentencing guidelines for use by judges when imposing a bifurcated sentence."[153]

A. Sentencing Commission Format

The committee envisions a sentencing commission as a large, broad-based group that will act review sentencing policy for the state. The commission also will act as a link between various state criminal justice agencies, and as a bridge between the Legislature and the Department of Corrections ("DO,"). The commission also will have a research role.

1. Commission functions; its role and authority

The commission should monitor sentencing practices in the state to modify guidelines according to public safety needs and changes in sentencing practices, to preserve the integrity of the system, and to compile data regarding anticipated needs.

The commission should report to the Legislature so that DOC budget needs are anticipated to gain public support and public understanding of sentencing practices, and to inform the legislature and other agencies of anticipated needs in corrections. The commission should consider using the computer model developed by the committee to do this.

The commission could be mandated to work with the state legislature's budget office to cost out the impact of any proposed new criminal laws and changes such that the legislature make an informed decision on same.

At least on a limited basis, the commission should be in charge of teaching about the sentencing guidelines. It should also aid in, if not take the lead role in, educating judges, prosecutors, public defenders, and the private bar concerning sentencing guidance.

The commission could issue statistics, updated semi-annually, or even quarterly if possible, publishing what sentences offenders received, on which crimes, both statewide, and by geographic area: Milwaukee County, Dane-Rock Counties, the Fox Valley,

[153] See 1997 Wis. Act 283 sec. 454(1)(e)4-5.

Racine-Kenosha Counties, and the rest of the state. These reports could be distributed to all judges.

These reports could have a different substantive theme each year to prevent them from becoming a purely statistical compendium. The commission could issue a public annual report with any proposed sentencing guideline revisions.

2. Commission membershin

The committee decided that a commission with a make-up similar to the Criminal Penalties Study Committee (although without representatives from the state's 2 law schools). The commission would have 17 regular members:

The state attorney general or designee
The state public defender or designee
7 members appointed by the Governor, including 2 not in public employment
1 member from the political party other than the Governor's
2 circuit judges appointed by the Supreme Court
1 member appointed from the state senate
1 member appointed from the state assembly
1 victim's advocate appointed by the attorney general
1 district attorney appointed by the attorney general
1 private defense attorney appointed by the criminal law section of the State Bar of Wisconsin

The commission also would have 3 ex officio members:

The secretary of corrections or designee
The parole commissioner or designee
The state court administrator or designee

A term of service on the commission would be for 3 years. There should be no limit on the number of terms which a member could serve **[give reason].** The terms should be staggered so as to: (a) expedite turnover of commission membership, with new members with new ideas joining the commission more quickly than could otherwise be the case, and (b) members already on the commission could educate new members.

3. Commission staff and budget

Through research of various states, it was decided that a commission staff size of 6 would be proper. Although the commission should decide the functions of the various staff members, the committee thought that a good breakdown of the 6 positions could be:

1 executive director
1 deputy director
1 data entry operator

2 research analysts
1 training coordinator

A cost estimate for the new sentencing commission is attached at Appendix ___.

4. Duration of commission

The committee debated whether the sentencing commission should be temporary or permanent. The committee recommends that after the commission's initial run of a set number of years, the commission would sunset with a provision for legislative review to decide whether or not the commission should continue.

5. Character of commission

The committee proposes that the sentencing commission be attached to the Department of Administration for all administrative support services, as was the previous sentencing commission and is the Criminal Penalties Study Committee.

6. Scope of commission's responsibility

Committee members agree that for the commission to have the powerful policy role the committee envisions, the selection of an executive director will be important.

7. Parole-like responsibilities for the commission?

The committee debated whether or not a "geriatric clause," which could be within a trial judge's discretion, and appealable only for abuse of discretion, should be recommended.

[Further development per Mr. McCann]

8. Enactment and modification of guidelines

On an annual basis, the commission will promulgate new guidelines or revisions to existing guidelines.

B. Sentencing Guidelines

1. Introduction and overview

Perhaps the most difficult question this committee faced was the choice of a sentencing guidelines system. The sentencing guidelines subcommittee, as well as the full committee, had long and difficult discussions about the format sentencing guidelines should take for Wisconsin's "new world" of Truth-in-Sentencing. As it studied this problem, the committee knew that given the new determinate sentencing system, all actors in the criminal justice system, but especially judges, who will be making

irrevocable decisions on sentence lengths, will need true guidance as to proper sentences in this "new world."

2. Study of other states' sentencing guidance systems

The full committee studied the sentencing guidance systems of various states and the federal system, each of which has implemented Truth-in-Sentencing, as well as the former Wisconsin sentencing guidelines. Given the full committee's short deadline, from the beginning, other states' systems were examined to determine if one was attractive to import into Wisconsin.

Committee members noted the following regarding those other systems:

North Carolina -mandatory guidelines using grid

Strengths - 1) prison population and cost projection capabilities
2) emphasis on community corrections for lower-end felonies

Weaknesses - I) insufficient flexibility forjudges, litigants, and defendants
2) incompatible with 1997 Wis. Act 283 mandate that guidelines be "advisory"
3) discomfort with community corrections as a possibility for punishment for serious/violent felonies

Virginia - voluntary guidelines using grid

Strengths - I) voluntary nature of grid
2) although voluntary, achieved 75% compliance by mandating that forms bc filled out
3) education effort through handouts to public
4) card given to offender exiting system delineating penalties if offender re-offends
5) geriatric clause

Weaknesses -- I) risk of reoffense calculation was controversial
2) midpoint sentence enhancements for violent felonies were controversial
3) imprisonment for longer period of time at early age of offender was controversial
4) admission from sentencing director that VA will bear great corrections expenses in the coming decades due to longer sentences

Delaware - [voluntary guidelines; not grid, but presumptive sentences and levels of incarceration]

Strengths -- I) by tying the level of supervision of an offender to their behavior, "good" actors are transferred into less expensive incarceration modes more quickly

Weaknesses -- I) difficult to translate system from such a small state to Wisconsin
2) complexity of system
3) felony-class based rather than offense based

Ohio - mandatory narrative guidance without a grid

Strengths - I) narrative questions posed by the judge were more particular/useful than other such questions studied
2) non-grid approach does not "reduce an offender to numbers"

Weaknesses - I) elaborateness of system would seem to make it take too long to sentence an average case
2) sentence ranges for serious/violent felonies could be insufficient to protect public safety
3) recidivist calculation too complex

Federal - **mandatory guidelines using grid**

Strengths -- **I) prison population and cost projection capabilities**

Weaknesses -- **I) insufficient flexibility for judges, litigants, and defendants**
2) incompatible with 1997 Wis. Act 283 mandate that guidelines be "advisory"
3) too complex
4) grid approach "reduced an offender to numbers"
5) those intimately familiar with the system objected to its adoption for reasons 3) and 4), among others

Former Wisconsin - **advisory guidelines using grid**

Strengths - **I) Strong foundation in historical research**
2) Judiciary's familiarity with framework
3) Offense-based system

Weaknesses -- **1) Perceived as "least common denominator" approach**
2) Comments from those who used the former guidelines that even in 1995, when they ceased to be used, sentencing ranges were too low
3) Political baggage of perceived previous lack of success

3. Conversion Table

The sentencing guidelines subcommittee developed for committee approval a conversion table, the purpose of which is to numerically convert "old world" indeterminate sentences to "new world" Truth-in-Sentencing determinate sentencing ranges.[154]

On the back of this table, information was also provided converting old indeterminate sentences to TIS converted sentences based on average time served to first release for (a) assaultive, (b) sexual assaultive, (c) drug, and (d) property/other crime categories. This was drafted based on very broad crime categories, to give judges an idea on where new world sentences could fall based upon their knowledge of old world sentence numbers. Some concern was expressed with the conversion table's use of averages from broad crime categories, as those categories incorporated so many crimes, decreasing sentences for severe crimes and increasing sentences for less severe ones.

The four categories listed each consolidates numerous and disparate types of felonies. The percentage of time served at the top of each column represents an average over 7 years of prison time served for all of the felonies in that category. Thus, the sentence listed is merely an example of what an average Truth-in-Sentencing-converted sentence could be for an average felony in that category.

Note that the former Wisconsin Sentencing Commission with a staff of 5 took 11 years to develop 16 sentencing guidelines. Time constraints have limited this Committee to developing sentencing guidelines for the 11 crimes which consume the greatest amount of corrections resources - approximately 72%. The conversion table should be used during "new world" sentencing of all other crimes.

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[154] **A copy of the conversion table is included at Appendix ___.**

[Need a provision in sentencing legislation until such times as sentencing commission is functioned, the guidelines prepared by the CPSC should be approved in some way.]

4 Discussion of sentencing guidelines format

None of the systems studied garnered enough support for the committee to recommend that Wisconsin adopt it. Instead, the committee decided to formulate a new advisory guidelines format.

The committee debated its goals for a sentencing guidelines system. Among those articulated were: (1) ensuring public safety; (2) preserving judicial sentencing discretion; (3) preserving individualized sentencing; (4) proportionality in sentencing statewide, especially given the abolishment of parole;[155] and (5) predictability, so that the the Legislature, the Governor, and the DOC may plan for what judges will do under the new system and how much it will cost.

The sentencing guidelines subcommittee discussed at length the merits and demerits of "grid" versus "non-grid" guidelines formats. A grid system would incorporates a graph with two axes upon which offender risk (horizontal axis) and offense severity (vertical axis) are measured.

After considerable debate, a majority of the subcommittee liked a vertical axis with mitigated, intermediate, and aggravated ranges. There was considerable disagreement among subcommittee members as to how a horizontal axis should look. Some members thought it important that an offender's prior crimes be assigned points, and that an offender be ranked on the horizontal axis according to those points. Other members disagreed with the scientific caste this gave to the offender risk calculation.

Having in mind the goals listed above, and contemplating different "grid" and "non-grid" formats, the subcommittee and full committee considered different proposals for this sentencing guidelines format, including the following:

a. "Rule-of-Law" Sentencing Guidance Proposal

The overriding principle for this proposal was that felony sentencing in Wisconsin should advance the public safety interests of its residents. It asks the judge to determine what version of the crime the offender committed (for example, what type of burglary had been committed - professional, retaliatory, opportunistic, or thrill-seeking?). The answer to this question is relevant to public protection and punishment deserved. The judge is to look at certain relevant facts and circumstances. These would include facts about the offense - e.g., what type of premises was burgled? - as well as facts about the

[155] **Under Truth-in-Sentencing, all of the discretion will be at the front end of the process, rather than some of it at the back end, as with parole. This proportionality must be vertical -the crimes should be in properly descending order, most serious to least serious - as well as horizontal - comparable sentences lengths for comparable crimes.**

victims - e.g., was the victim a vulnerable person, and was the victim known to the perpetrator to be vulnerable? These facts will affect what punishment is deserved, and what future risk the offender may be.

The judge would also examine facts about the offender's character and behavior. Initially, the judge would look at prior crimes and bad acts. Under this proposal, the judge would be told that prior offenses may render an offender more deserving of punishment for the current crime, but the judge would be required to look at the type of prior offense. This proposal sought to have the judge engage in a reasoning process about prior convictions to see what is relevant to the offense and what is not.

Other factors the judge would consider include legal status at the time of the crime, age of the perpetrator, and the offender's employment and familial status. This proposal would consider aggravating and mitigating circumstances, but not name them as such, because such circumstances can cut both ways. Then this proposal tells the judge how to weigh these circumstances by asking 2 fundamental questions: (1) Can the sentence contain the risks posed by the offender's return to the community?, and (2) Can punishment deserved by this offender be effective within the community? If the answer to both questions is "no," the judge must sentence the individual to prison within the range provided. A judge may depart upward or downward from the stated range if the judge, in analyzing these factors, determines that a sentence outside the guideline range was warranted.

Some members thought the benefits to this proposal were that it tells litigants in advance what information to present to the judge, gives guidance to the judge about how to use the information, makes the judge decide based on current law, which says that the least restrictive form of punishment and protection of the community ought to be used, and it avoids the use of a matrix. This lack of a matrix with a horizontal axis -- which assessed points for prior crimes, and used those points as an axis on a matrix -- was the essential difference between the Rule of Law approach and other approaches. Supporters of this proposal felt that scoring prior crimes was deceptive and did not adequately punish offenders who deserved greater punishment because they did not have a prior bad act or prior crime, and over-punished offenders whose prior bad acts or crimes were not related to this particular crime.

Detractors of this proposal thought the format was too long, and unwieldy. Also, they thought racial bias might be inserted if an offender's prior record was not considered. Another concern with the narrative approach is what guidance it actually provides. What type of guidance would the question "what type of burglary was this?' actually provide?

b. Former Wisconsin Sentencing Guidelines with monthly ranges adjusted for time-served

Another proposal offered was based on the theory that actual prison time-served equals Truth-in-Sentencing. Under this proposal, the former Wisconsin sentencing

guidelines would be adopted in all respects except for the numbers contained in the cells in the guideline matrix. Those monthly ranges would be converted to actual-time served in prison. As sentence lengths increased, the percentage of the sentence actually served increased. Those increasing percentages of time-served would be multiplied by the increasing sentences in the matrix to give truthful ranges to be used.

Proponents of this proposal thought it would be truthful and would let all actors in the criminal justice system, but especially judges, that sentences must be modified to the time periods which offenders actually served. Supporters also thought that this proposal had a statistical foundation in the former Wisconsin guidelines, and is familiar to judges and litigants. Further, if this theory is followed, and if judges follow the guidelines, theoretically, neither the number of prisoners nor costs would increase. This proposal continued to recognize that prior record and offense severity were the two key factors that made a difference statistically out of all crimes studied over many years of thousands of sentences. This proposal also allows consideration of aggravating and mitigating factors on the back of the guidelines sheet.

Critics of this proposal noted that the data relied upon in the former Wisconsin guidelines was 5, 10, sometimes 15 years old. Also, many of the people in the criminal justice system who used the former guidelines said that the ranges were based on old data, and adjusted their sentence recommendations and dispositions accordingly.

Other detractors thought that a matrix did not sufficiently take into account the individual and his or her circumstances. If you created a matrix, the starting point for the prosecution becomes a cell into which an individual is automatically plugged, and that is the starting point of the negotiation, which could inflate sentences.

c. Middle-ground approach

A middle ground approach between the Rule-of-Law and the former Wisconsin guidelines was also considered. This proposal attempted to maintain some of the benefits of a grid-guideline system while not straight-jacketing judges. The main objective of this proposal was to produce a clear starting point, and then specify the major aggravating and mitigating factors that a judge would consider in reaching a sentence. Some of these factors would be general, and some would be crime-specific.

This proposal originally retained the criminal-history scoring from these old guidelines (the horizontal axis), but with some substantial differences. But unlike the former guidelines, this proposal contained no severity of offense scoring (the vertical axis); rather, it broke the offense down into aggravated, intermediate, and mitigated ranges. Finding the intersection of the two axes would give the judge a starting point with a range of prison or probation. The judge would proceed from this range to the aggravating and mitigating factors, both general and crime-specific.

Supports of this proposal thought it gave the judge and the litigants some idea as to where a judge is likely to start the sentencing analysis. This would allow litigants to

structure their arguments to persuade a judge to go up or down. Critics felt that the criminal history scoring lent an improper scientific caste to past criminal history, and overweighed that factor in assessing an offender's risk.

4. Decision on sentencing guideline format

The committee discussed these various proposals at length. The committee approached the choice of a guideline format as an evolutionary process. Ultimately, the committee attempted to incorporate some of the aspects of each of the proposals.

Ultimately, the committee decided to recommend a two-page **worksheet**[156] with an accompanying **commentary**.[157]

The worksheet was drafted such that before sentencing, the presentence writer or a person designated by the judge could till out all but 1 section.

In section I. of the worksheet, **offense severity** is assessed. This brings to the court's attention (a) factors affecting the severity of the crime, (b) assesses the harm caused by the offense, (c) assesses the offender's role in the offense, (d) attempts to give objective weight to former penalty enhancers transformed into statutory sentencing aggravators, and brings to the courts attention (e) other factors relating to offense severity. Crimes are ranked as mitigated, intermediate, and aggravated. This assessment includes statutory aggravating factors, non-statutory aggravating and mitigating factors, as well as crime-specific factors. It includes former penalty enhancers as statutory aggravators. See below

In section II. of the worksheet, **risk assessment** is evaluated. This brings to the court's attention (a) factors that may suggested heightened or lesser risk, including prior acts (whether or not convictions/adjudications), the offender's age, employment, character, family/community ties, alcohol/drug dependency, drug treatment, and performance on bail. (b) A list of all convictions and/or juvenile adjudications will be attached to the worksheet. (c) Criminal history should be assessed with caution, and the judge is to consider whether prior criminal convictions fairly reflect risk to public safety or to re-offend. The format uses normative questions concerning an offender's prior criminal history as a guide toward certain risk levels. It also incorporates other narrative questions which ask litigants to identify and evaluate factors that bear upon the offender's future risk to public safety and directs the judge to determine which factors are relevant. At the end of this section, the judge is asked to consider whether the score improperly understates or overstates the offender's future risk to public safety. This risk assessment is ranked low, medium, and high. The format was altered to remove criminal history scoring. The low, medium, and high columns were chosen for risk assessment as roughly approximating the types of offenders judges encounter. A judge may decide for a variety of reasons to switch columns if the judge concludes that the risk assessment does not accurately reflect the offender's circumstances.

[156] See Appendix .
[157] See Appendix .

In section III. of the worksheet, the judge consults a 9-cell **graph** where these two assessments intersect. This gives the judge an advisory starting point from which to begin to sentence the offender. The percentage of the number of offenders who committed this crime and who were placed on probation for this offense is listed. A description of an intermediate offense is also listed. The concept of extended supervision is addressed below the chart.

Below the chart, additional factors which may warrant adjustment of the sentence are listed, such as uncharged read-in offenses, acceptance of responsibility, attorneys' recommendations, restitution paid at great sacrifice before sentencing, and the effect of multiple counts.

Along with the worksheet, the guidelines subcommittee has drafted a detailed **commentary** that elucidates for judges and litigants many of the considerations and concepts underlying the questions posed on the worksheet.

This format has the strengths of (a) risk assessment using criminal history, (b) narrative questions allow for guiding judge's sentencing decision, (c) advisory guidelines maintain flexibility for judges and litigants, (d) system not overly complex so able to be utilized in busy felony court, (e) use of a graph to allow for some corrections population and cost projection capabilities.

Per the direction of 1997 Wis. Act 283 sec. 454(e) 4-5, this format maintains the advisory nature of sentencing guidelines."[158]

5. Monthly ranges for the graph in the guideline format

On June 11, 1999, a survey was conduct of a number of circuit judges from around the state to determine sentence ranges for the graph to be used in the temporary advisory sentencing guidelines recommended by this committee.

Based upon an idea by committee reporter Professor Thomas Hammer, 47 judges who were thought to represent different viewpoints, different areas of the state, and who are well-regarded and experienced in felony sentencing were invited to Madison for a survey on June 11, 1999. Of the invitations extended, 18 judges accepted and attended the meeting, which was facilitated by former Wisconsin Supreme Court Justice Janine Geske.

At the meeting, the judges' opinions were solicited as to what were the characteristics of low-risk, medium-risk, and high-risk offenders, and what were the mitigated, intermediate, and aggravated forms of the 11 crimes which consumed the

[158] See **Appendix __ for example of the guideline.**

greatest amount of corrections resources (it was determined that this totaled approximately 72%.) Those crimes are:

1. **Burglary**
2. **Theft**
3. **Forgery/Uttering**
4. **Robbery**
5. **Armed Robbery**
6. **Possession of Controlled Substance With Intent to Deliver Cocaine - 1 gram or less**
7. **Possession of Controlled Substance With Intent to Deliver Marijuana - 200-1000 grams**
8. **1st Degree Sexual Assault**
9. **1st Degree Sexual Assault of a Child**
10. **2nd Degree Sexual Assault**
11. **2nd Degree Sexual Assault of a Child**

The statutory maximums recommended by the code reclassification subcommittee were used. The group brainstormed as to the various indicia of a low-, medium-, and high-risk offender who had committed that offense, as well as to list the indicia of a mitigated, intermediate, and aggravated version of the offense. This list of those indicia became valuable as the full committee reviewed what types of crimes the judges had been using when they filled out the cells. While there was not always universal agreement - e.g., some judges thought an addiction was an aggravating factor, others thought it was a mitigating factor -judges agreed on almost all of the indicia of a criminal's risk and an offense's severity.

After discussing the characteristics of each crime, the judges wrote ranges of punishment into each cell of a 9-cell graph to be inserted into whichever guideline format the committee chooses. For each crime, Justice Geske led a discussion among the judges as to what ranges they placed in which cells and why. Judges were encouraged to rethink the ranges, and then submitted these draft graphs for tabulation by committee staff.

Medians were used to calculate minimum and maximum numbers for each of the cells in the graphs. There was horizontal and vertical overlap between the ranges in the cells: e.g., the highest number in the cell for a low-risk offender, committing a mitigated version of an offense, would be higher than the lowest number for a medium-risk offender committing the same version of the same offense. Also, the judges were surveyed as to whether or not they would recommend using the statutory minimum of 25% of the period of incarceration to be the period of time the offender should serve on extended supervision. The judges' responses to that inquiry - overwhelmingly "no" - were listed on the bottom of the draft graphs distributed to the committee members. Most thought that the amount of ES time should vary based upon the offender's risk.

Topics of discussion among the judges at the survey included how many cells should include probation as the lower number in the range in the cell, and whether or not the maximum number of years for the crime should be the highest number in the range in the cell in the most aggravated form of the crime for the highest-risk offender. The judges who attended worked hard and patiently in order to come up with sound, middle-of-the-road ranges for the cells in the graphs for the various crimes.

The draft graphs were the topic of discussion at three separate sentencing guidelines subcommittee meetings. A symmetry emerged in the monthly ranges in the cells. For each crime, the median low was probation, and the median high was the statutory maximum. For most crimes, for a low-risk offender committing an aggravated version of an offense, a range of punishment was given identical to a range of punishment for a medium-risk offender committing an intermediate version of the same offense. Also, judges tended to give a higher sentence to an offender with an extended criminal history even though the offender had committed a more mitigated version of an offense, in contrast to a first-time offender or low-risk offender who had committed the most aggravated form of an offense.

The consensus among all who worked with the monthly ranges was that they wished to see relatively broad ranges in each cell to maintain a great deal of flexibility.

The former Wisconsin guideline monthly ranges for the same 11 crimes were also adjusted for the time period actually served. Those ranges were then reviewed by the guidelines subcommittee, but the resulting monthly ranges were so low as to cause concern among some members, and were ultimately rejected for use in the graphs.

For the committee's work to be credible, it was concluded that the cell for the high-risk offenders committing the severest version of the crime had to include the statutory maximum time in prison, and that the cell for the least-risky offenders committing the most mitigated version of the crime had to incorporate the statutory minimum of 1 year in prison. But some members thought that once the maximum was included in the guideline range, judges might feel pressure to sentence some offenders to the maximum.

The judicial survey approach was not without its critics. A judge tilling in the graphs might be doing different things: sentencing as he would normally sentence an offender; sentencing as he thought that offender ought to be sentenced; and setting up ranges of guidelines for judges to use when sentencing. However, judges were told to draw on their experience sentencing a variety of offenders who had committed these various offenses in their various permutations. Those who participated thought that the judges were writing in their normative judgments as to the proper sentence range for each cell. The judges paid special attention to the minimum in each cell, as they recognized the practical reality of a judge not wanting to sentence less than a cell minimum because of adverse public reaction.

The judicial survey did not purport to be a scientific process. Rather, it was an attempt to get a general reaction from judges as to what type of numbers they would place in a graph like the committee is contemplating inserting into whichever guideline format the committee recommends. The indicia of each cell, both offender risk and offense severity, were scrutinized, and judges were encouraged, after they initially filled out the graph, to change the numbers they inserted if they changed their minds after group discussion of the numbers.

The survey demonstrated a fair amount of agreement among judges, even from different places and different points of view, how like offenders committing the same offense should be treated. It was not possible to list all of the indicia for a certain cell, and therefore that judges would be free to move among them based upon advocacy.

Given time and resource constraints, this was the equivalent of the wise person approach advocated by sentencing expert Kay Knapp, from Minnesota, who addressed the full committee at its first meeting on August 28, 1998. While this process may be open to criticism, it is the best the committee could do in the short time-frame in which it was given to report.

6. Interplay of Former Penalty Enhancers as Statutory Aggravators

As discussed above at pp. , - the committee recommends that certain penalty enhancers be retained, others be repealed, and still others be transformed into statutory aggravators to be considered at the time of sentencing.

The guideline worksheet includes a line on which the judge considered such statutory sentencing aggravators. See

IV. Extended Supervision and its Revocation

Statutory charge: *"f. Changing the administrative rules of the Department of Corrections to ensure that a person who violates a condition of ES is returned to prison prontptly and for an appropriate period of time."*[159]

1. Act 283's new bifurcated sentence structure

Act 283 provides that if a court chooses to sentence a felony offender to a term of imprisonment in a state prison for a felony committed on or after December 3 1, 1999, the court must do so by providing a bifurcated sentence that includes (a) a term of confinement in prison, followed by (b) a term of extended supervision ("ES") in the community. The term of ES must equal at least 25% of the length of the term of confinement in prison. After the offender completes the prison component of the bifurcated sentence, the offender serves the term of ES in which the offender is subject to conditions set by both the court and the DOC and is subject to supervision by DOC. If a person violates a condition of ES, ES may be revoked and the person may be returned to prison for a period of time which may not exceed the amount of remaining ES.[160]

2. Subcommittee approach

Given this committee's charge, it asked representatives from each of the entities involved in the present probation and parole revocation process to participate, in a non-voting capacity, at its meetings. The committee received the assistance of representatives from the DOC Division of Community Corrections and the DOC office of legal counsel, from the Department of Administration ("DOA") division of hearings and appeals, including at least one administrative law judge as well as that division's administrator, from the state public defender's office, and from the state attorney general's office. The committee relied on these representatives to educate committee members on the revocation process, to their questions, and to give background information. This arrangement allowed the entities which participate in the revocation process and which will be affected by the statutory and administrative law changes to participate in formulating the proposed changes.

3. Extended Supervision ("ES") procedure

To determine whether, and if so how, any administrative law changes should be made concerning ES, the committee had to understand what ES will look like in the "new world" of Truth-in-Sentencing on and after December 3 1, 1999. Accordingly, the committee began its study by describing what they thought ES could look like, and then sought reactions from the DOC.

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[159] **See 1997 Wis. Act 283 sec. 454(1)(e)6.**

[160] **Explanation of some of the details of ES and its revocation procedure in Act 283 may be found in Legislative Council Staff Information Memorandum 98-1 l at pp. 9-13, and in Legislative Fiscal Bureau Informational Memorandum # 55 at pp. 4-7.**

Beyond the basic legal description found in Act 283 and summarized above, the committee thought that ES could consist of differing levels of supervision based upon an offender's behavior. The committee recommends that DOC start all offenders entering ES at a strict level of supervision, and that offenders could earn their way to lesser degrees of supervision as a result of good behavior. Considerations as to the appropriate level of supervision would include:

a. the length of that offender's ES term
b. the offender's dangerousness
c. any movement among levels of supervision by that offender
d. the offender's treatment needs
e. the existence/non-existence of a community environment/support network

The model the committee arrived at for strict supervision was described by the Intensive Sanctions Review Panel, chaired by Milwaukee County Circuit Judge Elsa Lamelas, which issued its report in February 1998.[161] Its primary goal is to enhance public safety. It employs outcome-based supervision, in which offenders would earn less restrictive levels of supervision only as a result of positive, measurable performance. It assumes a staff caseload of 20 offenders per agent. The purchase of service cost per offender will be expended upon halfway houses; confinement beds; alcohol, drug abuse, and sex offender programming; day reporting centers; employment programming; and psychological services.

The strict supervision model allows for reduced caseloads in contrast to current parolee-to-agent ratios. Due to this lower ratio, it would allow increased frequency of contact with offenders and individuals associated with offenders. There would be mandatory employment/education/treatment/community services for offenders. This model would employ consistency in the consequences for violations of supervision rules, as well as employ streamlined due process procedures for confinement of offenders for violations of supervision. Other goals would include to actively search, apprehend, and process absconders, and extend program operating hours to a 24-hour per day, 7-day per week operation. Increased use of computer technology for more efficient and effective supervision would be stressed, and data collection would be implemented for ongoing evaluation of the program to measure improvements in community safety.

The DOC - Division of Community Corrections ("DC,") took these recommendations from the committee as to what ES could look like and gave them detail.[162] The DCC also made a detailed cost breakdown of this strict supervision model. That estimate was an annual cost of $8,88 1 per offender, with a startup cost of $10,464 per offender.[163] This annual cost is less than one-half of the annual cost of a prison bed

[161] See pp. 15-l 8 of that report.
[162] See Appendix ___ (detailed breakdown of ES procedure from William Grosshans at July 9, 1999 full committee meeting).
[163] See Grosshans Jan. 20, 1999 memorandum to Judges Barland and Fiedler, attached as Appendix ___.

in Wisconsin, which is $1 9,330,[164] and slightly more than six times the annual cost of probation and parole supervision in Wisconsin, which averages $1 ,400[165] annual for each offender supervised.

The state attorney general's office opined that the strict supervision model meets basic due process requirements, as long as offenders being supervised on ES who enter strict supervision are not placed in Phase I (incarcerative) supervision. Supervision cannot be the same as confinement, as currently defined in the statutes.

The purpose of adopting the strict supervision model as the initial stage of ES is to increase the panoply of sanctions open to the DOC to match the spectrum of possible ES violations. As described below, the committee recognizes that its recommendation for a sufficient number of confinement beds to assure that offenders will be held accountable immediately will require that sufficient funding be allocated to properly effectuate this recommendation.

A graphic representation of ES looks like this:

	EXTENDED SUPERVISION
A. Primary Goal/ Population	Enhanced public safety by the strict supervision of all offenders returning to a community setting from prison.
B. Supervision Standard	Outcome-based Supervision Key components: • Movement to less restrictive supervision as a result of positive measurable changes • Minimum of twice weekly face-to-face contacts • Four additional collateral contacts per week • Mandatory employment, school and/or community service • Mandatory electronic monitoring
	Supervision Standards 1. High Risk • weekly face-to-face contacts • two home visits per month • electronic monitoring is at the agent's discretion (however, for certain sex-offenders, electronic monitoring is mandatory) 2. Maximum • face-to-face contact every 14 working days • monthly home visits • electronic monitoring is discretionary
	3. Medium • monthly face-to-face contacts • home visits every other month 4. Minimum • face-to-face contacts every three months, monthly reports by

[164] See Grosshans handout at July 9, 1999 CPSC meeting, a copy of which is in the committee's tile.
[165] See Grosshans handout at July 9, 1999 CPSC meeting, a copy of which is in the committee's file.

	mail on those months when not reporting in person • home visits at agent's discretion
	5. Contract Supervision (for some administrative/minimum cases) • State has a contract with BI of Colorado to supervise certain minimum/administrative cases. These are phone-in contracts over a "900" telephone line. [These are usually "collection only" cases where an offender owes restitution/other court fiscal obligations. Offenders are stable in job, leisure activities, etc.]
	6. Intensive Sanctions (ends as a sentencing option on December 31, 1999) Phase system (four phase, the first in a secure facility, the other three in the community) where an offender is required to have numerous face-to-face contacts each week at the agent's office, offender's residence, work of school; mandatory urinalysis; mandatory work/school/community service; electronic monitoring is mandatory in two of the three community phases. Inmates earn their movement to other phases based on their behavior and minimum time requirements in each phase.
C. Staff Caseload	Ratios (Agents: Offenders) 1:20
	Ratios (Agents: Offenders) Numerous ratios presently: - intensive sanctions 1:25 - enhanced supervision projects (Racine/Dane Counties) 1: 17 - high risk (varies by region) 1:20 / 1:30 - traditional caseload average 1:72
D. Purchase of Services/Resources	$3,500 Per Offender • Housing (HWH, TLP) • Substance abuse programming . Sex offender programs • Employment Readiness/job skills training • Community service • Day report centers • Education
	1. $48.62 per offender/year for probation or parole supervision 2. Intensive sanctions funded at $2.1 90/offender
E. Hours of Work	Sevens days/week, 24 hour operation in select areas of the state
[redacted]	1. Traditional supervision M-F, 7:45am-4:30pm 2. Intensive sanctions 7 days/week, 6:00am-10:00pm 3. Absconder Unit (Milwaukee) 7 days/week, 6:00am-10:00pm 4. Enhanced supervision (Racine/Dane) 7 days/week, hours vary 5. R.O.P.E. (Milwaukee)
F. [redacted]onde	Caseloads of 1:20 would provide for active search for non-compliant offenders
	1. Created and funded in 1998 in Milwaukee. There are currently 20 absconder agents assigned to actively search for absconders 2. Enhanced supervision projects (Racine/Dane) 3.

G. Transportation to the Community From Parole/MR	Mandatory DOC transport from prison to the community
	1. Mandatory DOC staff transport from prison to community for intensive sanctions and certain sex offenders 2. Offender is directed to report to the agent upon parole/MR
H. institution Visits/Meetings	DCC staff reauired to meet with offender/ institution staff annually. In last year of institution of institution stay, DCC staff meet with offender/institution staff 6 months before extended supervision is to begin
	Not reauired - at aaent's discretion
I. Urine Screening	Mandatory. • Baseline urine screens on all offenders at point of release • At least weekly urine screens
	1. Agent's discretion for traditional supervision model 2. Mandatory weekly for intensive sanctions 3. Federal requirement for truth-in- sentencing funds - 8% monthly of randomly selected parolees
J. Electronic Monitoring	Mandatory for all offenders upon return to the community
	1. Mandatory for intensive sanctions in two of the three phases 2. Mandatory for some sex offenders 3. Agent's discretion for traditional supervision
K. Neighborhood Supervision	Agents assigned/located in defined neighborhoods • Active supervision • Teams of staff and police • Work with neighborhood associations/others • The neighborhood is our "client"
	1. Developed in 1993, there is some form of neighborhood supervision in all regions of the state 2. Enhanced supervision projects (Dane/ Racine)-agents located in neighborhoods
L. Revocation/Return to Secure Confinement/Sanctions	1. Streamlined revocation process for program removal 2. Update re-incarceration forfeiture grid 3. Provide mechanism for return of offenders to secure confinement for up to 90 days (involuntary)
	1. Traditional supervision model - revocation process outlined in Administrative Code 331 2. Intensive sanctions - reduced due process provides for return to secure confinement 3. Sanctions - agent's discretion after consulting with supervisor
M. Technology	1. GIS - statewide 2. Electronic monitoring - discussed 3. Global positioning - if available/ reliable 4. Polygraph - expand statewide 5. Pagers/cell phones - provide to all agents 6. Juris monitoring - expand 7. Remote alcohol units - expand 8. Offender identification cards - create them/require offenders to carry them

	1. Geographical Information System (limited use) 2. Electronic monitoring 3. Global positioning/tracking (tested) 4. Polygraphs for sex offenders (limited use) 5. Pagers/cell phones 6. Juris monitoring (domestic violence) 7. Remote alcohol units 8. Offender identification cards (Racine)
N. Victims	Increase emphasis on rights of victims/ notification
	1. 10,000 victims registered in the Parole Eligibility Notification System (PENS) 2. Victim Advisory Committee
0. Community Advisory Boards	Required community advisory boards statewide
	Beginning to implement boards
P. cost	$8,881 per year
	1. Probation and Parole - $1,400 per year 2. Intensive Sanctions - $7,400 per year
Q. Secure Beds	Will require secure beds
	1. Use of county jails/reimbursement for felony non-criminal violations 2. Milwaukee • 125 beds at county jail • 300 beds at House of Correction • 300 beds at Racine Correctional Institution • 1048 bed facility to open February, 2000 3. Biennial Budget • Secure P/P Hold Facilities

4. Sanctions for violation of ES condition(s)

After it hypothesized what ES will look like, the committee addressed the possible sanctions for violation of an ES condition or conditions. The committee envisioned three tiers of such sanctions:

A. Alternatives-to-revocation ("ATR")
B. "Time-out"
C. Revocation

The committee's recommendations as to each of these tiers are explained below.

A. Alternatives-to-Revocation (ATR's)

The subcommittee concluded that current alternatives-to-revocation should remain unchanged, with one exception, explained immediately below.

Current ATR's include:

1. modify the rules of supervision (e.g. no contact provision)
2. increase the level of supervision
3. complete a program (e.g. anger management)
4. community service
5. halfway house placement
6. electronic monitoring
7. formal alternative to revocation in a state correctional facility (felons only)
8. curfews/home confinement
9. return the offender to court to modify the rules of supervision

The one current ATR the subcommittee thought should not be retained was detention for disciplinary purposes, which requires supervisory approval and cannot exceed 5 working days pursuant to Wisconsin Administrative Code DOC 328.22(c)(3). This ATR would be eliminated in favor of "time-out," explained below.

When an ALJ determines whether a violation of supervision has occurred, the ALJ must address an availability of reasonable alternatives-to-revocation pursuant to the ruling in Plotkin v. Department-of Health & Social Serv., 63 Wis. 2d 535, 217 N.W. 2d 641 (1974). The committee heard from various individuals who worked with the revocation process that over the years the Plotkin criteria had been codified in Chapter Hearings and Appeals 2 of the Wisconsin Administrative Code.[166]

The committee heard from various individuals unhappy with the current interpretation of the Plotkin criteria. It became clear that certain ALJ's, and others in the revocation process, were interpreting the criteria to mandate that a supervising agent attempt all possible alternatives to revocation before an offender being supervised can be revoked. Accordingly, the subcommittee has reviewed and revised applicable statutory and administrative law language to ensure that a supervisee may be revoked without the ALJ mandating that all possible alternatives-to-revocation be attempted.[167]

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[166] The Wisconsin Supreme Court in Plotkin had adopted the American Bar Association standards relating to probation, which provide:

> **Revocation followed by imprisonment should not be the disposition, however, unless the court finds on the basis of the original offense and the intervening conduct of the offender that:**
> **(i) confinement is necessary to protect the public from further criminal activity by the offender; or**
> **(ii) the offender is in need of correctional treatment which can most effectively be provided if he is confined; or**
> **(iii) it would unduly depreciate the seriousness of the violation if probation were not revoked.**
>
> **. . . In any event, the following intermediate steps should be considered in every case as possible alternatives to revocation:**
> **(i) a review of the conditions, followed by changes where necessary or desirable;**
> **(ii) a formal or informal conference with the probationer to re-emphasize the necessity of compliance with the conditions;**
> **(iii) a formal or informal warning that further violations could result in revocation.**

Plotkin, 63 Wis. 2d at 544-45.

[167] See Appendix ____.

B. "Time-Out"

No legal sanction currently exists between an alternative-to-revocation and full revocation. Each of the entities involved - including the state public defender's office, who will represent the rights of many offenders on ES supervision -- desired a punishment mechanism short of full revocation, and more proper than a disciplinary hold without an actual intent to revoke. Such a sanction provides a less expensive solution to meet the problem of punishable but not revocable conduct than an offender on supervision occupying a $20,000 prison bed, which is in such short supply.

After many discussions, the concept of "time out" evolved. "Time out" is a sanction short of full revocation for violation of an ES condition or conditions. "Time out" would involve confinement for an amount of time not to exceed 90 days in an ES regional detention facility if available, or if not available, a county jail. If violations are alleged, and there is a signed admission of same,[168] then an ES agent can either: (a) invoke an ATR; or (b) impose up to a 90 day hold in "time out"; or (c) begin the revocation process.

To successfully put "time out" into practice, a number of requirements will have to be met. First, sufficient funds must be allocated for ES regional detention facilities to alleviate potential overcrowding at county jails. A good example of this expenditure is the probation and parole holding facility on which the DOC-DCC broke ground in Milwaukee at 10th & State Streets in May 1999. Second, if the offender is placed in "time out" in a county jail, sheriffs must (a) have the option to refuse the placement, and (b) be fully reimbursed. Third, absent disciplinary circumstances counseling to the contrary, Huber privileges should be an option for ES supervisees in "time out." Fourth, "time out" lasting O-45 days would have to be approved by a DOC supervisor; "time out" lasting 46-90 days would have to be approved by a regional DOC chief.

Because confinement in "time out" is involuntary, some due process is required. The attorney general's office opined for the subcommittee that "time out" would comport with due process because the ES supervisee has signed an admission of violation(s), and the "time out" is in lieu of revocation. The attorney general's office confirmed it can defend a basic disciplinary model such as this.

C. Revocation and return to prison

[conclusions and recommendations, where necessary give reasons to support]

Subcommittee members studied the current revocation process before any new rules or procedures affecting the revocation hearing process were debated or recommended. In this study, the subcommittee heard from various entities involved in the process, including administrative law judges, as well as the division administrator of the DOA division of hearings and appeals, David Schwarz. Pursuant to the letter of its

[168] The subcommittee's study yielded that supervisees admit approximately 90% of violations of condition of parole and probation.

statutory charge, the subcommittee spent the greatest amount of its time studying the revocation procedure to discern how it could recommend that the process, memorialized in Wisconsin Administrative Code chapter 33 1, be made most just and effective.

First, the subcommittee examined which actor in the justice system is in the best position to make the revocation decision. After much study and debate, it was concluded that the administrative law judge, who currently conducts revocation hearings and makes the revocation decision, should continue in that capacity. In the "new world" of Truth-in-Sentencing, the ALJ would continue to conduct the revocation hearing, would prepare a report containing specific findings of fact, and would make the revocation decision. If the ALJ decides to revoke, the ALJ would also recommend the period of prison time the revoked offender should serve.

The subcommittee concluded that the state has spent many years and millions of dollars constructing the current ALJ system. The subcommittee studied the facts and figures behind the system, and found it to be working relatively well. To give a numerical context to the scope of this issue, in calendar year 1997, DOC submitted 1,495 requests for hearings in parole revocation cases to the DOA division of hearings and appeals. Of those cases, 561 waived their right to a hearing, DOC withdrew 324 of them, and the DOA decided 576 cases by hearing. Of those 576, in 546 of them the supervisee's parole was revoked, and in 30 of them the supervisee's parole was not revoked.

DOA representatives pointed out that to shorten the revocation process too much could rob the system of its natural attrition. As demonstrated in the figures just cited, many revocation hearing requests are withdrawn or hearings are waived. This allows the system to function efficiently. To shorten the process too much was deemed to be counterproductive. DOA representatives also pointed out the high costs which could result should the revocation process be shortened too much. The size of DOA's work force has not kept pace with the rapid growth of the corrections caseload. The average annual caseload for corrections hearing examiners was under 400 cases per year in 199 1. That average has climbed to almost 600 cases in 1998. It is DOA's experience that shorter time limits generate more case referrals. Thus, any reduction in the time limit would require a corresponding budget increase.

The state public defender's ("SPD") office agreed with the DOA's reluctance to shorten the revocation process too much, as the SPD staff preferred as much time as possible to prepare for revocation hearings.

The appeal from the ALJ's revocation decision would continue to be to the DOA administrator of the division of hearings and appeals. This allows for errors to be caught before circuit court review. But the subcommittee recommends that the administrative review of the ALJ's decision be discretionary rather than mandatory.

The subcommittee also recommends that the ALJ's report (and administrator's written decision, if appealed) be forwarded to the circuit judge who originally sentenced

the offender, or that judge's successor. The circuit judge would determine an appropriate time period for the supervisee to be returned to prison at a disposition hearing. This disposition hearing is not a "resentencing." Rather, the judge would be deciding the new bifurcated penalty (prison + extended supervision) that the supervisee would serve as punishment in this revocation. The judge would be limited to the total amount of ES time the individual has remaining from which to fashion this new bifurcated penalty at the disposition hearing. This would involve the circuit judge in the decisionmaking process, but do so with minimal impact on the judge's valuable time, and take advantage of the ALJs' experience in this area. (Currently, the ALJ alone makes this decision, with power to reverse lodged with the administrator.)

Regarding the assignment of a revocation case for disposition, the committee recognizes that pursuant to Drow v. Schwartz, 225 Wis. 2d 362, N.W.2d ___ (1999), review of probation/parole revocations may be had by writ of certiorari in the circuit court of the county of conviction, but that did not necessarily mean the same branch of the circuit court. The committee intends return to the circuit court of the county of conviction. The committee understands from a presentation to the state's chief judges on June 17, 1999, that in certain areas of the state, individual judges will welcome the return of an offender on ES after revocation for sentencing, while other judges will not. The purpose of the recommendation is for the judge who originally sentenced the offender, who may be in the best position to determine the proper period of incarceration upon revocation, to at least have the option to determine that period.

The subcommittee notes that as Act 283 revises the felony structure, the judge will not have the authority to modify conditions of ES at any time after pronouncing sentence. Compare sec. 973.01(5), Stats., with sec. 973.09(1)(a) & (3)(a), which provides express authority to modify conditions before the expiration of probation.

[Further development? The authority to modify is an asset and a burden. Courts will have more control, but, depending on how law is drafted, could get petitions from offenders and increased work load.]

The subcommittee does not recommend altering the current writ of certiorari path for circuit court review of the revocation decision. The offender would retain the writ of certiorari remedy. Also, the subcommittee proposes that the DOC be allowed to seek certiorari review of an ALJ's decision not to revoke. (Currently, the DOC does not have this ability.) The internal DOC process would not change by which an agent initiates an ATR or the revocation procedure.

Pursuant to its statutory charge, the subcommittee studied the time period for revocation decision to try to ensure it is as short as advisable. Currently, it takes 84 days from alleged revokable conduct to decision on administrative appeal. The subcommittee saw the need to reduce the period of time (with the qualifications described above regarding natural attrition, cost, and preparation time for the SPD), as only if offenders understand that punishment will quickly follow for revokable conduct will such conduct decrease. The subcommittee proposed modifications to expedite the revocation decision

and decrease the timeline to 71 days. According to the attorney general's office, as long as the new administrative rules to be promulgated are directory and not mandatory, and deadlines remain in the DOC/DOA's discretion, no due process problems exist with this new shortened timeline.

The subcommittee envisioned the following timeline for the revocation decision:

DAY (actual, not work)	
0	**Hold for alleged ES violation and SPD notified**
10	**Notice of violation and violation report completed and DOC reaches decision on revocation - copies given to offender and SPD**
13	**Hearing request and violation report forwarded to ALJ and copied to SPD**
13-15	**Preliminary hearing, per current practice, held before P&P supervisor not in chain of command for that ES supervisee**
16	**Notice of full hearing**
20	**Revocation packet to be prepared**
40	**Full hearing**
47	**ALJ written decision**
57	**Appeal due - if no appeal, trial court notified**
64	**If appeal, response due**
71	**Administrator's decision -trial court notified**

Also, as part of its study, the committee also reviewed a pilot software program developed in Iowa to aid supervising officers in placement and revocation of supervisees. This probation and parole revocation matrix attempts to get all interested parties speaking in the same terms with the same set of facts. It is an automated computer program with the goal to make research-based, consistent decisions regarding clients. By entering specific data about a client, including demographics, assessment results, criminal history, and supervision status, the matrix guides the supervising officer through a decisionmaking process regarding supervision level, treatment interventions, and sanctions.

The committee found the Iowa revocation matrix interesting, but in too early of a stage of development to be useful in Wisconsin right now. It is only in use in 1 of 8 judicial districts in Iowa, and the tool is still being developed. The DOC—division of community corrections will maintain contact with Iowa corrections officials to monitor's the tool's evolution.

5. Hearing location - regional ES detention facilities

Important concepts in the "new world" of Truth-in-Sentencing include consideration of the site of the violations, the current location of the offender, and related concerns about whether the offender is readily accessible to his attorney and to his parole officer.

The DOA-Division of Hearings and Appeals has held these hearings in a county jail. The department designates the hearing site. The department frequently chooses to use the jail in the county where the offender was last being supervised, but often substitutes the jail where the offender is actually confined (for a new crime or sentence). This choice is further complicated by the fact that many jails move offenders to other "contract" locations due to jail over-crowding. As a result, hearings are often held at a site other than where the offender is actually confined. This can cause problems for the parole officer as well as for any assigned attorney if they are unable to obtain ready access to the offender prior to the hearing. It also requires that the offender be transported from one location to another for the hearing.

Because of the increasing problem with jail overcrowding, more and more cases exist in which the offender is actually confined in a jail that is some distance from the actual hearing site. While it is tempting to suggest that the hearing site simply be moved to the offender's location, that would raise problems with the assignment of counsel (usually a public defender). It might also interfere with an offender's right to have the hearing at a site that is reasonably near to the place of the violations. Holding the hearing at the site of the offender's location would also require that witnesses travel a great distance to the hearing or that the jails make available video and teleconferencing equipment.

One solution to these problems would be the creation of regional detention facilities for probation and extended supervision detentions. (This is what is currently being developed in the greater Milwaukee area.) The creation of regional detention facilities would add stability to the hearing process, minimize the impact of the process on county facilities and would allow suitable hearing space, which could includes new technologies for video and teleconferencing. It would also give the DOA a resource to use in treatment situations and would provide a location for "time out" placements. Finally, these facilities would provide some advantage to DOA by allowing it to schedule "clusters" of revocation hearings rather than being required to travel to isolated locations for just one hearing.

In many instances, the local county jails will remain the most viable site for revocation hearings. In some situations, the state may want to "lease" regional detention facilities from interested counties. In other situations, the department may be able to convert part of an existing corrections facility as a regional detention facility. The final configuration of such facilities could, however, take into account the need to keep the offender and the hearing reasonably close to the site of the violations.

6. Will changing the revocation criteria apply only to new law offenders or also apply to old law offenders?

The attorney general's office opined for the subcommittee that the proposed rules should not violate the principles of ex post facto. The new procedures should be applicable to current inmates and parolees as well as those sentenced under the Truth-in-Sentencing provisions. The new provisions primarily shorten the time limits for revocations. In most cases this should be for the benefit of the parolee. However, even if the parolee was somehow disadvantaged by the shortened time limit (perhaps by having too little time to prepare), this is not the type of change in law that implicates ex post facto.

Affected parolees would have to demonstrate that the new ES revocation rules somehow increased the penalty for their crime. Some ambiguous disadvantage is not enough. See California Department of Corrections, et al. v. Morales, 5 14 U.S. 499, 506 n.3 (1995). Additionally, the changes to the parole revocation rules are procedural rather than substantive. They deal with the method of implementing a parolee's sentence, not with the quantum of punishment imposed. Id. at 508. Rules of procedure generally do not violate ex post facto principles because they regulate secondary rather than primary conduct. Landgraf v. US1 Film Products, 511 U.S. 244,275 (1994).

7. Recommended statutory and administrative law changes

The committee's recommended statutory and administrative law changes are contained in Appendix .____

V. Computer Modeling

1. The challenge

Each of the representatives of other Truth-in-Sentencing states from which the committee heard - North Carolina, Virginia, Delaware, and Ohio - remarked how important a corrections population projection mechanism had been in their consideration of different policies. Individual committee members also noted that the committee's recommendations would have a large impact on increasing corrections population and the state's corrections budget.

Technical specialists were polled at each of the states from which the committee had heard to determine how each state developed an accurate forecast of prison population and cost. Each state's technical expert stressed that for the committee's work to have credibility, it must accurately forecast prison population and cost.[169] Also, a survey was done of the type of data Wisconsin has within its DOC and CCAP ("Circuit Court Automation Project") to determine whether, and if so, how, such data could be used to meet the needs of committee members.

Given other states' experiences, and the committee members' desires, it was concluded that, although not part of the committee's express statutory charge, the committee should attempt to develop a computer model: (1) to forecast corrections population and costs, and (2) which could be used to debate different policies. Such a mechanism could break down corrections data by crime, determine how long offenders were being sentenced to, how much prison time they were actually serving, how much corrections resources they were consuming, and what would happen to corrections population numbers and costs if the committee recommended certain policies.

2. A major problem

A common refrain heard at this committee's meetings was that Wisconsin's corrections data cannot be accessed in a useful way. The committee had serious difficulties getting basic statistical questions answered, not out of lack of effort by DOC-BTM or any other state entity, but because Wisconsin retains its corrections data in an antiquated manner. Further, the state has not done a good job of linking corrections data systems. The installation of OPUS, and the increasing coverage of CCAP, could solve some of these problems. But this is an area that requires much improvement. The new sentencing commission will require this data for its deliberations and recommendations. Currently, that data is not accessible. It was necessary for the Committee to in effect "go around" Wisconsin's data to build the computer model.

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[169] **The North Carolina Sentencing and Policy Advisory Commission graciously gave the committee free of charge a copy of its prison population projection software, which is now in the public domain. Unfortunately, it could not be adopted for use in Wisconsin because it uses a structured grid format which the committee did not choose to adopt.**

3. Wisconsin's current ability to forecast corrections population

First the committee turned to the DOC to determine whether or not it currently used such a statistical projection mechanism. It did not. Currently, the DOC uses a software package named "Forecast Pro." That software looks at data points over time to discern trends - e.g., corrections population at certain dates. Then it projects a trend into the future based upon a single variable - those past data points. Because it examines only a single variable, Forecast Pro did not allow for the policy analysis the committee required. Forecast Pro has no explanatory power, as all it can do is forecast the next point in a series based upon past points. It would not allow the committee to determine the causes behind the projections - e.g., whether the corrections population for a certain category was increasing, and how a reclassification of that crime, or a different guideline for that crime, might affect both that crime category and the overall corrections population, and thus the resources implicated.

OPUS ("Offender Population Unified System"), DOC's new prison population tracking system, may contain a corrections population projection component, but it is not expected to be fully installed until 2003. CCAP is on-line in 66 of Wisconsin's 72 counties, and given full funding and use by all state circuit courts, in the future may fulfill this population projection function. But it will not be able to do so for at least the next few years, again which did not help our committee meet its deadline.

4. Subcommittee and working group formed

The committee formed a computer modeling subcommittee to address this challenge. Because of the technical complexity of this challenge, the subcommittee relied heavily on technical assistance from various individuals already employed by state government. These individuals formed themselves into a working group which met every few weeks to address the continuing issues of data collection, data structuring, and monitoring technical consultants hired to build the model. The working group included representatives of the DOC - Bureau of Technology Management ("DOC-BTM"), CCAP, the Department of Administration - Bureau of Justice Information Services ("BJIS"), as well as professor Michael Smith of the University of Wisconsin Law School, who had previously developed a computer model used by the Governor's 1996 Task Force on Corrections.

The computer modeling subcommittee decided that it must secure data in two primary areas:

> (A) Who is in prison now, on what crimes, for how long, and for long they have been sentenced? This current population will drive future numbers, and to an extent policy recommendations, for some years. An accurate picture is needed of what is happening in and to the current DOC population.

> (B) What are past and current sentencing practices, including how they relate to the criminal histories of the offenders in the DOC database? What are the trends in sentences per crime, and by type of offender?

Once this information was secured, the subcommittee thought that computer modeling software could be borrowed, modified, or built to project prison population and assess the impact of Truth-in-Sentencing code reclassification and new sentencing guidelines.

5. Federal technical assistance

Dr. Ron Anderson of the University of Minnesota met with representatives of this subcommittee on February 4 & 5, 1999 to render technical assistance on this project.]" Dr. Anderson developed the first computer model for structured sentencing simulation, variations of which are used in several states, including Minnesota and North Carolina.

The working group met with Dr. Anderson over a two-day period. The first day was spent discussing the minimum data requirements for the forecasting tasks of the committee. In discussing those data requirements, the first and consistently most difficult hurdle the committee faced was with how the State of Wisconsin maintains its corrections data. The working group included individuals from DOC and CCAP expert in their respective databases. These individuals were questioned at length as to how the committee might secure the two types of data referenced above. No common variable exists linking the DOC and CCAP systems, so access was severely limited. This was especially problematic for our task, as we needed sentencing and criminal history information from CCAP, as well as information from DOC as to how many offenders are actually serving how much time on which crimes. Because DOC has very limited criminal history information, and CCAP does not have time-served information, the data could not tell us which criminals will be serving what sentence lengths on which crimes.

The numerous state employees aiding this effort attempted to unravel the differences between the CCAP and DOC data and to map out a "data cleansing" and subsequent "data linkage" task list. The huge magnitude of this task became clear when the group attempted to assign ownership to and time frames on the various tasks necessary just to posture the data in a format accessible for the type of model the Committee would find useful, much less to start the actual modeling. Finally, it was concluded on the second day that the committee's short deadline dictated that it would not be possible to merge the court and corrections data in a timely manner.

Dr. Anderson issued a pessimistic report given the committee's data requirements and constraints, and the committee's timeline and requests:

> The work involved in obtaining adequate information from corrections databases, to say nothing of the construction of criminal justice models and hypothetical simulations would be challenging even to a large research staff with a year of time to do it. Given that the Committee has neither such a staff, nor more than a few

[170] A federal technical grant paid for Dr. Anderson's expenses.

months of time, they will need considerable additional technical expertise to accomplish their tasks. We made major conceptual progress in the two days of discussion, but I advised them that, on the basis of my experience with other states, they were being much too optimistic in their expectations for doing this work with their existing constraints in terms of both resources and time.

6. Solution

With the help of Professor Smith, the computer modeling group altered its approach from asking a model to "microsimulate" -- replicate an offender's movement throughout the corrections system, and then aggregate that data -- to a "consumption" approach -- modeling and mining existing data in terms of its consumption of resources, which could give us estimates of corrections numbers and dollars, both principal concerns of the committee. This "consumption" approach attempted to answer 3 questions:

(A) What resources does Wisconsin need to service its existing corrections population over the next 10 years? ("old world")?

(B) What resources does Wisconsin need to service those individuals convicted after 12/31/99 over the next 10 years, absent any guidance from this Committee ("new world without guidance")? and

(C) What resources does Wisconsin need to service those individuals convicted after 12/31/99 over the next 10 years, modeling this Committee's conclusions ("new world with guidance")?

This consumption model would be less data intensive. DOC data could be relied upon heavily, and it was not necessary to link DOC and CCAP data, although CCAP sentencing data would be used in the model's calculations. This type of model could be constructed more quickly, and would more readily lit the committee's needs to debate differing recommendations for crime classifications and sentencing guidelines.

7. Hiring of technical consultants to construct computer model

The subcommittee interviewed applicants to retain as outside technical consultants. The consultants would work with the working group to build a "consumption approach" computer model. The consultants needed technical background and expertise in statistics and computer applications. They had to be able to manage and manipulate complex datasets. They also had to be able to advise on and implement various statistical tests and forecasting techniques. The consultants had to be able to massage and mine the data for the information the committee needed, be able to work with DOC and CCAP people to ensure the proper data is in the system, and be able to run "what-if?" queries on the model as the committee debated differing policies.

At the suggestion of the DOC-BTM, the subcommittee interviewed representatives of IBM, as that company had been retained to install OPUS at DOC. IBM did a preliminary analysis of the committee's computer modeling needs, and offered an approximate bid of $175,000. The subcommittee found this price tag too expensive. The subcommittee also interviewed Systems Seminar Consultants ("SSC") of Madison, Wisconsin, and concluded that SSC was the best consultants to fit this job description.

8. Computer model constructed

The computer model is intended to study the effects of different policy scenarios within the Truth-In-Sentencing framework. The tool allows the flexibility to change input parameters that are associated with different types of policy guidelines.

The DOC-BTM supplied SSC with over 8 years of historical corrections data, which included prison, probation, and parole information. That information described when each inmate made a transition among various statuses at DOC: e.g., from prison to parole, from probation to prison, or from parole to prison, etc.

The DOC data tracked offenders by what is termed a "governing statute." This means that if an offender is convicted of more than one crime, he might be tracked under a particular burglary statute, and not the criminal trespass statute on which he was also convicted. This problem, the vast number of statutes and their individual subsections, and changes in the statutory numbering of drug penalties hindered grouping the data into a manageable number of crime categories. Committee staff and SSC worked together to classify similar statutes into distinct felony groupings. The result was 47 felony categories that covered more than 500 individual statute classifications. Those groupings are:

1. **1st Degree Intentional Homicide**
2. **1"' Degree Reckless Homicide**
3. **Other Homicide (e.g.: 2nd Degree Intentional Homicide; Felony Murder)**
4. **Substantial/Aggravated Battery**
5. **Battery**
6. **Other Bodily Security (e.g.: Mayhem, 1st and 2nd Degree Reckless Injury)**
7. **1st Degree Sexual Assault**
8. **1st Degree Sexual Assault of a Child**
9. **2nd Degree Sexual Assault**
10. **2nd Degree Sexual Assault of a Child**
11. **3rd Degree Sexual Assault**
12. **Kidnapping/Hostage Taking/False Imprisonment**
13. **Stalking**
14. **Intimidate Witness/Victim**
15. **Child Abuse**
16. **Other Crimes Against Children (e.g.: Incest, Child Enticement)**
17. **Armed Robbery**
18. **Unarmed Robbery**
19. **Burglary**
20. **Tresspass**
21. **Theft (including felony Retail Theft)**
22. **Receiving Stolen Property**

23. **Operating Vehicle Without Owners Consent**
24. **Criminal Damage to Property (including graffiti offenses)**
25. **Arson**
26. **Weapons/Explosives (e.g.: Felon in Possession of Firearm)**
27. **Other Public Safety Crimes (e.g.: 1st and 2nd Degrees of Recklessly Endangering Safety)**
28. **Gambling**
29. **Drug Manufacture/Delivery (but not Cocaine or Marijuana)**
30. **Drug Possession With Intent to Deliver - Marijuana**
31. **Drug Possession With Intent to Deliver - Cocaine**
32. **Drug Possession (but not Cocaine or Marijuana)**
33. **Drug Possession -Cocaine**
34. **Drug Possession - Marijuana**
35. **Other Drug Offenses (e.g. Maintaining Drug Trafficking Place)**
36. **Traffic-related Felonies**
37. **Forgery**
38. **Issuance of Worthless Checks**
39. **Public Assistance Fraud**
40. **Other Fraud (e.g.: Food Stamps, W2)**
41. **Perjury**
42. **Escape**
43. **Bail Jumping**
44. **Extradition**
45. **Interference with Law Enforcement**
46. **Other Felonies (e.g.: election law violations, securities law violations)**
47. **Unidentified Felonies**

The modelers received data from the Circuit Court Automation Project ("CCAP") concerning imposed sentence lengths for each of these categories. This data was from 1996-1998. Median time served for incarcerations, median parole time, and median probation time was calculated from the master data set supplied by the DOC. The computer modeling working group performed a series of validation exercises to ensure these figures were correct.

With help from people knowledgeable about the current indeterminate and future determinate sentencing systems, SSC developed a transitional matrix. Transitions among different states (i.e. incarceration, parole/extended supervision, or probation) were aggregated and summarized to yield statistics for the matrix. This matrix included revocation rates, parole rates, discharge rates, and continuation rates (chance of continuing in same state) across each of the 47 categories.

Average new additions for incarceration and probation for each category were also calculated. These were the average new additions to the corrections population for incarcerations and probation across 1990- 1998.

SSC made extensive efforts to validate the accuracy of the DOC data. During this process, it noted overlapping episodes: e.g., a single offender was listed in incarceration and parole status at the same time. The computer model working group worked hard to unravel these problems, and were ultimately able to rely on adult institution incarceration data to take precedence over conflicts in the parole and probation data.

After the data had been validated, the transitional matrix was applied to the projected prison population on 12/31/99. New additions were not added. This gave an estimate of the "old world" (pre-Truth-in-Sentencing) population decay across the next 9 years.

SSC then calculated "new world" population growth with new Truth-In-Sentencing additions from 1/1/2000 forward for the next 9 years. SSC ran initial projections across many scenarios with different parameters. SSC used revocation rates from the "old world" transitional matrix across all felony categories.

After the initial presentation of the computer model to the CPSC, a few members questioned the integrity of parts of the data. There was much discussion about the validity of the "old world" decay. The consensus was that the "old world" prison population was decaying too rapidly. So SSC employed the maximums, rather than averages, for each of the transitional probabilities. This adjustment slowed "old world" decay significantly. This adjustment also addressed a concern over probation revocation rates being too low. To keep adjustments consistent, "new world" parameters were also updated.

SSC created a front-end template for the committee and subsequent sentencing commission to use for flexible input of "new world" computer model parameters. The model's user can change the following parameters: (1) new addition counts; (2) revocation rates; (3) sentence lengths; (4) Extended Supervision (ES) parameters, including length; (5) ratio of incarceration to probation. These parameters can be changed for the whole scenario, or per crime category.

The model produces an overall summary as well as individual summaries at the category level. The output consists of three components: (1) new world; (2) old world decay; and (3) new world and old world decay combined.

Five scenarios were run for the committee:

Scenario I : **JUDGES DO NOT CHANGE SENTENCES**

Judges sentence offenders to same prison terms in the old world and the new world.
ES in the new world = parole in the old world.

Scenario 2: **JUDGES ADJUST SENTENCES DOWN TO TIME-SERVED**

In the new world, judges adjust sentences down to time-served periods for the same crimes in the old world.
ES =25% of prison time served.

Scenario 3: **VIOLENT CRIMES=CURRENT SENTENCES; NON-VIOLENT CRIMES = TIME SERVED SENTENCES**

For violent crime categories (including drugs), judges sentence offenders to same prison terms in the old world and the new world, and ES in the new world = parole in the old world.
For nonviolent crime categories in the new world, judges adjust sentences down to time-served periods for the same crimes in the old world and ES = 25% of prison time served.

Violent crime categories (including drugs) = I-12; 15-18; 29-35 (from a handout to the committee)
Nonviolent crime categories = 13-14; 19-28; 36-47 (same)

Scenario 4: **TOP 12 CATEGORIES = CURRENT SENTENCES**

For the 12 crime categories which produce the most new additions to the prison population, judges sentence the same in the old world and the new world, and ES in the new world = parole in the old world.

For the remaining crime categories, in the new world judges adjust sentences down to time-served and ES = 25% of prison time served.

The 12 categories are:
(1) Drug possession
(2) Drug manufacture/deliver
(3) Burglary
(4) Unarmed robbery
(5) 1" deg. SA-child
(6) Theft
(7) 2nd deg. SA-child
(8) Other public safety crimes
(9) Possession with intent to deliver-cocaine
(I 0) Operating vehicle without owners consent
(I I) Forgery
(12) Other homicide

Scenario 5: **MOST LIKELY SCENARIO?**

For violent crime categories in the new world, judges sentence offenders to 85% of old world imposed sentences, and ES in the new world = parole in the old world.

For non-violent crime categories in the new world, judges adjust sentences down to time-served and ES = 150% of prison time served.

9. Use of computer model, and the model's results

Another way the computer model was used was to assess code reclassification decisions to ensure new classes properly fit current time-served populations. Charts of several high-volume crime categories (felony battery; burglary; operating vehicle without owner's consent; possession of controlled substance - cocaine) were reviewed to assess what percentage of imposed and time-served sentences fall under the committee's proposed classifications for some key crimes. The results are encouraging. The proposed crime classifications captured high percentages of the time-served sentences for each of these crimes (79%, 82%, 78%, 92%, respectively). The code reclassification subcommittee's choice of felony class thus "caught" most of the current time-served sentences.

The model was also used to forecast corrections population and corrections costs.

Immediately following this section may be found population projection graphs for scenarios 1, 2, 3, and 5.

Also immediately following this section may be found cost projection graphs scenarios 3 and 5.

10. Future issues

The subcommittee has identified a number of topics for future consideration in this area.

First, the CCAP system which courts use to gather sentencing information should be altered to accommodate the new Truth-in-Sentencing sentences which will be given after January 1, 2000. In the future, the new sentencing commission, and other state law enforcement entities, will increasingly look to CCAP for data, since that system collects sentencing information statewide. It is important that CCAP remain fully funded, as for many years it will remain the primary source of sentencing information for the courts and litigants.

Second, sentencing guidelines information must be collected in a streamlined manner for the new sentencing commission. This will require "computer-friendly" forms and a central data collection program. Information from the new guidelines forms will be instrumental in the new sentencing commission's work.

Third, the various law enforcement computer systems in use in Wisconsin should be linked to maximize utility and efficiency. Now, a single defendant will change identification numbers as he moves from arrest, through the court system, and into the corrections system. The technology exists to solve this problem. A common computer system, or at least a network linking existing systems, should be developed with a common defendant identification number."[171]

[171] On this topic, see Interagency Justice Information System Report, published September 1998 by the Department of Administration, Bureau of Justice Information Services.

Scenario 1

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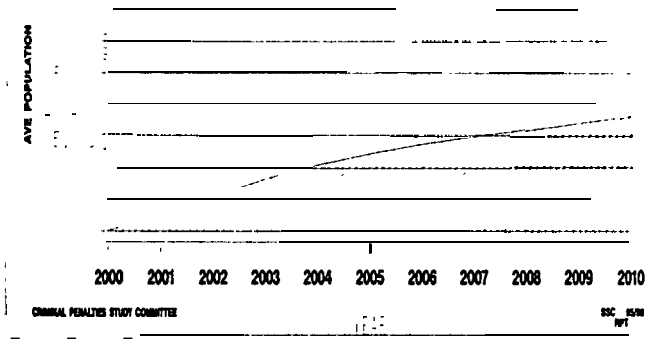
NEW WORLD-INCARCERATION
NEW WORLD=IS PAROLE=ES



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OLD WORLD-INCARCERATION
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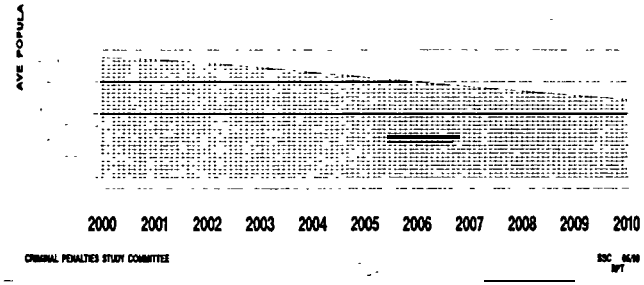
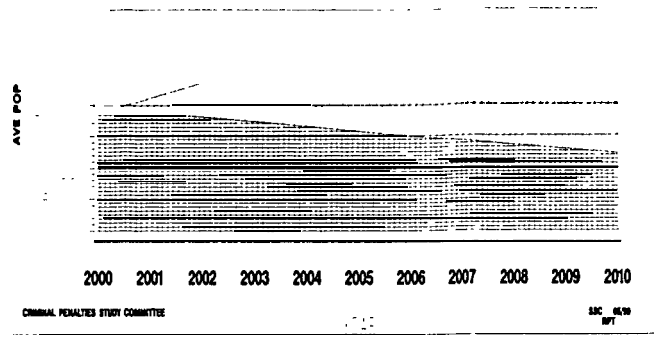
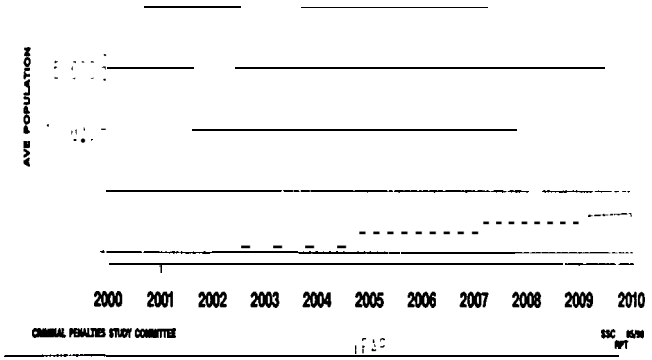


WISCONSIN FELONY COMPARISON FOR 2000-2009
NEW WORLD AND OLD WORLD COMBINED-INCARCERATION
NEW WORLD=IS PAROLE=ES

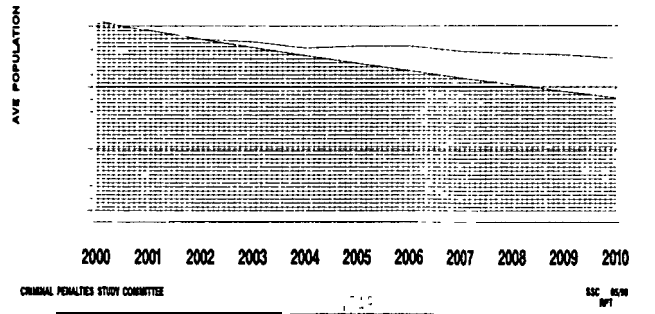


WISCONSIN FELONY COMPARISON FOR 2000-2009
NEW WORLD-PAROLE/EXTENDED SUPERVISION



WISCONSIN FELONY COMPARISON FOR 2000-2009
OLD WORLD-PAROLE/EXTENDED SUPERVISION

WISCONSIN FELONY COMPARISON FOR 2000-2009
NEW WORLD AND OLD WORLD COMBINED-PAROLE/EXTENDED SUPERVISION



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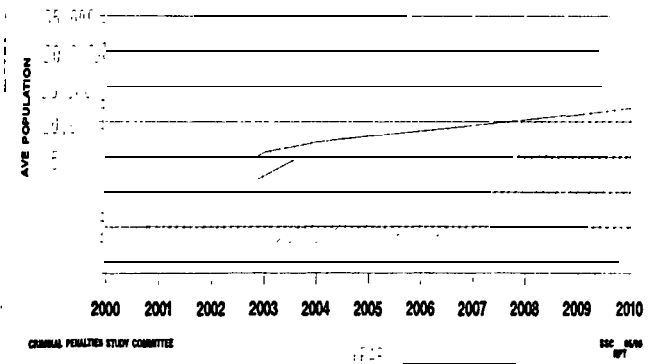
NEW WORLD-PROBATION



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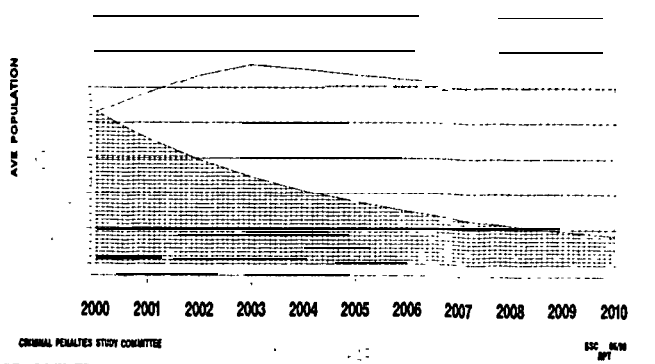
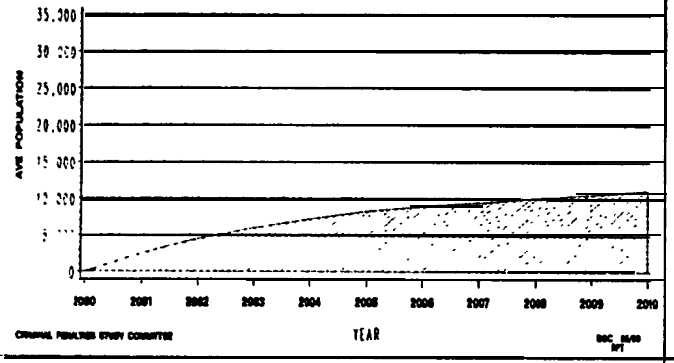
OLD WORLD-PROBATION

WISCONSIN FELONY COMPARISON FOR 2000-2009
NEW WORLD AND OLD WORLD COMBINED-PROBATION

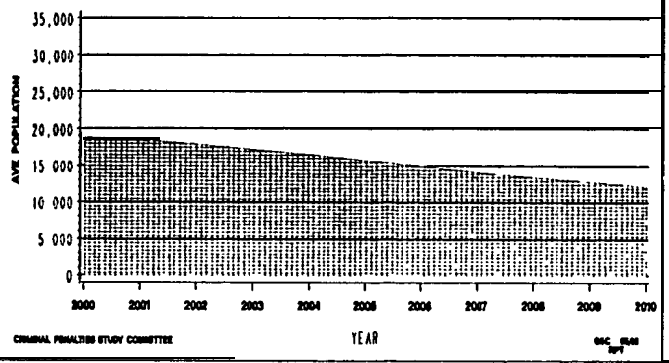


SCENARIO 2:JUDGES ADJUST SENTENCES DOWN TO TIME – SERVED

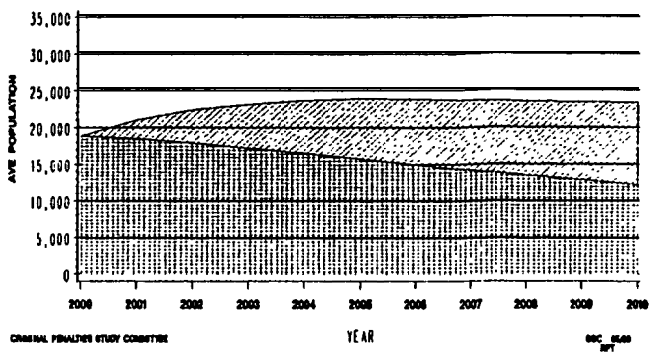
WISCONSIN FELONY COMPARISON FOR 2000 – 2009
NEW WORLD – INCARCERATION
NEW WORLD = TS, ES = 25% OF TS



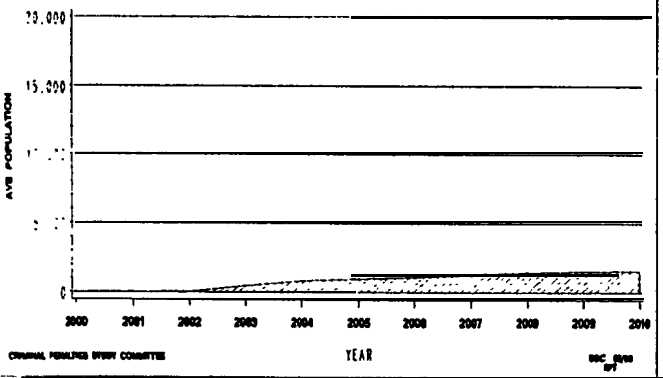
WISCONSIN FELONY COMPARISON FOR 2000 – 2009
OLD WORLD – INCARCERATION
NEW WORLD = TS, ES = 25% OF TS



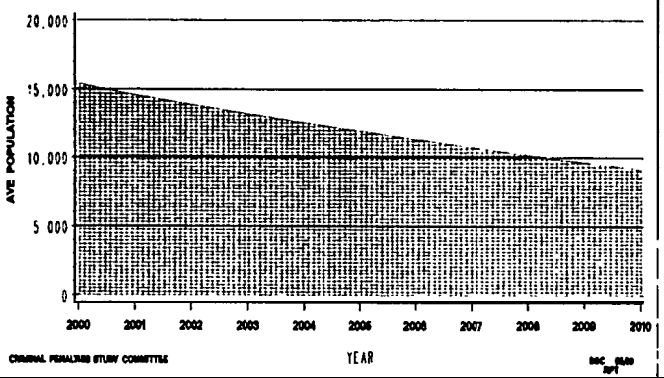
WISCONSIN FELONY COMPARISON FOR 2000 – 2009
NEW WORLD AND OLD WORLD COMBINED – INCARCERATION
NEW WORLD = TS, ES = 25% OF TS



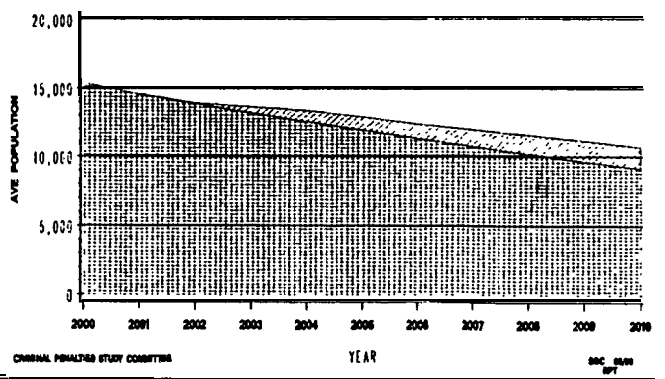
WISCONSIN FELONY COMPARISON FOR 2000 – 2009
NEW WORLD – PAROLE/EXTENDED SUPERVISION



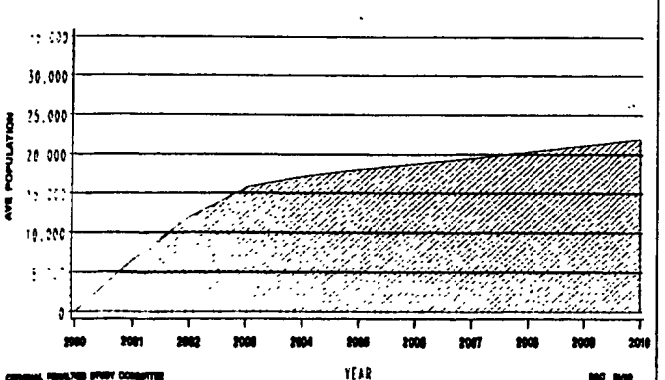
WISCONSIN FELONY COMPARISON FOR 2000 – 2009
OLD WORLD – PAROLE/EXTENDED SUPERVISION



WISCONSIN FELONY COMPARISON FOR 2000 – 2009
NEW WORLD AND OLD WORLD COMBINED – PAROLE/EXTENDED SUPERVISION



WISCONSIN FELONY COMPARISON FOR 2000 – 2009
NEW WORLD – PROBATION



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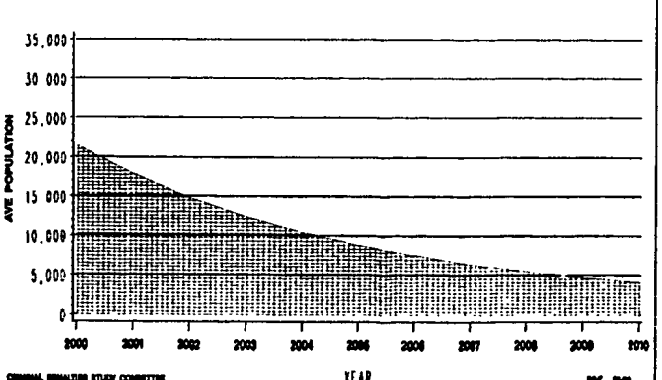
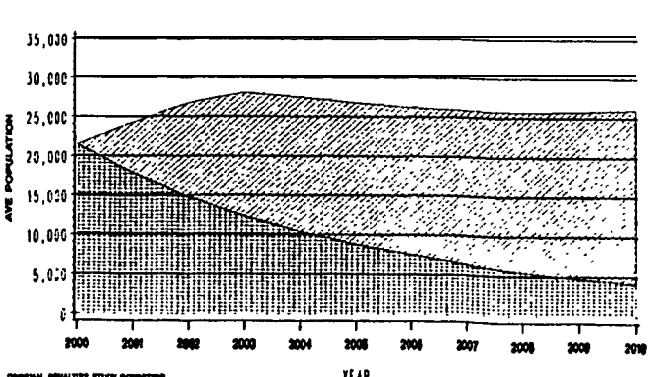
OLD WORLD – PROBATION

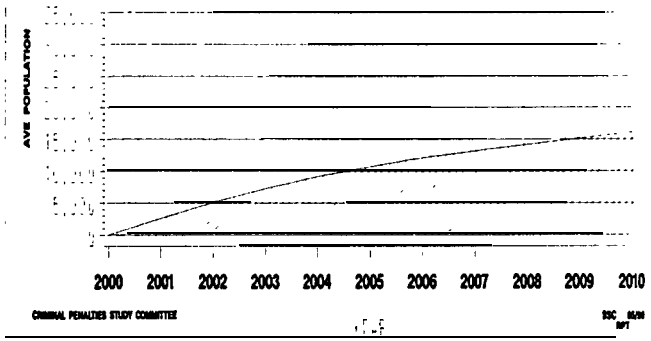


WISCONSIN FELONY COMPARISON FOR 2000 – 2009
NEW WORLD AND OLD WORLD COMBINED – PROBATION

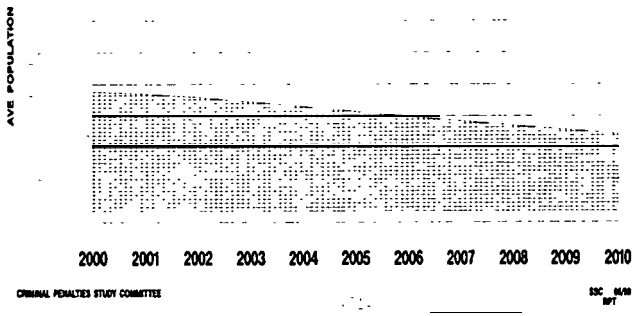


Scenario 3

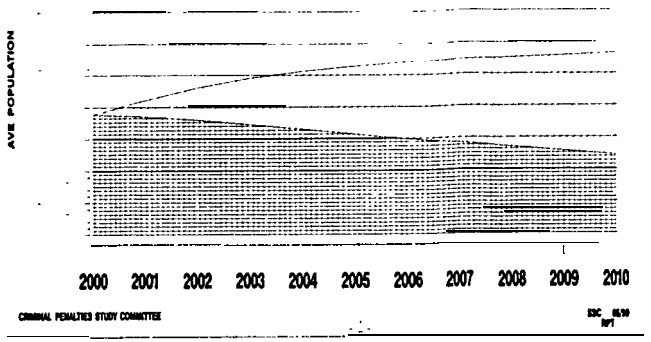
WISCONSIN FELONY COMPARISON FOR 2000-2009
NEW WORLD-INCARCERATION
NEW WORLD:V=IS NV=TS



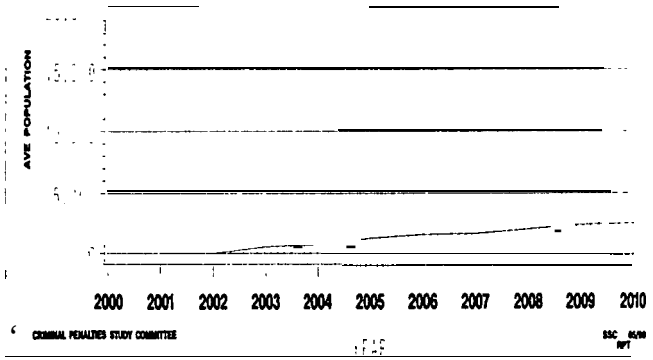
WISCONSIN FELONY COMPARISON FOR 2000-2009
OLD WORLD-INCARCERATION
NEW WORLD:V=IS NV=TS



WISCONSIN FELONY COMPARISON FOR 2000-2009
NEW WORLD AND OLD WORLD COMBINED-INCARCERATION
NEW WORLD:V=IS NV=TS



WISCONSIN FELONY COMPARISON FOR 2000-2009
NEW WORLD-PAROLE/EXTENDED SUPERVISION



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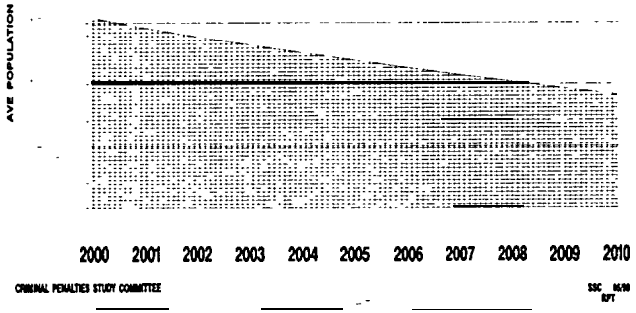
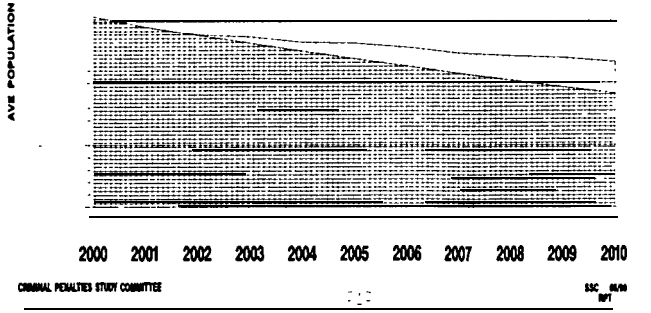
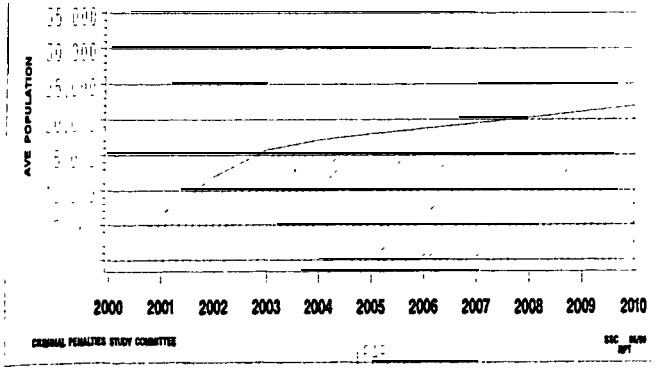
OLD WORLD-PAROLE/EXTENDED SUPERVISION



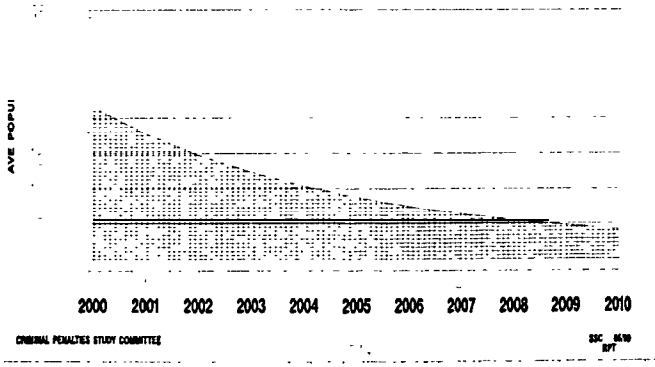
WISCONSIN FELONY COMPARISON FOR 2000-2009
NEW WORLD AND OLD WORLD COMBINED-PAROLE/EXTENDEDSUPERVISION



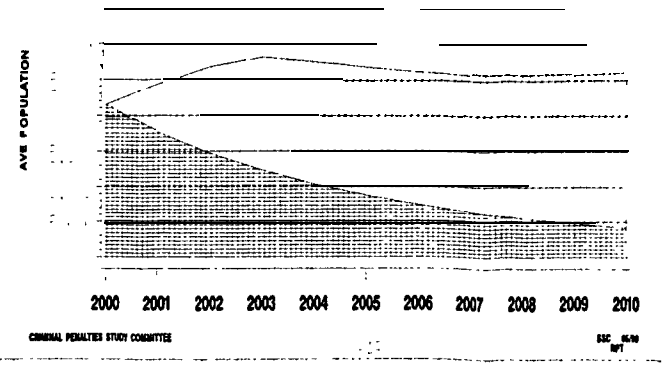
WISCONSIN FELONY COMPARISON FOR 2000-2009
NEW WORLD-PROBATION



WISCONSIN FELONY COMPARISON FOR2000-2009
OLD WORLD-PROBATION

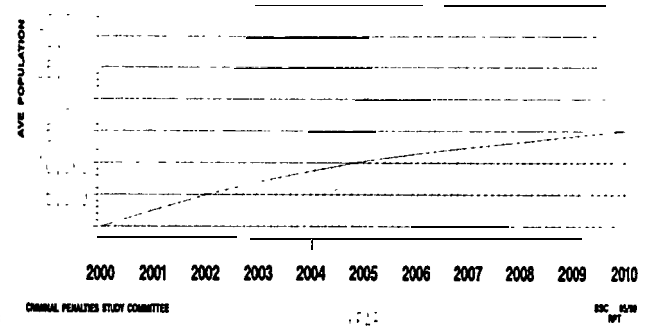


WISCONSIN FELONY COMPARISON FOR2000-2009
NEW WORLD AND OLD WORLD COMBINED-PROBATION

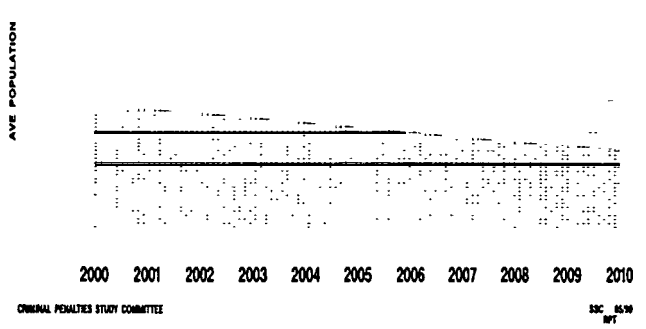


Scenario 5

WISCONSIN FELONY COMPARISON FOR 2000-2009
NEW WORLD - INCARCERATION
NEW WORLD:V=85% IS, NV=TS

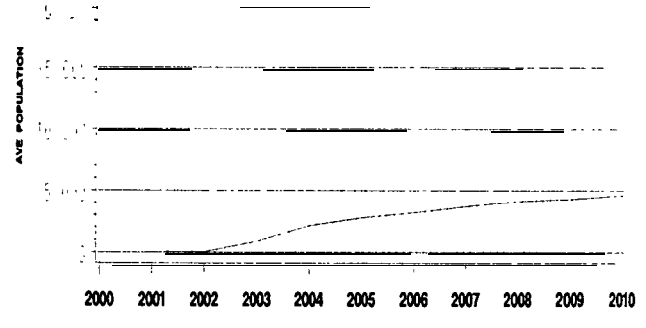


WISCONSIN FELONY COMPARISON FOR 2000-2009
OLD WORLD - INCARCERATION
NEW WORLD:V=85% IS, NV=TS

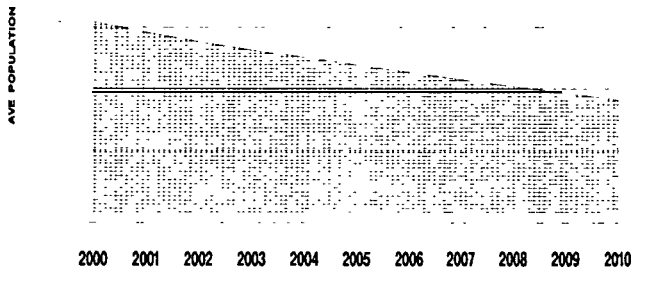


WISCONSIN FELONY COMPARISON FOR 2000-2009
NEW WORLD AND OLD WORLD COMBINED - INCARCERATION
NEW WORLD:V=85% IS, NV=TS

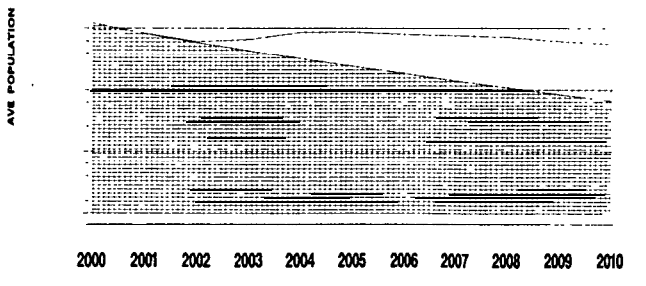
WISCONSIN FELONY COMPARISON FOR 2000-2009
NEW WORLD - PAROLE/EXTENDED SUPERVISION



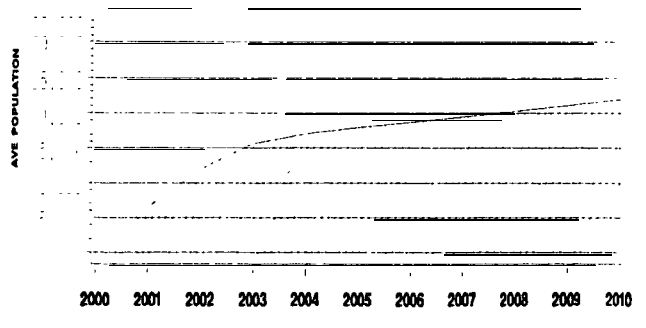
WISCONSIN FELONY COMPARISON FOR 2000-2009
OLD WORLD - PAROLE/EXTENDED SUPERVISION



WISCONSIN FELONY COMPARISON FOR 2000-2009
NEW WORLD AND OLD WORLD COMBINED - PAROLE/EXTENDED SUPERVISION



WISCONSIN FELONY COMPARISON FOR 2000-2009
NEW WORLD - PROBATION



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WISCONSIN FELONY COMPARISON FOR 2000-2009
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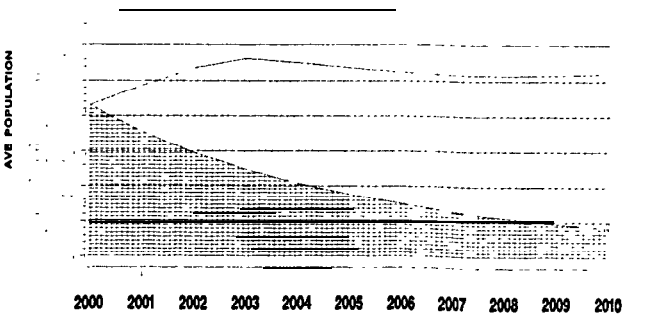

Scenario 3

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NEW WORLD-INCARCERATION
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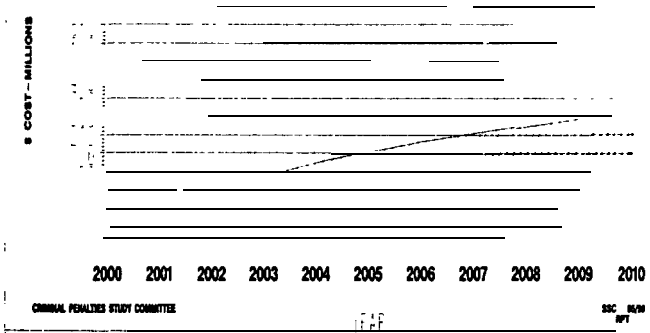

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OLD WORLD-INCARCERATION
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NEW WORLD AND OLD WORLD COMBINED-INCARCERATION
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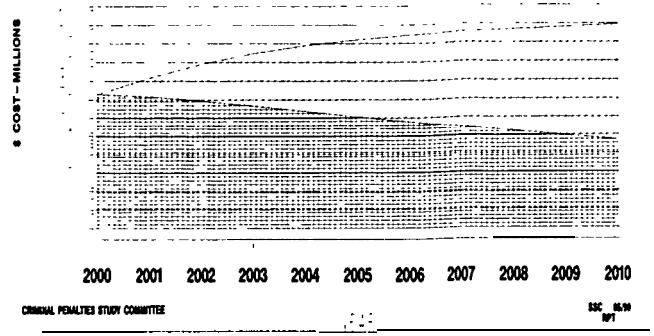
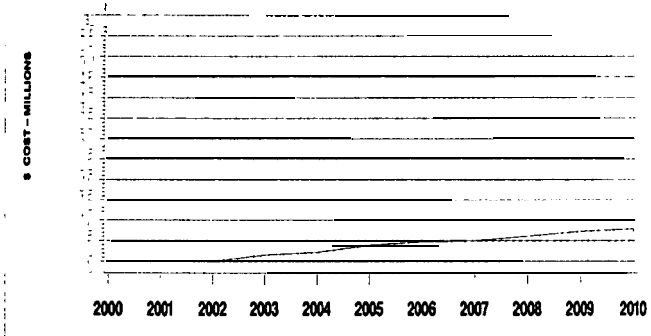


WISCONSIN FELONY COMPARISON FOR 2000-2009
NEW WORLD-PAROLE/EXTENDED SUPERVISION



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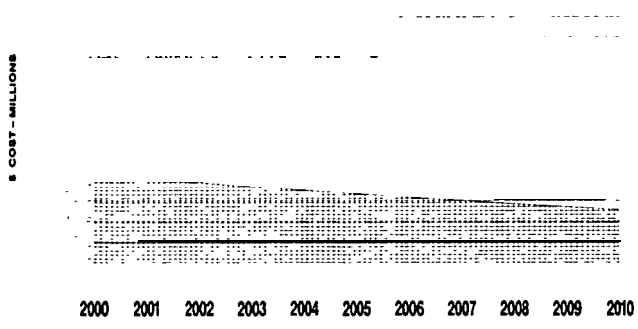
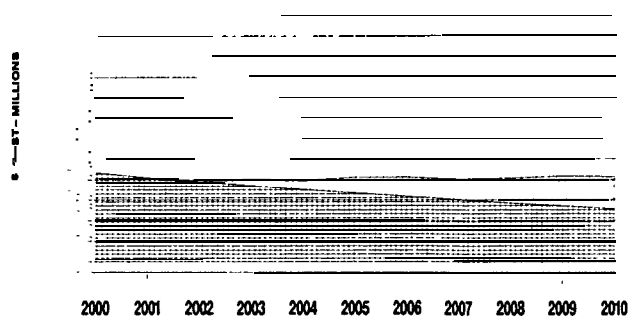


WISCONSIN FELONY COMPARISON FOR2000-2009
NEW WORLD AND OLD WORLD COMBINED-PAROLE/EXTENDED SUPERVISION



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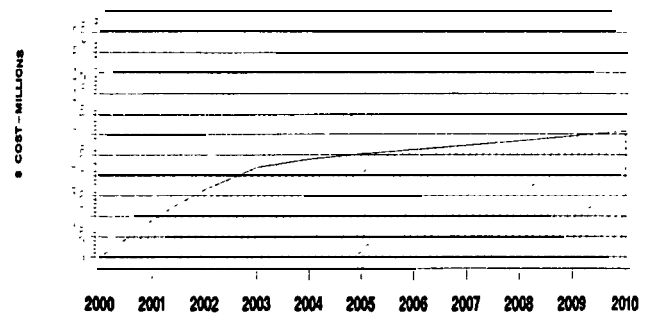
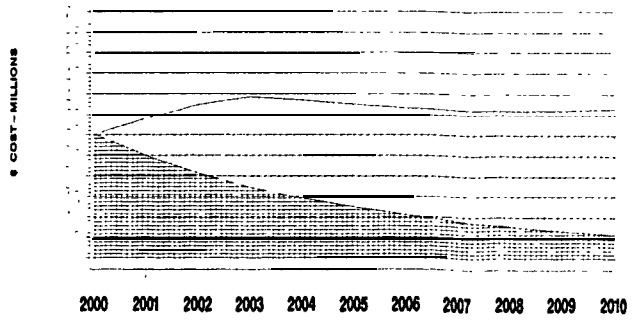
NEW WORLD-PROBATION



WISCONSIN FELONY COMPARISON FOR 2000-2009
OLD WORLD-PROBATION

WISCONSIN FELONY COMPARISON FOR 2000-2009
NEW WORLD AND OLD WORLD COMBINED-PROBATION



Scenario 5

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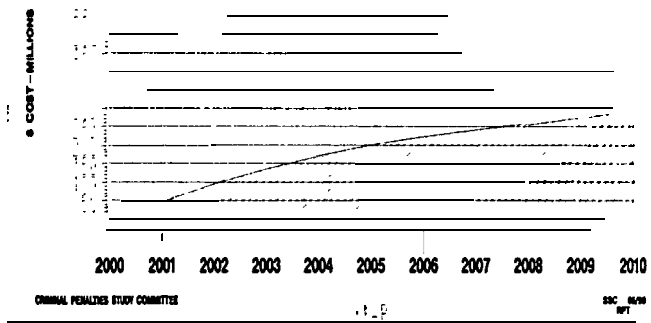
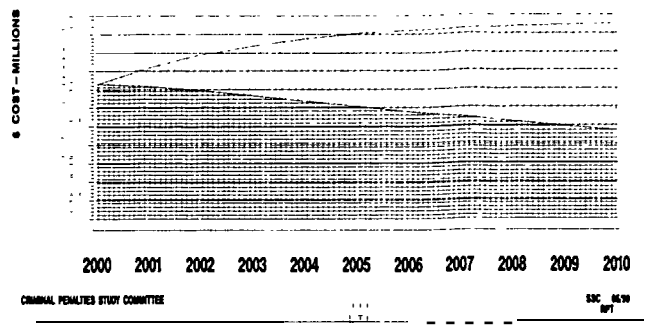
NEW WORLD-INCARCERATION
NEW WORLD:V=85%IS, NV=TS



WISCONSIN FELONY COMPARISON FOR 2000-2009
OLD WORLD-INCARCERATION
NEW WORLD:V=85%IS, NV=TS

WISCONSIN FELONY COMPARISON FOR 2000-2009
NEW WORLD AND OLD WORLD COMBINED-INCARCERATION
NEW WORLD:V=85%IS, NV=TS



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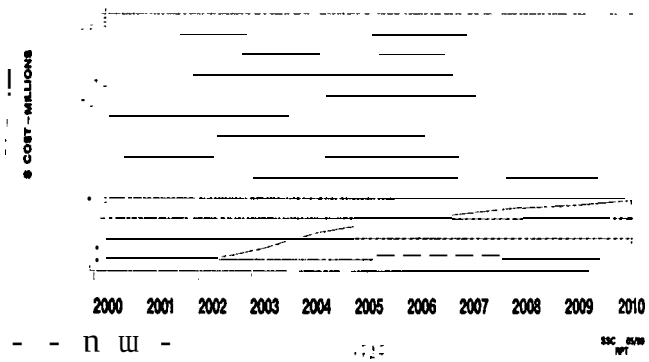

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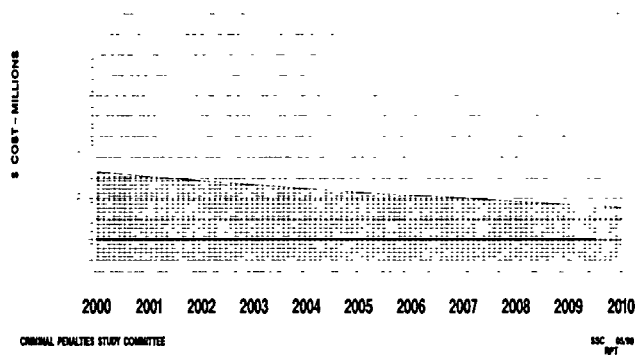
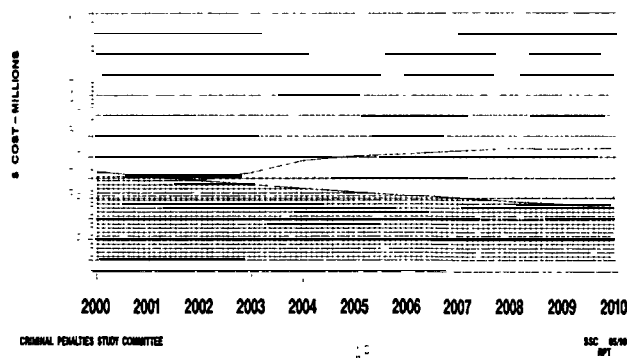
OLD WORLD-PAROLE/EXTENDED SUPERVISION



WISCONSIN FELONY COMPARISON FOR 2000-2009
NEW WORLD AND OLD WORLD COMBINED-PAROLE/EXTENDED SUPERVISION



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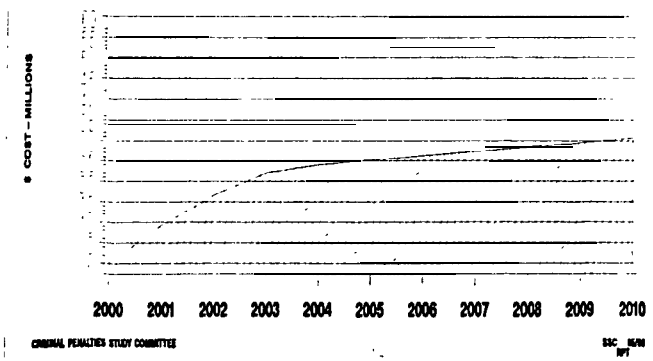
WISCONSIN FELONY COMPARISON FOR 2000-2009
NEW WORLD-PROBATION



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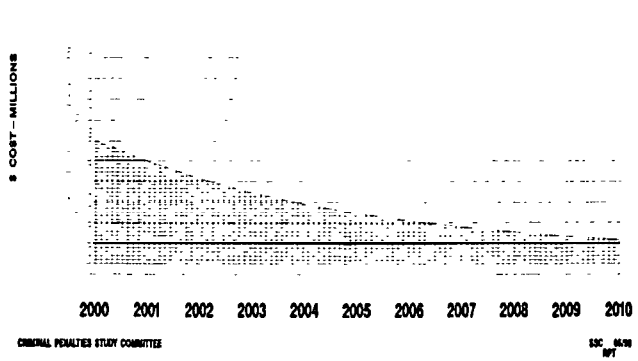
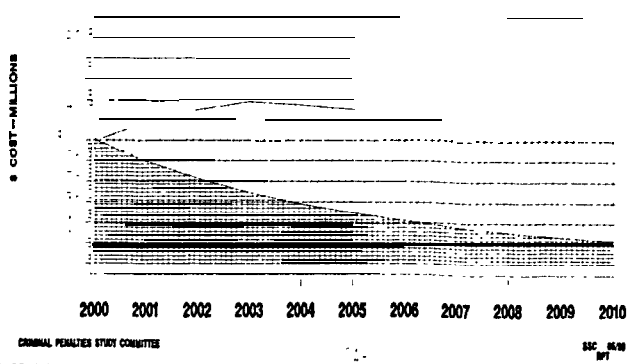
OLD WORLD-PROBATION



WISCONSIN FELONY COMPARISON FOR 2000-2009
NEW WORLD AND OLD WORLD COMBINED-PROBATION



VI. Education of the Judiciary, the Bar, and the Public

As the committee's work progressed into 1999, members realized that educating the bench, the bar, and the public about this new law would be an important part of making Truth-in-Sentencing work. A complex, indeterminate sentencing system with parole, varying release times for offenders, and decisionmaking authority dissipated among prosecutors, judges, and the parole board was being replaced. A simpler, more straightforward system which employed some new terminology now will control.

This educational challenge was exacerbated by the short time period between the date of this report and the effective date of Truth-in-Sentencing, December 3 1, 1999. So another subcommittee was formed to formulate a strategy to educate about the new law and to act as liaisons between the committee and the media, members of the justice system, and the public.

The education effort is important for another reason. In the new world of Truth-in-Sentencing, once a judge pronounces sentence, it is all-but permanent. There is no parole, and no modification except under the existing "new factor" test, which is rarely satisfied. When this is considered, along with the advisory -- not mandatory -- character of the sentencing guidelines mandated by Act 283 and produced by this committee, a judge's decision at the time of sentencing is largely irrevocable, and will not be mandated by a guideline. Accordingly, it is of the greatest importance that Act 283 and the new laws the committee is recommending be understood as Wisconsin enters the "new world" of Truth-in-Sentencing.

1. Education plan

The committee has decided to target education efforts at three core audiences: the bench, the bar, and the public through the media. It is critical that Wisconsin state circuit judges understand the new law and how it can be applied as they make the serious decisions about whether an offender should be sentenced to prison and for how long. Advocates in the new system must understand how it works as they negotiate, plead, and try cases in the new world of Truth-in-Sentencing, and as they argue on behalf of their clients at sentencing hearings. Members of the general public, the beneficiaries of Truth-in-Sentencing, can look forward to easier understanding of the criminal justice system, but also must be taught the new system through the media. [why?] That new system will mean shorter sentences in the number of years pronounced at sentencing but will result in approximately equal actual time in prison when contrasted -- no shorter in actual time-served.

Various vehicles were considered and then chosen to accomplish this education effort. The Wisconsin Supreme Court's public information office has helped in a number of ways. For example, that office helped by drafting a prototype media plan.[172]

[172] **A copy of this plan is attached as Appendix ___.**

2. Education efforts thus far

The education subcommittee already has accomplished two major education efforts, one for judges and one for prosecutors.

On May 20, 1999, committee members and staff presented at the 1999 Criminal Law & Sentencing Institute in Eau Claire, Wisconsin. Approximately 105 judges attended. Staff counsel made a presentation on the new law and committee members also formulated and administered a survey of how judges sentencing practices might change from the current law to the new Truth-in-Sentencing law. The survey contained exercises for burglary, armed robbery, sexual assault and drug cases, and utilized mitigated, intermediate, and aggravated fact scenarios, which the judges considered using low-, medium-, and high- risk offender profiles. An analysis of the survey responses was done. In general, judges sentenced offenders under the new Truth-in-Sentencing law lowered the prison component of the new bifurcated sentences to take into account the determinative nature of these new truthful sentences. This was true of their sentences for the burglary, armed robbery and drug dealing scenarios, but not for sexual assault. Overall sentence lengths increased, as judges gave lengthy post-prison extended supervision periods for some scenarios; thus, the overall period of state involvement with an offender increased in the Truth-in-Sentencing sentences.[173]

Committee members also participated in a discussion with the judges attending the seminar about the various aspects of Truth-in-Sentencing. The judges made some interesting comments. When filling out the survey, about one-half of the judges went through the mental exercise of translating indeterminate to determinate sentences. When doing so, the judges rarely used time to first release (25%) of the indeterminate sentence in this calculation. Rather, they used their own estimate as to how long an offender at the specified level of risk committing an offense of the stated severity would serve. Approximately one-third of the judges present, mostly from Milwaukee, did not have confidence in probation. Many judges said that they would continue to give out one- and two-year sentences, even though this might mean the offender will serve between two and four times as much real-time on such sentences.

On June 16, 1999, committee members and staff presented at the 1999 State Prosecutors Education and Training Conference in Egg Harbor, Wisconsin. Approximately 240 prosecutors attended. Again, committee staff counsel spoke about the new law, and committee members participated in a discussion among the prosecutors about the various aspects of Truth-in-Sentencing. Committee members also administered a shorter version of the same survey of sentencing practices under the new law given to the judges at Eau Claire.

That survey contained exercises for burglary, armed robbery, and sexual assault cases, and used mitigated and aggravated fact scenarios, which the prosecutors considered using low- and high- risk offender profiles. An analysis of the prosecutors sentence recommendations was done. In general, prosecutors proposed bifurcated

[173] **A copy of this spreadsheet analysis is attached at Appendix ___.**

sentences for offenders under the new Truth-in-Sentencing law with lower prison components. Overall sentence lengths increased slightly, so again the overall period of state involvement with an offender increased slightly.[174]

Committee members met with City of Milwaukee Mayor John Norquist on February 15, 1999, and with Milwaukee County Executive Thomas Ament on March 11, 1999, to give them an overview of Act 283 and the committee's work, hear their thoughts on Truth-in-Sentencing, and begin a dialogue between their offices and the committee. Also, on June 17, 1999 staff counsel made a 2 hour presentation to the state's chief judges, deputy chief judges, and court administrators on Act 283 and the committee's work.

3. Future education efforts

Subcommittee members and staff have agreed to speak at many future education efforts. As of the date of this report, the dates, audience, and locations for these efforts include:

September 16-I 7, 1999 - State Public Defender Conference (state public defenders) in Milwaukee
September 27, 1999 - Wisconsin Correctional Conference (statewide corrections personnel) in Milwaukee
October 5, 1999 - State Judicial Districts 4 & 8 (court personnel) in Kimberly
November 18, 1999 - State Bar Truth-in-Sentencing Continuing Legal Education seminar (general bar) in Brookfield
December 4, 1999 - Marquette University Law School Criminal Law Seminar (general bar) in Milwaukee
December 9, 1999 - Statewide Prosecutor Education and Training Seminar (state prosecutors) in Madison
December 16- 17, 1999 - Judicial Truth-in-Sentencing seminar (statewide judiciary) in Wisconsin Rapids
January 26-28, 2000 - Bench-Bar Conference (statewide bar and judiciary) in Milwaukee

The subcommittee looked into federal technical assistance grants to help with the expenses of this educational effort. Unfortunately, this approach did not bear fruit.

The public information office of the Supreme Court of Wisconsin has grant money available for "mock trial" presentations and accompanying panel discussions for the media and the public around the state. That office has agreed to restructure these presentations to focus on Truth-in-Sentencing education, and the subcommittee has made its members and committee staff available to assist in that effort.

Another project to get underway will be the construction of a committee website. The committee's program and planning analyst, Jennifer Dubberstein, can operate hypertext markup language and, time allowing, will construct a Criminal Penalties Study

[174] A copy of this spreadsheet analysis is attached at Appendix ___.

Committee website on DOA server space which will include a copy of the committee's report, its minutes, and other key documents.

Also, the State Bar of Wisconsin has committed to placing articles about Truth-in-Sentencing in its monthly magazine, The Wisconsin Lawyer, as well as in its quarterly section newsletters and on its website.

Other future ideas include forming "training teams" involving a judge, an attorney, and maybe one other committee member, who would place local editorials, conduct interviews with the local media, and seek out community forums at which presentations on Truth-in-Sentencing will be given.

VII. Issues the Committee Has Identified for Further Study

A. Probation as a viable alternative to prison

Whether or not, and if so how much, Truth-in-Sentencing will exacerbate Wisconsin's prison overcrowding has been a concern in much of this committee's work. During this committee's study, it has found that the issue of prison overcrowding is intertwined with another topic of much discussion - lack of confidence in probation, especially in the Milwaukee area.

From the beginning of this committee's work, it has received anecdotal comments by Milwaukee judges, and witnesses knowledgeable about Milwaukee, that probation services in the Milwaukee area have been insufficient. After the committee's study, it strongly concludes that an important element in reducing the increase in flow of prisoners into the prison system is to strengthen the effectiveness of probation and parole services, especially in the Milwaukee area.

Violent and dangerous felons should be sentenced to prison and for periods long enough to protect the public. Further, some crimes so offend the public that prison should be considered, even though the felon may be considered not violent and not dangerous. But today in Wisconsin, felons are sometimes sentenced to prison who could be better sanctioned and the public adequately protected were the state to have more fully developed alternatives to prison than it now has. Exclusive of capital costs, it costs approximately $20,000 per year to house a felon in the prison system. It could cost only approximately $8,800 per year per felon to utilize an alternative to prison other than traditional probation, or even less, depending upon the level of supervision.

Although the Legislature did not assign this committee the duty of studying either probation or alternatives to prison, our study has led us to the conclusion that Wisconsin must strengthen its probation system and develop credible alternatives to prison. Not only can the strength of probation effect whether a judge will sentence an offender to prison or place that offender on probation. The attractiveness of extended supervision may influence judges to use prison with extended supervision rather than probation in the case which is a close call between probation or prison.

Informal polls taken at this committee's educational efforts yielded that approximately one-third of the Wisconsin judiciary lacks confidence in probation. The lack of confidence in probation is exceptionally strong in the Milwaukee judiciary. Nearly 47% of Wisconsin's prison inmates come from Milwaukee County. Yet Milwaukee has only 18.3% of Wisconsin's population. For the state as a whole in 1998, 67% of those convicted of a felony were placed on probation. The comparable figure for Milwaukee County was 52%.

Part of these discrepancies can be attributed to causes other than lack of confidence in probation. Milwaukee County is the most densely urban area of the state and has greater social and racial problems than the less urban areas of the state. An armed robbery in

Milwaukee County often is a much more serious armed robbery than one in a rural county. Milwaukee County's defendants tend to have more serious past criminal histories. And there is a higher conviction rate in Milwaukee County than other counties. For example, as to all burglary and auto theft charges in 1998, Milwaukee County had a conviction rate of 73%, while the comparable figure for the remainder of the state was 47%. While a drive-by-shooting may occur in certain areas of Milwaukee, such a shooting is a rarity in much of the rest of the state.

There are many reasons for the lack of confidence in probation in Milwaukee. Milwaukee is the most urban area of the state with a heavy criminal case load with many probation agents and a large number of judges. Thus, communication between the judiciary and the agents is remote and impersonal, in contrast with the more rural areas where the judges and agents have frequent and close contact. Milwaukee has a higher turnover of agents. It has become a training ground with many newly trained agents leaving for more peaceful parts of the state. With a high turnover of agents, supervisors must spend more time training. In the past there has been a lack of sufficient holding cells for short term incarceration of recalcitrant or non cooperative probationers and parolees. Agents have not had the tools such as immediate short-term incarceration to enforce discipline. Finally, the intensive sanctions program was seriously damaged by two highly publicized killings by defendants who were in that program. While intensive sanctions is a sanction separate from probation, the Division of Community Corrections ("DCC") which administers both programs was tarred as a whole by those incidents.

The DOC and its DCC are working hard to strengthen probation. Many holding cells have been added in the Milwaukee area. More are coming on line soon. Stricter supervision has been tested in Racine and Dane Counties. The results have been good. DOC is improving the lines of communication with the judiciary. But it takes time to change perceptions.

Two Truth-in-Sentencing states that have managed to reduce the number of inmates in prison while continuing to imprison violent and dangerous offenders for longer periods of time inmates are North Carolina and Virginia. Study of other states, especially North Carolina, show that in that state's implementation of Truth-in-Sentencing, in addition to increasing the number of prison beds, it radically increased state funding of alternatives to incarceration and probation/parole supervision. These states have accomplished this in good part by using intermediate sanctions as an alternative to prison. Their intermediate sanctions involve highly structure treatment facilities, short-term lockup, and immediate punishment for infractions and strict supervision, all done under the ambit of community corrections. The cost per inmate per year is higher than ordinary probation, but much less than prison. It has meant more money from the Legislature for more agents and treatment, but that investment of resources has resulted in a reduction of the overall cost of the system. The same could be done in Wisconsin to keep the lid on prison costs. If judges know about effective supervision and treatment tools short of prison, they can use them, provided they have confidence that the public will be adequately protected.

Drug offenses continue to be a significant factor in the increasing prison population. Milwaukee County, which has 18.3% of the state's population, is responsible for more than one-half of the drug offense admissions to prison. Many of these offenders are small-time drug dealers who serve between six months to two years of actual time in prison. Since under Truth-in-Sentencing the minimum prison sentence is one year, if the same number of drug offenders are continued to be sentenced to prison there will be a significant increase in inmates over time.

There was much debate at committee meetings as to the percentage of offenders convicted for drug crimes who are users or addicted. The Milwaukee County District Attorney's office's drug unit believe the percentage to be approximately 25%, while Corrections and the Public Defender believes it to be 67% or higher. Whatever the actual percentage, drug users could be screened out for treatment in highly controlled and structured facilities outside prison which can be operated at a lower cost per inmate per year than within the prison system.

We recommend that DOC be given sufficient resources to permit the use of strict supervision and appropriate drug and alcohol treatment facilities in Milwaukee County and other urban areas with high crime rates. We further recommend that Wisconsin study successful crime reduction programs in other states such as the CUNY Catch Program in New York, the drug prison in Pennsylvania, and the drug usage program in Arizona, with the view of possibly implementing them in Wisconsin.

Under current conditions, Truth-in-Sentencing could exacerbate the prison overcrowding problem, at great cost to the state, because the judiciary could view extended supervision as a more attractive alternative than probation. Under Act 283, a sentencing judge can set conditions to be met while on extended supervision. A judge cannot now set conditions of parole. To take advantage of the judicial control and supervision permitted under extended supervision, a felon must first be sentenced to prison for at least one year. Because Wisconsin will no longer have parole, an offender sentenced to prison will serve their entire prison sentence so a 1 -year sentence under the new system is equivalent to a 2 ½-year sentence under the old system. Since non-violent and non-dangerous felons have generally received shorter sentences under the old system, the greatest danger of sentence inflation and hence more prison crowding and expense lies with those felons whose crimes call for shorter sentences.

Our discussion of probation cannot end without some reference to the racial misrepresentation within the corrections system. Approximately 57% of our prison population and 36% of our probation/parolee population are members of minority groups. Yet minorities make up only 10% of the state's population. Over 3% of the state's black population was in prison as of December 3 1, 1998, along with 1% of the Native American population and 1% of the Hispanic population. The comparable figure for whites was .17% Only Asians had a lower percentage at .12%. Although not within this committee's statutory charges to explain these figures, they do deserve attention by the state.

B. DOC data problems

1. As delineated above. When CCAP, or OPUS for DOC, are fully operational, they may be capable of some of the forecasting necessary to engage in this public policy discussion.

2. CPSC's computer model is state property, and can be utilized by the new sentencing commission, DOC, or whatever state entity wishes.

C. Cost of committee's proposals

1. A fiscal note will be attached to the proposed legislation estimating fiscal impact of committee's proposed legislation. Rough cost projections are listed above at _____

2. Throughout the committee's work, members discussed the role cost should play in the committee's debate and conclusions.

3. Concerns about the increasing corrections budget are not unfounded due to ever-increasing portion of state spending devoted to this issue.

4. Some members expressed worries that if judges did not adjust new determinate sentences downward to at least approximate the amount of time-served on current indeterminate sentences, a two-fold impact, each prong negative, would occur:

   (a) "new world" offenders would quickly clog the system, forcing dangerous "old world"-parolable offenders out of the system, many of whom would go to Milwaukee;

   (b) Truth-in-Sentencing sentences will result in so many additions to prisons, or new prisons, having to be built that the corrections budget will become unmanageable.

5. Given its study and "overview" capability, the committee offers 3 major ways costs can be controlled:

   (a) sentencing guidelines - funneling typical case into proper sentencing range

   (b) alternatives to prison - not always $20,000 per year per offender solution: boot camps,

(c) education, especially of prosecutors and judges, to whom much discretion has been shifted under new law.

6. Also, it must be remembered that cost savings from incarcerating an offender must be calculated. This is not as easy to calculate, but such externalities are part of entire cost picture.