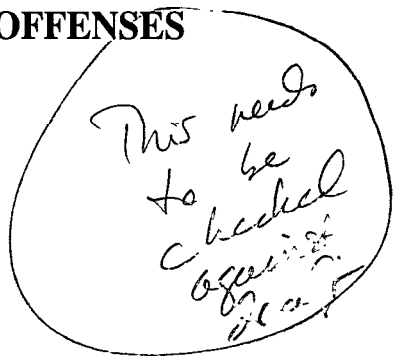
DEPICTION OF MISCELLANEOUS INJURY OFFENSES IN THE A-I SYSTEM



AVA = ABUSE OF VULNERABLE ADULTS (940.285)
APF = ABUSE OF RESIDENTS OF PENAL FACILITIES (940.29)
APR = ABUSE AND NEGLECT OF PATIENTS AND RESIDENTS (940.295)
TI-IP = TAMPERING WITH HOUSEHOLD PRODUCTS (941.327)
PAC = PHYSICAL ABUSE OF A CHILD (948.03)[147]
MHC = CAUSING MENTAL HARM TO A CHILD (948.04)
CN = NEGLECTING A CHILD (948.21)

MENS REA ("MR"): I = Intentionally R = Recklessly N = Negligently

HARMS ("II") GBH = Great Bodily Harm BH = Bodily Harm
LGBH = Likely to Cause GBH LBH = Likely to Cause BH
HPGBH = High Probability of Great Bodily Harm SBH = Substantial Bodily Harm

A	B	C	D	E	F	G	H	I
		AVA MR:I R H: Death	AVA MR: N H: Death		AVA MR:I R N H: GBH	AVA MR: I H: LGBH	AVA MR: I H: BH[148]	AVA MR: I H: LBH
								AVA MR:RN H: LGBH
								APF
		APR MR:I R H: Death[149]	APR MR: N H: Death"'	APR MR:I R N H: GBH[151]	APR MR: I H:GBH[152]	APR MR: I H: LGBH	APR MR: I H: BH[153]	APR MR: I H: LBH
							APR MR: RN H: GBH[154]	APR MR: RN H: LGBH
		THP H: Death			THP H: GBH		THP HPGBH	THP General

[147] See also Wis. Stat. sec. 948.03(4) re: Failing to Act to Prevent Bodily Harm.
[148] This proposal calls for classifying what is currently sec. 940.285(2)(b)2 as an H felony when bodily harm is actually caused and as an I felony when there is only a likelihood of bodily harm. Under present law these two offenses are both classified as an E felony.
[149] Victim must be a "vulnerable person."
[150] Victim must be a "vulnerable person."
[151] Victim must be a "vulnerable person." This is the justification for classifying this offense at the E level.
[152] This proposal calls for classifying what is currently sec. 940.295(3)(b)1r as a F felony when great bodily harm is actually caused and as an I felony when there is only a likelihood of great bodily harm. Under present law these two offenses are both classified as a D felony.
[153] This proposal calls for classifying what is currently sec. 940.295(3)(b)2 as an H felony when bodily harm is actually caused and as an I felony when there is only a likelihood of bodily harm. Under present law these two offenses are both classified as an E felony.
[154] This proposal calls for classifying what is currently sec. 940.295(3)(b)3 as an H felony when great bodily harm is actually caused and as an I felony when there is only a likelihood of great bodily harm, Under present law these two offenses are both classified as an E felony.

A	B	C	D	E	F	G	H	I
				PAC MR: I H: GBH			PAC MR: I H: BH	PAC MR: R H: BH
					PAC MR: I [155] H: BH [156]	PAC MR: R [157] H: GBH		
							PAC MR: R H: BH [158]	
					MHC			
			CN H: Death					
				Agg. Battery [159] MR: I: GBH H: GBH			Int. Battery [160] MR: I: BH H: GBH	Int. Battery [161] MR: I: BH H: SBH

[155] The intent here must be to cause bodily harm.
[156] The conduct here must be such as to create a high probability of great bodily harm.
[157] The recklessness element of this offense involves creating a situation of unreasonable risk of harm to and demonstrates a conscious disregard for the safety of the child. It is less serious than the ordinary definition of recklessness found in sec. 939.24 which involves consciously creating an unreasonable and substantial risk of death or great bodily harm to another. Thus the offense to which this footnote is attached is graded less seriously than 2nd degree reckless injury (940.23(2)).
[158] The conduct here must be such as to create a high probability of great bodily harm.
[159] See proposed amendment to general battery statute at p. _____
[160] See proposed amendment to general battery statute at p. _____
[161] See proposed amendment to general battery statute at p. _____

Fleeing an Officer. Under present law fleeing an officer[162] is a felony offense. It is codified in the Motor Vehicle Code and has a graduated penalty structure as follows:[163]

HARM	IMPRISONMENT	FINE
No Bodily Harm; No Property Damage	2 years	$ 10,000
Bodily Harm or Damage to Property of Another	2 years	$1000 - $10,000
Great Bodily Harm	2 years	$1100 - $10,000
Death	5 years	$1100 - $10,000

The Committee notes several problems with this structure of penalties. First, the maximum term of imprisonment is the same (2 years) regardless of whether the harm caused by the act of fleeing is no bodily harm, bodily harm or great bodily harm. The term of imprisonment increases only if death is caused. Further, the only distinction between the penalty for an act of eluding that causes bodily harm and one that causes great bodily harm is a $ 100 difference in the minimum fine.

The Committee recommends that the penalty structure for fleeing be revamped such that the terms of maximum possible imprisonment are graduated according to the level of harm caused by the actor. This would bring fleeing into line with a number of other crimes whose penalties are likewise staggered according to harm.

[162] Wis. Stat. sec. 346.04(3).

[163] The penalties depicted in the chart accompanying this note are those established by the legislature prior to 1997 Wis. Act 283. See Wis. Stat. sec. 346.17(3)(a)-(d).

Using the A-I felony classification system the Committee recommends the following classifications for fleeing offenses:

HARM	FELONY CLASS	MAXIMUM TERM OF INCARCERATION	MAXIMUM TERM OF EXTENDED SUPERVISION	MAXIMUM FINE
No Bodily Harm; No Property Damage	I	18 months	**2 years**	$ 10,000
Bodily Harm or Damage to Property of Another	H	**3 years**	**3 years**	$ 10,000
Great Bodily Harm to Another	F	**7.5 years**	**5 years**	**$25,000**
Death Of Another	E	10 years	**5 years**	**$50,000**

The Committee further recommends that a **misdemeanor** fleeing offense be restored to Wisconsin law. Until 1994 an act of fleeing that did not result in injury or property damage was a misdemeanor offense.[164] In that year the misdemeanor was elevated to a 2-year felony.[165] Doubtless this occurred because some fleeing episodes, though not resulting in injury or property damage, nonetheless pose great threats to the safety of officers and others and thus deserve felony treatment.

However, the Committee learned that the total absence of a misdemeanor fleeing offense has caused an undesirable gap in the motor vehicle laws. Some episodes are short, don't involve high speed, don't seriously compromise public safety, etc. Some prosecutors are hesitant to pursue these cases as felonies and look for ways to resolve them other than at the felony level, sometimes resorting to non-traffic offenses like resisting an officer. Some judges, too, have expressed dissatisfaction with adjudication at the felony level when the actor's conduct, though technically in violation of the statute, is relatively minor in nature.

The Committee believes that a misdemeanor fleeing offense should be incorporated into the fleeing statute for use in those cases when the defendant's behavior is appropriately addressed with a conviction other than at the felony level. The

[164] Wis. Stat. secs. 346.04(3) and 346.17(3)(a) (1991-92).
[165] See 1993 Wis. Act 189.

Committee further believes that the misdemeanor should be part of the motor vehicle laws so that a conviction is properly entered upon the actor's driving record and can appropriately affect the actor's driving privilege. The latter does not occur if a minor offense is pleaded out to a non-traffic offense like resisting an officer.

The Committee searched for the most desirable way of describing the misdemeanor offense. It recommends-the-following: ---

> **No operator of a vehicle, after having received a visual or audible signal from a traffic officer, or marked police vehicle, shall intentionally resist the officer by failing to stop his or her vehicle as promptly as safety reasonably permits.**

As proposed, the misdemeanor would not be a lesser included offense of the felony because it has elements in addition to the elements of the felony, i.e., a mental state of "intentionally" and an actus reus element of "resists." Neither of these is an element of felony fleeing.

A provision should be crafted that indicates that one cannot be convicted of both the misdemeanor and the felony for the same act of fleeing. As a practical matter the Committee expects that the misdemeanor will probably be used most often – not as a charge to be tried - but as a way of resolving minor fleeing cases by way of a guilty plea. Nonetheless, in appropriate cases, the prosecutor may elect to proceed from the outset with the misdemeanor.

This offense should be punishable by fine or imprisonment or both. The Committee recommends penalties at the Class A misdemeanor level, which would involve a g-month maximum term of imprisonment or a $10,000 fine, or both.

Habitual Criminality. The Committee recommends that the penalty section of the general repeater statute[166] (also known as habitual criminality) be amended to read as follows:

> 939.62 (1) If the actor is a repeater, as that term is defined in sub. (2), and the present conviction is for any crime for which imprisonment may be imposed (except for an escape under s. 946.42 or a failure to report under s. 946.425) the maximum term of imprisonment prescribed by law for that crime may be increased as follows:
>
> (a) A maximum term of one year or less may be increased to not more than 3 2 years.

[166] Wis. Stat. sec. 939.62(1).

(b) A maximum term of more than one year but not more than 10 years may be increased by not more than 2 years if the prior convictions were for misdemeanors and by not more than ~~6~~ 4 years if the prior conviction was for a felony.

(c) A maximum term of more than 10 years may be increased by not more than 2 years if the prior convictions were for misdemeanors and by not more than ~~10~~ 6 years if the prior conviction was for a felony.

The Committee arrived at these changes by applying the mandatory release converter (which it used to convert felonies from their existing felonies into the new A-I classification system) to arrive at the numbers recommended above. It does not recommend reducing the provisions for the 2-year increases specified in (b) and (c) which apply when the person is a habitual criminal because of prior misdemeanor convictions.

The Committee recommends no changes for the persistent repeater ("three strikes" and "two strikes") provisions of the habitual criminality statute.[167]

Penalty Enhancers. The last recodification of the Wisconsin Criminal Code occurred in the early 1950's.[168] At that time Chapter 939 had a habitual criminality provision but no other enhancers. Concealing identity during the commission of a crime was treated as a separate crime[169] and a few substantive crimes had aggravating circumstances built into them which elevated the severity of the offense.[170]

Since that time the enactment of penalty enhancers has become extremely popular with the Wisconsin legislature (and legislatures nationally). Today Chapter 939 by itself has at least 17 enhancer statutes and that number may reasonably be expected to rise. In addition to the Chapter 939 enhancers, numerous substantive crimes have enhancers and penalty doublers built into them. Further, the legislature has passed a significant number of special circumstances crimes which really amount to enhancers in the sense that they consist of ordinary crimes whose protections have been extended to special groups with concomitant increases in penalties.[171]

With the advent of truth in sentencing the Committee considered whether some penalty enhancers (but not all of them) might be incorporated into an omnibus statute identifying aggravating circumstances which the judge must consider at sentencing. An aggravating circumstance may drive the judge to impose a heavier sentence but it does not affect the maximum possible sentence. In making the recommendations which

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[167] See Wis. Stat. sec. 939.62(2m).
[168] See 1955 Wis. Laws 696.
[169] See Wis. Stat. sec. 946.62 (1955).
[170] See, e.g, Criminal Damage to Property (Wis. Stat. sec. 943.01(2)(1955)) and Burglary (Wis. Stat. sec. 943.10(2)(1955)).
[171] The numerous special circumstances battery statutes codified in Wis. Stat. ch. 940 are perhaps the best examples of ordinary crimes whose protections have been extended to special groups.

follow for the recharacterization of certain enhancers as sentencing aggravators, the Committee determined that the amount of real incarceration time available to the judge in the proposed A-I classification system leaves enough room for appropriately dealing with the offender who has committed most "aggravated" forms of the underlying offense. It also considered the extent to which the enhancers are actually utilized, the real impact of enhancers on the maximum term of imprisonment, and the experience of other states which have embraced truth in sentencing and which have recast penalty enhancers as sentencing aggravators.

The Committee believes that if any enhancers are recharacterized as sentencing aggravators, a statute should be enacted that lists the aggravators and directs the judge to consider them when imposing a sentence. The statute should specify that aggravators are not elements of the crime.

The Committee recommends that the following penalty enhancers found in Chapter 939 be recast as sentencing aggravators and codified in an omnibus sentencing statute.

- The defendant committed the crime while his or her usual appearance was concealed, disguised or altered, with intent to make it less likely that he or she would be identified with the crime;[172]

- The defendant committed any felony while wearing a bulletproof garment;[173]

- The defendant committed a violation of secs. 940.19(2), (3), (4), (5) or (6), 940.225(1), (2) or (3), 940.23 or 943.32 against a person who at the time was 62 years of age or older;[174]

- The defendant committed the crime for the benefit of, at the direction of or in association with any criminal gang, with the specific intent to promote, further or assist in any criminal conduct by criminal gang members;[175]

- The defendant committed a violation of secs. 940.225(1) or (2), 948.02(1) or (2) 948.025 and at the time knew that he or she had syphilis, gonorrhea, hepatitis B, hepatitis C, chlamydia, or acquired immunodeficiency syndrome or has had a positive test for the presence of HIV, antigen or nonantigenic products of HIV or an antibody to HIV.[176]

[172] Currently codified at Wis. Stat. sec. 939.641.
[173] Currently codified at Wis. Stat. sec. 939.64.
[174] Currently codified at Wis. Stat. sec. 939.647.
[175] Currently codified at Wis. Stat. sec. 939.625.
[176] Currently codified at Wis. Stat. sec. 939.622.

- The defendant committed a crime using information that was disclosed to him or her under sec. 301.46.[177] (sex offender registry)

- Terrorism[178]

The Committee recommends that the following statutes should be maintained as presently codified without change:

- Wis. Stat. sec. 939.63 Penalties; Use of a Dangerous Weapon
- Wis. Stat. sec. 939.632 Penalties; Violent Crime in a School Zone
- Wis. Stat. sec. 939.621 Increased Penalty for Certain Domestic Abuse Offenses
- Wis. Stat. sec. 939.645 "Hate Crimes"

The Committee further recommends that the following enhancers codified other than in Chapter 939 be recast as sentencing aggravators:

- The defendant committed a violation of secs. 948.02(1) or (2) against a child and at the time was a person responsible for the welfare of that child, as defined in sec. 948.01(3).[179]

- The defendant committed a violation of sec. 948.025 against a child and at the time was a person responsible for the welfare of that child, as defined in sec. 948.01(3).[180]

- The defendant committed a violation of sec. 940.09(1) or 940.25(1) and there was a minor passenger under 16 years of age in the motor vehicle at the time of the offense.[181]

- Various enhancers codified in Chapter 961 .[182]

Minimum Sentences and Mandatory Consecutive Sentences. The Committee makes a general recommendation that provisions in criminal statutes establishing minimum sentences (presumptive or otherwise) or mandatory consecutive sentences be repealed. This is consistent with the general approach to crime classification and penalty variations embraced by the legislature when it first undertook the process of crime

[177] Currently codified at Wis. Stat. sec. 939.646.
[178] Currently codified at Wis. Stat. sec. 939.648.
[179] Currently codified at Wis. Stat. sec. 948.02(3m).
[180] Currently codified at Wis. Stat. sec. 948.025(2m).
[181] Currently codified at Wis. Stat. sec. 940.09(1b) and 940.25(1b).
[182] Chapter 961 changes were recommended in a separate memorandum dealing with drug offenses.

classification more than twenty years ago. It allows the court maximum sentencing discretion to deal with the multitude of offenders who commit crimes and the multitude of ways in which they do so. Guided by sound judicial discretion and assisted by sentencing guidelines (when the crime of conviction is one for which a guideline has been established), the judge should have maximum flexibility to mete out the appropriate sentence in every case. As a practical matter the Committee notes that when the circumstances which underlie these statutes are present in a particular case, they are properly matters for the prosecutor to argue at sentencing and will inevitably influence the court in determining the sentence to be imposed.

The observations in the preceding paragraph are subject to a limited number of exceptions. There is no recommendation to change mandatory life imprisonment for Class A felonies, nor is there a recommendation to change the provisions of the persistent repeater ("three strikes" or "two strikes") statute which, if invoked, mandate life imprisonment. Finally, the Committee recommends maintaining the structure of minimum mandatory penalties for repeat OWI offenders. Those exceptions aside, the Committee recommends the repeal of the following Criminal Code statutes:

- Wis. Stat. sec. 939.615(7)(c) Violation of a Condition of Lifetime Supervision (consecutive sentence provision only)[183]
- Wis'. Stat. sec. 939.623 Increased Penalty; Repeat Serious Sex Crimes[184]
- Wis. Stat. sec. 939.624 Increased Penalty; Repeat Serious Violent Crimes'[185]

[183] Wis. Stat. sec. 939.615(7) establishes penalties for certain sex offenders who are placed on lifetime supervision and violate a condition of that supervision. Under present law this offense is punished either as a Class A misdemeanor or a Class E felony. However, if the person is convicted of violating this statute for the same conduct that resulted in the person being convicted of another crime, the sentence imposed for a violation of this statute must be consecutive to any sentence imposed for the other crime.

This is one of the very few situations where the law requires the court to impose a consecutive sentence. In virtually every other sentencing context, the law trusts the judge to appropriately decide whether a sentence should be concurrent with or consecutive to another sentence. There is no reason not to likewise trust the judge in the sec. 939.615(7) context.

[184] Wis. Stat. sec. 939.623 provides that if a person has one or more prior convictions for a serious sex crime (defined as first or second degree sexual assault), the court shall sentence the person to not less than 5 years imprisonment, but otherwise the penalties for the new crime apply, subject to any penalty enhancement. The court shall not place the person on probation.

This statute really isn't a penalty enhancer, though the title of the statute speaks of an "increased penalty." Rather, it establishes a minimum term of imprisonment. It is thus inconsistent with the general approach of the Committee to recommend that, except for life imprisonment felonies, minimum terms of imprisonment should be repealed. Further, as a practical matter, there is little likelihood that a person who qualifies as a serious sex offender and then commits another sexual assault would be placed on probation or receive a sentence of less than five years.

[185] Wis. Stat. sec. 939.624 provides that if a person has one or more prior convictions for a serious violent crime (defined as felony murder or second-degree intentional homicide) or a crime punishable by life imprisonment and subsequently commits felony murder or second-degree intentional homicide, the court

- Wis. Stat. sec. 939.63(2) Penalties; Use of Dangerous Weapon (minimum term only)[186]
- Wis. Stat. sec. 939.635 Penalties; Assault or Battery in Secured Juvenile Facilities or to Aftercare Agent[187]
- Wis. Stat. sec. 941.296(3) Use or Possession of a Handgun and An Armor-Piercing Bullet During Crime (consecutive sentence provision only)[188]
- Wis. Stat. sec. 946.42(4) Escape (consecutive sentence provision only)[189]

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shall sentence the person to not less than 5 years in prison, but otherwise the penalties for new crime apply, subject to any applicable penalty enhancements. The court shall not place the defendant on probation.

Like sec. 939.623 discussed in the preceding footnote, this statute is not really a penalty enhancer either though the title of the statute speaks of an "increased penalty." If the very unusual circumstances described therein should occur, the court must sentence the person to a minimum prison term. For the very same reasons described in the preceding footnote, the Committee recommends repeal of this statute.

[186] Wis. Stat. sec. 939.63 is a penalty enhancer available when the defendant commits a crime while possessing, using or threatening to use a dangerous weapon. The Committee recommends that this enhancer be retained as an enhancer and further recommends that the amount of imprisonment by which the penalty for the underlying crime may be increased be retained without change. However, it recommends that sub.(2) of the statute, which establishes certain minimum terms of imprisonment when the underlying crime is a felony, be repealed. This is consistent with the Committee's general approach of removing presumptive minimum penalties from the criminal law in favor of maximizing judicial discretion in the imposition of sentences. Further, as a practical matter, present law allows the court to depart from this minimum or to place the person on probation if it places its reasons for doing so on the record.

[187] Though codified with the Chapter 939 penalty enhancers, this statute really amounts to a presumptive minimum sentencing statute. As indicated in the text, the Committee recommends repeal of all presumptive minimum sentencing provisions.

[188] Wis. Stat. sec. 94 1.296(3) provides that a court shall impose a sentence for this crime consecutive to any sentence previously imposed or that may be imposed for the crime that the person committed while using or possessing a handgun loaded with an armor-piercing bullet.

This offense is currently a Class E felony and would naturally convert to a Class I felony in the proposed A-I felony classification system. The Committee recommends that the offense be raised to a Class H felony. However, it recommends that the consecutive sentencing provision be repealed. This is one of the very few situations where the law requires the court to impose a consecutive sentence. In virtually every other sentencing context, the law trusts the judge to appropriately decide whether a sentence should be concurrent with or consecutive to another sentence. The same discretion should be afforded in the sec. 94 1.296 context.

[189] Wis. Stat. sec. 946.42(4) provides that a sentence for escape must be consecutive to any sentence previously imposed or which may be imposed for any crime or offense for which the person was in custody when he or she escaped.

The Committee recommends repeal of this mandatory consecutive sentence provision. This too is one of the very few situations where the law requires the court to impose a consecutive sentence. In virtually every other sentencing context, the law trusts the judge to appropriately decide whether a sentence should be concurrent with or consecutive to another sentence. The same discretion should be afforded here.

- Wis. Stat. sec. 946.425(2) Failure to Report to Jail (consecutive sentence provision only)[190]
- Wis. Stat. sec. 948.36 Use of a Child to Commit a Class A Felony[191]
- Wis. Stat. sec. 948.605(4) Gun-Free School Zones (consecutive sentence provision)[192]

Felony Murder. The felony murder statute[193] should be amended to provide that the maximum penalty for the underlying offense may be increased by not more than 15 years. Under present law the increase is 20 years, but applying the mandatory release converter (2/3rds of the maximum possible imprisonment), which has been used to convert all felonies to the new A-I classification system, this number (20) should be reduced to 15.

Carjacking Resulting in Death. Carjacking resulting in death[194] is currently classified as a Class A felony. The Committee recommends treating this offense like armed robbery and including it within the catalogue of offenses that receive felony murder treatment under Wis. Stat. sec. 940.03. Armed robbery and carjacking are very similar to each other and, as proposed by the Committee, both would be classified as Class C felonies. If death results from either, the prosecutor should have the similar option of proceeding with a felony murder charge. Of course, if the factual circumstances of the case so warrant, the state may forego a felony murder charge in favor of a combination of other charges, like first-degree intentional homicide and carjacking (just as it often does when it charges first-degree intentional homicide along with armed robbery).

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[190] Sentencing for failure to report to jail is treated much like sentencing for escape described in the preceding note. For the same reasons the Committee recommends repeal of that part of the statute mandating a consecutive sentence.

[191] In essence this statute adds 5 years to a life term if a person who has attained the age of 17 years advises, hires, counsels, procures, etc. a person 17 years of age or younger to commit a Class A felony and the latter is actually committed by the child. In the view of the Committee sec. 939.05(2)(c) makes the adult in these circumstances a party to the Class A felony and he or she would thus face life imprisonment. This is sufficient exposure and the 5-year enhancer is unnecessary.

[192] The Gun-free School Zone statute provides that, if a term of imprisonment is imposed for a violation thereof, the court shall impose the sentence consecutive to any other sentence. The Committee recommends repeal of this mandatory provision. Imposing a sentence of incarceration for a violation of this statute is discretionary with the judge; no jail term is mandated. Further, the Committee believes the court should have the same discretion to impose a concurrent or consecutive sentence for a violation of this law that it has for virtually every other violation of the criminal law, including many more serious crimes.

[193] See Wis. Stat. sec. 940.03.

[194] Wis. Stat. sec. 943.23(1r).

Possession of Firearm by Felon. The Committee recommends classifying the crime of possession of a firearm by a felon[195] as a Class G felony with a maximum term of confinement of five years followed by a maximum term of extended supervision of five years. Under present law a violation of this statute is punishable as a Class E felony for which the maximum term of imprisonment is two years.[196] If the actor is a repeat violator of this statute, the offense is punishable as a Class D felony for which the maximum term of imprisonment is currently set at five years.[197] The Committee recommends making all violations of the statute punishable by up to five years in prison. The severity of the offense and the potential for violence posed by those who are prohibited from possessing firearms prompted the proposed classification at the G level. The new five-year exposure is sufficient to deal even with repeat offenders and therefore the Committee recommends repeal of the repeater which is built into the current statute.

Operating Vehicle without Owner's Consent. The operating vehicle without owner's consent (OAWOOC) statute prohibits taking and driving any vehicle without the consent of the owner (recommended for classification as a Class H felony).“* It also prohibits driving or operating any vehicle without the consent of the owner (recommended for classification as a Class I felony). [199] There is no misdemeanor joyriding offense except for one dealing with passengers who know that the vehicle is being driven without the owners consent.[200]

The Committee recommends that a misdemeanor joyriding statute be restored to the OAWOOC law. It uses the term “restore” because such a statute used to be part of the OAWOOC law. In essence it provided that whoever violated the OAWOOC law (normally a felony) would be guilty of a Class A misdemeanor if he or she abandoned the vehicle without damage within 24 hours.[201] The misdemeanor portion of the statute was subsequently repealed.

The Committee recommends the restoration of a misdemeanor OAWOOC consent offense to read as follows:

> **It is an affirmative defense to a prosecution for a violation of sub. (2) or (3) [of Wis. Stat. sec. 943.23) if the defendant abandoned the vehicle without damage within 24 hours after the vehicle was originally taken from the owner. An affirmative defense under this subsection mitigates the offense to a Class A misdemeanor. A defendant who raises this affirmative defense has the burden of proving the defense by a preponderance of the evidence.**

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[195] Wis. Stat. sec. 941.29.
[196] Wis. Stat. sec. 941.29(2).
[197] Wis. Stat. sec. 941.29(2m).
[198] Wis. Stat. sec. 943.23(2).
[199] Wis. Stat. sec. 943.23(3).
[200] Wis. Stat. sec. 943.23(4m).
[201] See Wis. Stat. sec. 943.23(2) (1977).

This statute provides an option for disposing of OAWOOC consent cases at the misdemeanor level when the deprivation is brief in duration and involves no property damage to the vehicle. The proposed statute resolves difficult proof issues that existed under the prior misdemeanor law by clearly articulating that abandonment without damage within 24 hours of the taking is an affirmative defense as to which the defendant bears the burden of proof by a preponderance of the evidence.

Juvenile Absconding Statutes. Under current law each felony class has a provision dealing with the very specialized situation of a juvenile who absconds after being adjudicated delinquent and then fails to return to court for a dispositional hearing before attaining the age of 17.[202] This offense is punishable as a felony at the same level as the offense of which the actor would have been guilty had his or her conduct been committed by an adult. For example, it is a Class B felony to abscond after having been adjudicated delinquent for committing an act that would be a Class B felony if committed by an adult.

The Committee debated the classification of this absconding provision at length. It recognizes the anomaly that the juvenile who appears as required for a dispositional hearing before turning 17 is subject to a juvenile disposition, but if the very same juvenile fails to appear before turning 17, he or she may be prosecuted under the absconding statute and in some cases face an adult sentence of much greater length. But the Committee also recognizes another anomaly in the law. If a juvenile absconds prior to adjudication and does not become adjudicated before turning 17, the prosecutor may waive him or her to adult court on the underlying charge,[203] whereas if the same juvenile is adjudicated prior to turning 17 but is returned to custody after turning 17, he or she cannot be waived on the underlying charge and, except for a few very serious felonies, would only to subject to a disposition lasting until his or her 18th birthday. The absconding statute attempts to deal with the latter situation.

Though there are to date very few cases in which this statute has been enforced, the Committee recommends retaining it and extending its application to all classes of felonies in the new A-I classification system. Though not totally satisfied with this result because of the first anomaly described above, it appreciates the need to fill the gap which exists because of the second., Perhaps a better solution would be to allow the adjudication of the juvenile who absconds after adjudication and is not returned to court before turning 17 to be vacated and to thereafter permit the filing of an adult charge on the underlying offense. However, making such a change would require amendments to the Juvenile Code which should not be pursued until those with greater expertise in juvenile law have a chance to consider the matter,

Solicitation of a Child to Commit a Felony. Wis. Stat. sec. 948.35 is an inchoate solicitation statute when the person solicited is a person 17 years of age or older. The Committee recommends the repeal of this statute. In its view of the penalties under

[202] Wis. Stat. sec. 946.50.
[203] See Wis. Stat. 938.18(2).

the general solicitation statute[204] are sufficient to address the dangers of inchoate solicitation. Whether the actor solicited a child to commit an offense is an aggravating circumstance to be considered by the court at sentencing.

[204] See Wis. Stat. sec. 939.30.

E. Proposed Classification of Criminal Code Class A Misdemeanors

Act 283 directs this Committee to study the penalties "for all felonies and Class A misdemeanors." It further provides that the committee shall classify "each felony and Class A misdemeanor in a manner that places crimes of similar severity into the same classification." There is no directive in Act 283 to classify misdemeanors that are presently unclassified.

The Committee has examined all crimes currently assigned status as Class A misdemeanors in the Criminal Code using the classification criteria described earlier in this report. Except as noted below, it has concluded that they are all properly classified as Class A misdemeanors and therefore ought to be retained in that classification.

The changes which the Committee recommends are as follows:

- Stalking[205] should be elevated to a Class I felony.
- Criminal Damage to Railroad Property[206] should be elevated to a Class I felony.
- The "value" level at which the following crimes listed are classified as Class A misdemeanors should be raised to a new ceiling of $2,000:
  1. Theft[207]
  2. Fraud on Hotel or Restaurant Keeper or Taxicab Operator[208]
  3. Issuance of Worthless Check[209]
  4. Removing or Damaging Encumbered Real Property[210]

  J/Receiving Stolen Property[211]
  6. Fraudulent Insurance and Employee Benefit Program Claims[212]

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[205] Wis. Stat. sec. 940.32(2) (1997).
[206] Wis. Stat. sec. 943.07(1) & (2) (1997).
[207] Wis. Stat. sec. 943.20(3)(a) (1997).
[208] Wis. Stat. sec. 943.21(3)(a) (1997).
[209] Wis. Stat. sec. 943.24(1) (1997).
[210] Wis. Stat. sec. 943.26(1) (1997).
[211] Wis. Stat. sec. 943.34(1)(a) (1997).
[212] Wis. Stat. sec. 943.395(2)(a) (1997).

7. Financial Transaction Card Crimes[213]

8. Retail Theft[214]

- Possession of a Firearm in a School Zone[215] should be elevated to a Class I felony.

- Discharge of a Firearm in a School Zone[216] should be elevated to a Class G felony.

- Carrying Firearm in a Public Building[217] should be elevated from a Class B misdemeanor to a Class A misdemeanor.

- Fornication[218] should be renamed "Public Fornication" to more accurately depict the nature of the offense and should remain classified as a Class A misdemeanor.

- The crime of Criminal Damage to Certain Coin-Operated or Card-Operated Machines with Intent to Commit Theft[219] should be repealed. The harm covered by this statute is adequately addressed by several other crimes, including Damage to Property (943.01), Attempted Theft (943.20 and 939.32), and Entry Into Locked Coin Box (943.125).

[213] Wis. Stat. sec. 943.41(8)(c) (1997).
[214] Wis. Stat. sec. 943.50(4)(a) (1997).
[215] Wis. Stat. sec. 948.605 (2) (1997).
[216] Wis. Stat. sec. 948.605(3) (1997).
[217] Wis. Stat. sec. 941.235(1) (1997).
[218] Wis. Stat. sec. 944.15 (1997).
[219] Wis. Stat. sec. 943.01(2g).

F. Classification of Chapter 961 Drug Offenses

1. Introduction

Most of Wisconsin's drug offenses are codified in Chapter 961 of the Statutes. This chapter is not part of the Wisconsin Criminal Code,[220] though many of the Code's general provisions apply to drug prosecutions[221] and, unless there is a specific provision to the contrary, so do the provisions of the Wisconsin Code of Criminal Procedure.[222]

Chapter 961 is a relatively self-contained drug code for the state. Beyond the complex set of crimes codified therein, it has its own declaration of legislative intent, its own set of definitions, and its own system of sanctions. At present its felonies and misdemeanors are not classified in either the A-E felony classification system or the A-C misdemeanor classification system provided for in Wis. Stat. secs. 939.50 to 939.5 1.

The Committee used the same process for converting drug offenses to the new A-I classification system that it used for Criminal Code offenses as well as non-drug non-Criminal Code felonies.[223] The factors described earlier in this report which guided the classification of crimes in the new system were applied to drug offenses as well. However, with specific regard to drug crimes, the Committee also took into account the statement of legislative intent codified in Wis. Stat. sec. 961.001 as well as the interplay between the federal and state governments in the enforcement of overlapping drug laws.

2. Impact of Proposed Classification of Drug Offenses

Under current law drug offenses are not classified; each has a specific penalty articulated in Chapter 961. For drugs that are stratified by amounts delivered or possessed with the intent to deliver, different penalty systems are used. In some instances the maximum amount of imprisonment escalates with the amount of the drug. In others presumptive minimum penalties are used to distinguish among amounts. In yet others a combination of these approaches is used.

Bringing drugs within a uniform system for classifying crimes (a charge given to the Committee by the legislature) means that the penalty structure for these offenses will be expressed in terms of a maximum fine and a maximum term of imprisonment. Once a drug offense is placed in a given felony classification, the penalty range for that classification will apply.

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[220] Chapters 939 to 951 comprise the Wisconsin Criminal Code. See Wis. Stat. sec. 939.01.

[221] Wis. Stat. sec. 939.20 provides: "Sections 939.22 to 939.25 [definitions of criminal intent, criminal recklessness, criminal negligence, and other miscellaneous words and phrases] apply only to crimes defined in chs. 939 to 95 1. Other sections in ch. 939 [the general provisions of Wisconsin's substantive criminal law] apply to crimes defined in other chapters of the statutes as well as to those defined in chs. 939 to 95 1."

[222] Wis. Stat. sec. 967.01 provides in pertinent part that "Chapters 967 to 979 [the Wisconsin Criminal Procedure Code] shall govern all criminal proceedings.. . .."

[223] See Part II.C.4., pp. ____---____

There is at least a two-fold impact of such classification. First, for all felony classes into which drugs have been placed, there is no minimum term of imprisonment and no minimum fine (presumptive or mandatory). In appropriate cases the judge would have the discretion to place the offender on probation. The Committee agrees that this is a desirable outcome of classifying drug offenses. It believes that judges should have the same full range of penalties available to them when sentencing drug offenders as they have when sentencing persons convicted of such dangerous offenses as homicide (other than first-degree intentional homicide), armed robbery, sexual assault, or aggravated burglary. It also believes that the exercise of sound judicial discretion in sentencing drug offenders should not be restricted by minimum penalties when the legislature has not seen fit to so restrict discretion when sentencing offenders convicted of other serious felonies like those noted above.[224]

Another impact of classification is the reduction in maximum fines. Under current law fines top out at $100,000 for THC (marijuana), $500,000 for cocaine, $500,000 for LSD, $500,000 for methamphetamine, amphetamine, phencyclidine (PCP) and methcathinone, and $1,000,000 for heroin. These amounts double for repeat offenders. As a practical matter these enormous amounts are never imposed on state law offenders and, if the drug defendant has sizable assets linked to his or her illicit activities, the forfeiture laws will be used to seize them. The latter is most attractive to the authorities because it results in some or all of the forfeited assets being retained by law enforcement agencies for official use.[225] The Committee recommends that its proposed fine structure for other classified felonies be applied to drug felonies as well. The maximum fines in the uniform fine structure are more than sufficient to encompass the kinds of fines judges impose in state drug prosecutions today.

These changes are in no way intended to depreciate the seriousness of drug offenses or to minimize the impact drugs have had on modern society. Rather, they bring drugs into the kind of uniform classification system which the Committee believes was intended by the legislature when it commanded that "a uniform classification system for all felonies, including felonies outside of the criminal code"[226] be created.

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[224] The Committee recognizes that some presumptive minimum penalties are used in the penalty enhancer statutes. It will be recommending that these be repealed as well for the same reasons as those articulated in the text accompanying this note.

[225] See Wis. Stat. sec. 961.55 et seq.

[226] See 1997 Wis. Act 283 sec. 454(1)(e)1.

3. Proposed Classification of Drug Offenses

COLOR CODES

ENTRIES IN GREEN REFLECT
UPWARD CLASS ADJUSTMENT
AFTER APPLICATION OF M.R. CONVERTER.

ENTRIES IN BLUE REFLECT
NEW CRIMES RECOMMENDED
FOR ENACTMENT BY THE
LEGISLATURE OR EXISTING
CRIMES FOR WHICH
SIGNIFICANT AMENDMENTS
ARE PROPOSED.

ENTRIES IN RED REFLECT
DOWNWARD CLASS ADJUSTMENT
AFTFR APPLICATION OF M.R.
CONVERTER.

ENTRIES IN BLACK REFLECT
THE NATURAL PLACEMENT
OF CRIMES IN A-I SYSTEM
AFTER APPLICATION OF THE
M.R. CONVERTER.

NOTE: Each entry in green and red is accompanied by a parenthetical which indicates "from ____." Red and green entries mean that an adjustment has been made either upward (green) or downward (red) from the felony class where a crime would naturally be placed by application of the M.R. converter. The "from" indicates where natural placement would be.

KEY TO ABBREVIATIONS

DELIVERY: Manufacture, distribution or delivery
COCAINE: Cocaine or cocaine base
METH: Phencyclidine, amphetamine, methamphetamine or methcathinone
LSD: lysergic acid diethylamide
PSILOCIN: psilocin or psilocybin
THC: tetrahydracannibonols (marijuana). **NOTE:** All weight values for THC should also be expressed in terms of the number of plants with the converter of 1 plant = 50 grams applied.

CLASS A (LIFE)

NO ENTRIES

CLASS B (40 MAX PRISON: 20 E.S.)

NO ENTRIES

CLASS C (25 MAX PRISON: 15 E.S.)

Delivery of COCAINE > 40 g[227]	961.41(1)(cm)4
Possession of COCAINE w/intent to deliver > 40 g[228]	961.41(1m)(cm)4
Delivery of HEROIN, > 50 g[229]	961.41(1)(d)4
Possession of HEROIN w/intent to deliver > 50 g[230]	961.41(1m)(d)4
Delivery of METH > SO g (from E)[231]	961.41(1)(e)4
Possession of METH w/intent to deliver > SO g (from E)[232]	961.41(1m)(e)4

[227] The Committee recommends that all cocaine delivery offenses involving more than 40 grams be classified as a C felony. It further recommends that the categories of 40-100 grams and more than 100 grams for this offense be eliminated. Using the Class C felony classification for all offenses over 40 grams provides the courts with 25 years of real prison time within which to sentence the most serious of offenders who are prosecuted under state law. The Committee has taken into consideration the fact that the most serious violators of cocaine delivery laws are prosecuted in the federal system. In the view of the Committee 25 years of exposure for state crimes is sufficient and the additional categories of 40-100 and more than 100 grams are therefore unnecessary.

[228] See preceding note.

[229] The Committee recommends that all heroin delivery offenses involving more than 50 grams be classified as a C felony. It further recommends that the categories of 50-200 grams, 200-400 grams, and more than 400 grams for this offense be eliminated. Using the Class C felony classification for all offenses over 50 grams provides the courts with 25 years of real prison time within which to sentence the most serious of offenders who are prosecuted under state law. The Committee has taken into consideration the fact that the most serious violators of heroin delivery laws are prosecuted in the federal system. In the view of the Committee 25 years of exposure for state crimes is sufficient and the additional categories of 50-200, 200-400, and more than 400 grams are therefore unnecessary.

[230] See preceding note.

[231] The Committee recommends that all delivery methamphetamine, amphetamine, phencyclidine (PCP) and methcathinone offenses involving more than 50 grams be classified as a C felony. It further recommends that the categories of 50-200 grams, 200-400 grams, and more than 400 grams for these offenses be eliminated. Using the Class C felony classification for all offenses over 50 grams provides the courts with 25 years of real prison time within which to sentence the most serious of offenders who are prosecuted under state law. The Committee has taken into consideration the fact that the most serious violators of these delivery laws are subject to prosecution in the federal system. In the view of the Committee 25 years of exposure for state crimes is sufficient and the additional categories of 50-200, 200-400, and more than 400 grams are therefore unnecessary. The Committee has considered the threat to public safety posed by recent increases in methamphetamine activity (most notably in the rural parts of western Wisconsin) and has noted the pending legislation to treat this substance on a par with heroin, which the recommendation of the Committee does. See 1999 A.B. 318.

[232] See preceding note.

CLASS D (15 MAX PRISON: 10 E.S.)

Delivery of COCAINE > 15 g but ≤ 40 g	961.41(1)(cm)3
Possession of COCAINE w/ int. to deliver > 15 but ≤ 40 g	961.41(1m)(cm)3
Delivery of HEROIN, > 10 g but ≤ 50 g	961.41(1)(d)3
Possession of HEROIN w/intent to deliver > 10 g but ≤ 50 g	961.41(1m)(d)3
Delivery of METH > IO g but ≤ 50 (from E)	961.41(1)(e)3
Possession of METH w/intent to deliver > 10 g but ≤ 50 g (from E)	961.41(1m)(e)3

CLASS E (10 MAX PRISON: 5 E.S.)

Delivery of COCAINE > 5 g but ≤ 15 g	961.41(1)(cm)2
Possession of COCAINE w/ int. to deliver > 5 but ≤ 15 g	961.41(1m)(cm)2
Delivery of HEROIN, > 3 g but ≤ 10 g	961.41(1)(d)2
Possession of HEROIN w/intent to deliver > 3 g but ≤ 10 g	961.41(1m)(d)2
Delivery of METH > 3 g but ≤ 10 (from H)	961.41(1)(e)2
Possession of METH w/intent to deliver > 3 g but ≤ 10 g (from H)	961.41 (I m)(e)2
Delivery of LSD > 5 g	961.41(1)(f)3
Possession of LSD w/intent to deliver > 5 g	961.41(1m)(f)3
Delivery of THC > 10,000 g[233]	NEW STATUTE
Possession of THC w/ intent to deliver > 10,000 g[234]	NEW STATUTE
Delivery of a narcotic drug included in Schedule I or II	961.41(1)(a)
Possession w/intent to deliver a narcotic drug included in Schedule I or II	961.41(1m)(a)
Delivery of PSILOCIN > 500 grams	961.41(1)(g)3
Possession w/intent to deliver PSILOCIN > 500 grams	961.41(1m)(g)3
Delivery or possession w/intent to deliver a counterfeit substance included in Schedule I or II which is a narcotic drug	961.41(2)(a)

CLASS F (7.5 MAX PRISON: 5 E.S.)

Delivery of COCAINE > 1 g but ≤ 5 g	961.41(1)(cm)1
Possession of COCAINE w/ int. to deliver > 1 but ≤ 5 g	961.41(1m)(cm)1
Delivery of HEROIN ≤ 3g	961.41(1)(d)1
Possession of HEROIN w/intent to deliver ≤ 3 g	961.41(1m)(d)1
Delivery of METH ≤ 3 (from H)	961.41(1)(e)1
Possession of METH ≤ 3 g (from H)	961.41(1m)(e)1
Delivery of LSD > 1 g but ≤ 5 g (from H)	941(1)(f)2
Possession of LSD w/intent to deliver > 1 g but ≤ 5 g (from H)	961.41(1m)(f)2

[233] Under current law the maximum penalties for delivery of THC apply to deliveries of 2500 g or more. Considering the great range between this amount and the amount at which federal authorities are likely to become interested in the case (100-400 kilograms) and given that state cases can involve amounts well in excess of 2500 g, the Committee recommends that the amount categories on the higher end be as follows: > 10,000, 2500 to 10,000, and 1000-2500 grams.

[234] See preceding note.

CLASS F (7.5 MAX PRISON: 5 E.S.) (continued)

Delivery of THC > 2500 g but ≤ 10,000 g	NEW STATUTE
Possession of THC w/intent to deliver > 2500 g but ≤ 10,000 g	NEW STATUTE
Delivery of PSILOCIN >100 but ≤ 500 grams	961.41(1)(g)2
Possession of PSILOCIN w/intent to deliver >100 but ≤ 500 g	961.41(1m)(g)2
False or fraudulent drug tax stamp	139.95(3)
Possession of any amount of piperidine	961.41(1n)(c)
Use of a person who is 17 years of age or under for the purpose of the delivery of a controlled substance[235]	961.455(1)

CLASS G (5 MAX PRISON: 5 E.S.)

Delivery of COCAINE ≤ 1 g[236]	NEW STATUTE
Possession of COCAINE w/ int. to deliver ≤ 1 g[237]	NEW STATUTE
Delivery of LSD ≤ I g (from H)	961.41(1)(f)1
Possession of LSD w/intent to deliver ≤ 1 g (from H)	961.41(1m)(f)1
Delivery of THC > 1000 but ≤ 2500 g[238]	961.41(1)(h)3
Possession of THC w/intent to deliver > 1000 but ≤ 2500[239]	961.41(1m)(h)3
Delivery of PSILOCIN < 100 grams	961.41(1)(g)1
Possession of PSILOCIN w/intent to deliver < 100 grams	961.41(1m)(g)1

CLASS H (3 MAX PRISON: 3 E.S.)

Delivery of THC > 200 but ≤ 1000 g	961.41(1)(h)2
Possession of THC w/intent to deliver > 200 but ≤ 1000 g	961.41(1m)(h)2
Delivery of any other controlled substance included in Schedule I, II or III, or a controlled substance analog of any other controlled substance included in Schedule I or II	961.41(1)(b)
Delivery or possession with intent to deliver any other counterfeit substance included in Schedule I, II or III	961.41(2)(b)

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[235] Statute should be amended to prohibit use of a person "under the age of 17 years" for the purpose of delivering a controlled substance. This would be consistent with recent amendments to Wisconsin's Juvenile Code.

[236] The Committee recommends creation of a new category for delivery of cocaine to cover amounts of 1 gram or less. This encompasses the vast majority of state delivery cases and the 5 year penalty of Class G is sufficient for offenses in this category. As a matter of fact sentencing data available from the Department of Corrections (as substantiated by the experience of experts who assisted the Committee) reveal that the vast majority sentences statewide for deliveries of 5 grams or less (the lowest category under current law), when adjusted for truth in sentencing and time actually served, result in actual incarceration well within the 5-year range.

[237] See previous footnote.

[238] Under current law the lower end THC weight categories are 500 g or less and more than 500 but less than 2500 grams. The Committee recommends that the amounts be more stratified to more accurately reflect the diversity of violations and to structure penalties accordingly. Thus it recommends that the lower end amount ranges be as follows: > 1000 but ≤ 2500 g, > 200 but ≤ 1000 g, and ≤ 200 g.

[239] See preceding note.

CLASS H (3 MAX PRISON: 3 E.S.) (continued)

Possession with intent to deliver any other controlled substance included in Schedule 1, II or III, or a controlled substance analog of a controlled substance included in Schedule I or II	961.41(1m)b
Possession of a Schedule I or II controlled substance not bearing drug tax stamp	139.95(2)
Delivery of a substance included in Schedule IV	961.41(1)(i)
Possession with intent to deliver a substance included in Schedule I v	961.41 (lm)(i)
Delivery or possession with intent to deliver a counterfeit substance included in Schedule IV	961.41(2)(c)
Acquire or obtain a controlled substance by misrepresentation, fraud, forgery, deception or subterfuge	961.43(2)
Possession or attempted possession of gammahydroxybutric acid, gammahydroxybutyrolactone, ketamine or flunirazepam[240] (from I)	961.41(3g)(f)

CLASS I (18 MO. MAX PRISON: 2 YRS E.S.)

Delivery of THC ≤ 200 g	961.41(1)(h)1
Possession of THC w/intent to deliver ≤ 200 g	961.41(1m)(h)1
Fraudulent drug advertising	100.26(7)
Delivery of a substance included in Schedule V	961.41(1)(j)
Possession with intent to deliver a substance included in Schedule V	961.41(1m)(j)
Delivery or possession with intent to deliver a counterfeit substance included in Schedule V	961.41(2)(d)
Possession of a narcotic included in Schedule I or II[241] 961.41(3g)(a)1	
Possession or attempted possession of Heroin	961.41(3g)(a)
Distribution or delivery of imitation controlled substance	961.41(4)(am)3
Keeping of a drug house	961.42(2)

[240] The substances included in the text accompanying this footnote include what have come to be known as "date rape" drugs.

[241] A first offense under this statute is now punishable by 1 year and subsequent offenses are punishable by 2 years. The Committee recommends deleting this distinction, classifying all offenses a Class I felonies, and treating the fact of prior conviction as a sentencing factor or, when appropriate, as a basis for invoking repeat offender laws.

4. Depiction of Controlled Substances Offenses with Stratified Penalties in the A-I Classification System

ALL OFFENSES INCLUDE DELIVERY & POSSESSION WITH INTENT TO DELIVER

COKE = COCAINE
HEROIN = HEROIN
METH = METHAMPHETIMINE AMPHETAMINE, PHENCYCLIDINE (PCP) AND METHCATHINONE
PSILOCIN = PSILOCIN AND PSTLOCYBTN
LSD = LYSERGIC ACID DIETHYLAMIDE
THC = TETRAHYDROCANNABINOLS (MARIJUANA)

A	B	C	D	E	F	G	H	I
		COKE > 40 g		PSILOCIN > 500 g				
			COKE > 15 g but ≤ 40 g		PSILOCIN > 100 g but ≤ 500 g			
		HEROIN > 50 g		COKE > 5 g but ≤ 15 g		PSILOCIN ≤ 100 g		
			HEROIN > 10 g but ≤ 50 g		COKE > 1 g but ≤ 5 g			
				HEROIN > 3 g but ≤ 10 g		COKE ≤ 1 g		
					HEROIN ≤ 3 g			
		METH > 50 g		THC > 10,000g				
			METH > 10 g but ≤ 50 g		THC > 2500but ≤ 10,000g			
				METH > 3 g but ≤ 10 g		THC > 1000but ≤ 2500 g		
					METH ≤ 3 g		THC >200 but ≤ 1000 g	
				LSD > 5 g				THC ≤ 200 g
					LSD > lg but < 5 g			
						LSD < 1 g		

5. Additional Recommendations Regarding Controlled Substances Offenses

In addition to the classification of drug offenses described above, the Committee also makes the following recommendations regarding the provisions of Chapter 96 1 of the Statutes:

1. The penalty doubler for second and subsequent offenses[242] should be recast to resemble the general habitual criminality statute[243] but should remain codified in sec. 961.46 with the procedures now specified therein. In particular the Committee recommends that if a defendant is a second or subsequent drug offender,[244] the maximum incarceration penalty[245] may be increased as follows:

    - Four years if the present offense is a Class E, F, G, H or I felony.

    - Six years if the present offense is a Class C or D felony.[246]

2. Simple possession or attempted possession of (a) cocaine or cocaine base,[247] (b) lyseric acid diethylamide, phencyclidine, amphetamine, methamphetamine, methcathinone, psilocin or psilocybin,[248] and (c) tetrahydrocannibinols (THC),[249] all of which are misdemeanors, should retain their present misdemeanor penalties unless the offender qualifies as a second or subsequent offender,[250] in which case the possession or attempted possession offense should be classified as a Class I felony. The Committee makes no recommendation for changing the penalties of other misdemeanor offenses codified in Chapter 961. Nor does it classify those misdemeanors because doing so would be beyond the charge given to the Committee by the legislature.[251]

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[242] See Wis. Stat. sec. 961.48.
[243] See generally Wis. Stat. sec. 939.62.
[244] Persons qualifying as second or subsequent offenders are described in Wis. Stat. sec. 961.48(3).
[245] The proposal speaks of increasing the maximum period ofincarceration for repeat drug offenders. It does not increase fines. Further, any reference to doubling minimum penalties should be deleted because of the general recommendation against the use of minimum penalties for drug and non-drug offenses alike.
[246] No drugs felonies are proposed for classification in Class A or B.
[247] See Wis. Stat. sec. 961.41(3g)(c).
[248] See Wis. Stat. sec. 961.41(3g)(d).
[249] See Wis. Stat. sec. 961.41(3g)(e).
[250] Persons qualifying as second or subsequent offenders are described in Wis. Stat. sec. 961.48(3).
[251] 1997 Wis. Act 283 sec. 454(1)(e)2 directs the Criminal Penalties Study Committee to classify "each felony and Class A misdemeanor." There is no direction to classify what are currently unclassified misdemeanors (like those in Chapter 961) though doing so may be desirable at some point in the future.

3. The penalty enhancer for distribution of or possession with intent to deliver a controlled substance on or near certain places (e.g., within 1,000 ft. of a park, jail or correctional facility, school, youth center, etc.)[252] should be set at 5 years. The provisions for minimum penalties associated with this enhancer should be repealed for the reasons articulated above. The judge should have the full range of penalties available when exercising sentencing discretion in these kinds of cases.

4. The penalty doubler for distribution to prisoners[253] should be recast as a statutory sentencing aggravator which may result in a lengthier disposition but which does not otherwise increase the maximum term of imprisonment. In this regard the Committee notes that one who distributes to a prisoner within the precincts of a prison, jail or other correctional facility will be subject to the penalty enhancer described in the preceding paragraph.

5. The penalty doubler for distribution to persons under age 18[254] should be recast as a sentencing enhancer which increases the maximum term of imprisonment by 5 years. The provision for doubling fines and presumptive minimum penalties should be repealed.

6. The penalty enhancer for distribution or possession with intent to deliver certain controlled substances on public transit vehicles[255] should be recast as a statutory sentencing aggravator which may result in a lengthier disposition but which does not otherwise increase the maximum term of imprisonment. The Committee believes that existing penalty ranges proposed for delivery and possession with intent to deliver are adequate to deal with the aggravating circumstance of delivery or possession with intent to deliver a controlled substance while on a public transit vehicle.

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[252] See Wis. Stat. sec. 961.49.
[253] See Wis. Stat. sec. 961.465.
[254] See Wis. Stat. sec. 961.46.
[255] See Wis. Stat. sec. 961.492.

G. Classification of Non-Drug Non-Criminal Code Felonies

1. Introduction

The non-drug non-Criminal Code felonies analyzed in this section of the Committee's report, which number approximately 150, are scattered throughout the Wisconsin Statutes. These crimes are not part of the Wisconsin Criminal Code,[256] though many of the Code's general provisions apply to them[257] and, unless there is a specific provision to the contrary, so do the provisions of the Wisconsin Code of Criminal Procedure.[258] Under current law these felonies are not classified. Each offense has its own special penalty provision expressed in terms of incarceration or fine or both.

The Committee used the same approach for classifying non-drug non-Criminal Code offenses that it used for classifying Criminal Code felonies and drug felonies.[259] It used the mandatory release date under present law to convert these crimes into the A-I felony classification system. It then employed the classification factors discussed earlier to determine whether to make any class adjustments after the M.R. converter was applied.

2. Impact of Classification on the Nature of Non-Drug Non-Criminal Code Penalties

Under current law these miscellaneous offenses are not classified; each has a specific penalty articulated for the particular statute and different penalty systems are used. In some instances a maximum fine and a maximum amount of imprisonment are specified. In others minimum fines and minimum periods of incarceration are included. For some of the latter probation is an option, but if the court elects to incarcerate, then the minimum period of incarceration must be imposed.

Bringing these miscellaneous offenses within a uniform system for classifying crimes (a charge given to the Committee by the legislature) means that the penalty structure for these offenses will be expressed in terms of a maximum fine and a maximum term of imprisonment. Once a crime is placed in a given felony classification, the penalty range for that classification will apply.

There is at least a two-fold impact of such classification. First, with the exception of 5th offense OWI for which a minimum mandatory term of imprisonment is preserved

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[256] Chapters 939 to 951 comprise the Wisconsin Criminal Code. See Wis. Stat. sec. 939.01.

[257] Wis. Stat. sec. 939.20 provides: "Sections 939.22 to 939.25 [definitions of criminal intent, criminal recklessness, criminal negligence, and other miscellaneous words and phrases] apply only to crimes defined in chs. 939 to 951. Other sections in ch. 939 [the general provisions of Wisconsin's substantive criminal law] apply to crimes defined in other chapters of the statutes as well as to those defined in chs. 939 to 95 1."

[258] Wis. Stat. sec. 967.01 provides in pertinent part that "Chapters 967 to 979 [the Wisconsin Criminal Procedure Code] shall govern all criminal proceedings.. . .."

[259] See Part II.C.4., pp. _____---_____.

to maintain consistency in the structure of penalties for all OWI offenders, for all felony classes into which these miscellaneous felonies have been placed, there is no minimum term of imprisonment. In appropriate cases the judge would have the discretion to place the offender on probation. The Committee supports this result. It believes that judges should have the same full range of penalties available to them when sentencing violators of these miscellaneous offenses as they have when sentencing persons convicted of such dangerous offenses as homicide (other than first-degree intentional homicide), armed robbery, sexual assault, or aggravated burglary. It also believes that the exercise of sound judicial discretion in sentencing these offenders should not be restricted by minimum penalties when the legislature has not seen fit to so restrict discretion when sentencing offenders convicted of other serious felonies like those noted above.[260]

Another impact of classification occurs in the area of maximum fines. Under current law maximum fines vary with each offense. The Committee recommends that its proposed fine structure for other classified felonies be applied to these miscellaneous felonies as well with the exception of a few offenses for which the legislature is established particularly high fines for obvious reasons. As to the latter the Committee recommends that the current maximum fines be preserved. Further, unless specifically noted, the Committee recommends that minimum fines be abandoned. As a general principle it believes the court should have full discretion in deciding when to impose a fine and, if so, in what amount.

[260] The Committee recognizes that some presumptive minimum penalties are used in the penalty enhancer statutes. It will be recommending that these be repealed as well for the same reasons as those articulated in the text accompanying this note.

3. Proposed Classification of Non-Drug Felonies Codified Outside the Criminal Code

NOTE: THE LIST OF NON-DRUG FELONIES CODIFIED OTHER THAN IN THE WISCONSIN CRIMINAL CODE WAS DERIVED FROM DOCUMENTATION PREPARED BY THE WISCONSIN LEGISLATIVE REFERENCE BUREAU.

COLOR CODES

ENTRIES IN GREEN REFLECT UPWARD CLASS ADJUSTMENT AFTER APPLICATION OF M.R. CON-VERTER.

ENTRIES IN BLUE REFLECT NEW CRIMES RECOMMENDED FOR ENACTMENT BY THE LEGISLATURE OR EXISTING CRIMES FOR WHICH SIGNIFICANT AMENDMENTS ARE PROPOSED.

ENTRIES IN RED REFLECT DOWNWARD CLASS ADJUSTMENT AFTER APPLICATION OF M.R. CONVERTER.

ENTRIES IN BLACK REFLECT THE NATURAL PLACEMENT OF CRIMES IN A-I SYSTEM AFTER APPLICATION OF THE M.R. CONVERTER.

NOTE: Each entry in green and red is accompanied by a parenthetical which indicates "from." Red and green entries mean that an adjustment has been made either upward (green) or downward (red) from the felony class where a crime would naturally be placed by application of the M.R. converter. The "from" indicates where natural placement would be.

Statute	Offense	Current Penalty (prior to 1997 Act 283)	Proposed Class: A - I System
11.61(1)(a) and (b)	Criminal violations of campaign finance statutes	Fine not more than $10,000 or imprisoned not more than 3 ***years*** or both	Class I
12.60(1)(a)	Criminal violations of elections statutes	Fine not more than $10,000 or imprisoned not more than 3 ***years*** in the Wisconsin state prisons or both	Class I
13.05	Logrolling by members of the Legislature prohibited	Fine not less than $500 nor more than $1,000 or imprisoned for not less than one year nor more than 3 ***years*** or both	Class I
13.06	Granting of executive favor by members of the Legislature prohibited	Fine not less than $500 nor more than $1,000 or imprisoned for not less than one year nor more than 2 ***years*** or both	Class I
13.69(6m)	Criminal violations of lobby law statutes	Fine not more than $10,000 or imprisoned for not more than 5 ***years*** or both	Class H
23.33(13)(cg)	Causing death or injury by interfering with all-terrain vehicle route or trail sign standard	Fine not more than $10,000 or imprisoned for not more than 2 ***years*** or both if the violation causes the death or injury	Class H (from I)
26.14(8)	Intentionally setting fires to land of another or a marsh	Fine not more than $10,000 or imprisoned not more than 5 ***years*** or both	Class H
29.971(1)(c)	Possession of fish with a value exceeding $1,000 in violation of statutes	Fine of not more than $10,000 or imprisonment for not more than 2 ***years*** or both	Class I
29.971(lm)(c)	Possession of clams with a value exceeding $1,000 in violation of statutes	Fine of not more than $10,000 or imprisonment for not more than 2 ***years*** or both	Class I
29.971(11m)(a)	Illegal shooting, shooting at, killing, taking, catching or possessing a bear	Fine of not more than $5,000 or imprisonment for not more than ***one year*** or both for the second and any subsequent violation	Class A misd. penalties (9 mos. or $10,000 or both)

Statute	Offense	**Current Penalty (prior to 1997 Act 283)**	**Proposed Class: A - I System**
29.971(11p)(a)	Entering the den of a hibernating black bear and harming the bear	Fine of not more than $10,000 or imprisonment for not more than one year or both	Class A misd. penalties (9 mos. or $10,000 or both)
30.547	Falsifying boat certificate or title, or altering hull or engine serial numbers	Fine not more than $5,000 or imprisoned not more than 5 ***years*** or both	Class H
30.80(2g)(b)	Failure to render aid in a boating accident that involves injury to a person but not great bodily harm	Fine not less than $300 nor more than $5,000 or imprisoned not more than one ***year*** or both	Class A misd. penalties (9 mos. or $10,000 or both)
30.80(2g)(c)	Failure to render aid in a boating accident that involves injury to a person and the person suffers great bodily harm	Fine not more than $10,000 or imprisoned not more than 2 ***years*** or both	Class I
30.80(2g)(d)	Failure to render aid in a boating accident that involves the death of a person	Fine not more than $10,000 or imprisoned not more than 5 ***years*** or both	Class H
36.25(6)(d)	Improper release of mines and explored mine land information by employes of the Geological and Natural History Survey or Department of Revenue	Fine not less than $50 nor more than $500, or imprisoned in the county jail for not less than one month nor more than 6 months, or imprisoned in the Wisconsin state prisons for not more than *2* ***years***	Class I
47.03(3)(d)	Illegal use of the term "blind-made"	Fine not more than $1,000 or imprisoned not more than ***one year*** or both	Class A misd. penalties (9 mos. or $10,000 or both)
49.127(8)(a)2.	Illegal use of food stamps with a value over $100 but less than $5000 - first offense	Fine not more than $10,000 or imprisoned not more than 5 ***years*** or both	Class 1 (from H)
49.127(8)(b)2.	Illegal use of food stamps with a value over $100 but less than $5000 - second and subsequent offenses	Fine not more than $10,000 or imprisoned not more than 5 ***years*** or both	Class H
49.127(8)(c)	Illegal use of food stamps with value of $5000 or more - Any offense	Fine not more than $250,000 or imprisoned not more than 20 years or both.	Class G (from D)

Statute	Offense	**Current Penalty (prior to 1997 Act 283)**	**Proposed Class: A - I System**
49.141(7)(a)	Committing a fraudulent act in connection with providing items or services under W-2	Fine not more than $25,000 or imprisoned for not more than 5 ***years*** or both	Class H
49.141(7)(b)	Committing other fraudulent acts to obtain W-2 benefits or payments	Fine not more than $10,000 or imprisoned for not more than one year or both	Class A misd. penalties (9 mos. or $10,000 or both)
49.141(9)(a)	Solicitation or receiving of a kickback, bribe or rebate in connection with providing items or services under W-2	Fine not more than $25,000 or imprisoned for not more than 5 ***years*** or both	Class H KEEP OLD MAX FINE
49.141(9)(b)	Offering or paying a kickback, bribe or rebate in connection with providing items or services under W-2	Fine not more than $25,000 or imprisoned for not more than ***5years*** or both	Class H KEEP OLD MAX FINE
49.141(10)(b)	Improper charging by a provider for W-2 services	Fine not more than $25,000 or imprisoned for not more than 5 ***years*** or both	Class H KEEP OLD MAX FINE
49.49(1)(b)1.	Committing a fraudulent act in connection with providing items or services under medical assistance	Fine not more than $25,000 or imprisoned for not more than ***5 years*** or both	Class H KEEP OLD MAX FINE
49.49(2)(a)	Soliciting or receiving a kickback, bribe or rebate in connection with providing medical assistance	Fine not more than $25,000 or imprisoned for not more than ***5 years*** or both	Class H KEEP OLD MAX FINE
49.49(2)(b)	Offering or paying a kickback, bribe or rebate in connection with providing medical assistance	Fine not more than $25,000 or imprisoned for not more than ***5 years*** or both	Class H KEEP OLD MAX FINE
49.49(3)	Fraudulent certification of qualified medical assistance facilities	Fine not more than $25,000 or imprisoned not more than 5 ***years*** or both	Class H KEEP OLD MAX FINE
49.49(3m)(b)	Improper charging by a provider for medical assistance services	Fine not more than $25,000 or imprisoned not more than 5 ***years*** or both	Class H KEEP OLD MAX FINE
49.49(4)(b)	Improper charging by a facility for medical assistance services	Fine not more than $25,000 or imprisoned not more than 5 ***years*** or both	Class H KEEP OLD MAX FINE

Statute	Offense	Current Penalty (prior to 1997 Act 283)	Proposed Class: A – I System
49.95(1)	Illegal intent to secure public assistance if the value exceeds $1,000 but does not exceed $2,500	Fine not more than $500 or imprisoned for not more than ***5 years*** or both	Class H
49.95(1)	Illegal intent to secure public assistance if the value exceeds $2,500	Fine not more than $10,000 or imprisoned for not more than ***10 years*** or both (Class C felony)	PENALTY UNDER REVIEW
51.15(12)	False statement related to emergency mental health detentions	Fine not more than $5,000 or imprisoned not more than 5 ***years***, or both	Class H
55.06(11)(am)	False statement related to protective services placements	Fine not more than $5,000 or imprisoned not more than 5 ***years,*** or both	Class H
66.4025(l)(b)	False statement related to securing or assisting in the securing of housing for persons of low income in order to receive at least $2,500 but not more than $25,000	Fine not more than $10,000 or imprisoned for not more than 2 ***years*** or both	Class I
66.4025(l)(c)	False statement related to securing or assisting in the securing of housing for persons of low income in order to receive more than $25,000	Fine not more than $10,000 or imprisoned for not more than ***5 years*** or both	Class H
69.24(1)(intro)	Fraudulent or destroyed vital statistical record	Fine not more than $10,000 or imprisoned not more than 2 ***years*** or both	Class I
70.47(18)(a)	Tampering with records of the Board of Review with intent to injure or defraud	Fine not more than $1,000 or imprisoned not more than 2 ***years*** or both	Class I
71.83(2)(b)1.	False income tax return; fraud	Fine not to exceed $10,000 or imprisoned not to exceed 5 ***years*** or both	Class H
71.83(2)(b)2.	Officer of a corporation; false franchise or income tax return	Fine not to exceed $10,000 or imprisoned not to exceed ***5 years*** or both, together with the cost of prosecution	Class H

Statute	Offense	Current Penalty (prior to 1997 Act 283)	Proposed Class: A - I System
71.83(2)(b)3.	Income tax evasion	Fine not more than $5,000 or imprisoned not more than 3 years or both, together with the costs of prosecution	Class I
71.83(2)(b)4.	Fraudulent claim for tax credit	Fine not to exceed $10,000 or imprisoned not to exceed 5 ***years*** or both, together with the cost of prosecution	Class H
86.192(4)	Tampering with road signs if the tampering results in the death of a person	Fine up to $10,000 or imprisoned not more than 2 ***years,*** or both	Class H (from I)
97.43(4)	Use of meat from dead or diseased animals	Fine not less than $500 nor more than $5,000 or imprisoned for not more than 5 years or both	Class H
97.45(2)	Violation of horsemeat labeling requirements	Fine not less than $500 nor more than $5,000 or imprisoned for not more than ***5 years*** or both	Class H
100.26(2)	Violation of commission merchant duties and responsibilities	Fine not less than $50 nor more than $3,000, or by imprisonment for not less than 30 days nor more than 3 years, or both	Class I
100.26(5)	Violations of dairy license requirements, DATCP orders or regulations and false advertising	Fine not less than $100 nor more than $1,000 or imprisoned for not more than one year or both	Class A misd. penalties (9 mos. or $10,000 or both)
100.26(7)	Fraudulent drug advertising	Fine not less than $500 nor more than $5,000 or imprisoned not more than ***one year*** or both for each offense	Class A misd. penalties (9 mos. or $10,000 or both)
101.143(10)(b)	Intentional destruction of a PECFA record	Fine not more than $10,000 or imprisoned for not more than ***10 years*** or both	Class G (from F)

Statute	Offense	Current Penalty (prior to 1997 Act 283)	Proposed Class: A - I System
101.94(8)(b)	Intentional violation of manufactured home laws that threaten health and safety	Fine not more than $1,000 or imprisoned not more than ***one year*** or both	Class A misd. penalties (9 mos. or $10,000 or both)
102.[redacted])	Intent to evade collection of uninsured employer levies under the worker's compensation law	Fine not more than $5,000 or imprisoned for not more than 3 ***years*** or both, and shall be liable to the state for the cost of prosecution	Class I
102.835(18)	Discharge or discrimination by employer against employe who has been the subject of a worker's compensation levy	Fine not more than $1,000 or imprisoned for not more than ***one*** year or both	Class A misd. penalties (9 mos. or $10,000 or both)
102.85(3)	Violation of an order to cease operation because of a lack of worker's compensation insurance	Fine not more than $10,000 or imprisoned for not more than 2 ***years*** or both	Class I
108.225(11)	Evading collection of unemployment compensation levies under employment compensation law	Fine not more than $5,000 or imprisoned for not more than 3 ***years*** or both	Class I
108.225(18)	Discharge or discrimination by employer against employe who has been the subject of an unemployment compensation levy	Fine not more than $1,000 or imprisoned for not more than ***one year*** or both	Class A misd. penalties (9 mos. or $10,000 or both)
114.20(18)(c)	False statement related to aircraft registration	Fine not more than $5,000 or imprisoned not more than 5 ***years*** or both	Class H
125.075(2)	Injury or death by providing alcohol beverages to a minor	Fine not more than $10,000 or imprisoned for not more than ***5 years*** or both	Class H - if great bodily harm results Class G - if death results
125.085(3)(a)2.	Receiving money or other considerations for providing false proof of age	Fine not more than $10,000 or imprisoned for not more than 2 ***years*** or both	Class I

[redacted]	Offense	Current Penalty (prior to 1997 Act 283)	Proposed Class: A - I System
125.105(2)(b)	Impersonating an agent, inspector or employe of DOR or DOJ in commission of a crime	Fine not more than $10,000 or imprisoned for not more than 5 years or both	Class H
125.66(3)	Sale and manufacturing of liquor without permits	Fine not more than $10,000 or imprisonment for not more than ***10*** years or both	Class F
12568(12)(b)	Delivering alcohol from denatured alcohol	Fine not less than $1,000 nor more than $5,000 or imprisoned not less than one year nor more than ***10*** years or both	Class F
125.68(12)(c)	Sale or disposal of denatured alcohol resulting in death	Imprisoned for not more than ***10 years***	Class E (from F)
132.20(2)	Trafficking in counterfeit trademarks and other commercial marks with intent to deceive	Fine not more than $250,000 or imprisoned for not more than 5 ***years*** or both, or, if the person is not an individual, be fined not more than $1,000,000	Class H KEEP OLD MAXFINE
133.03(1)	Unlawful contracts or conspiracies in restraint of trade or commerce	Fine not more than $100,000 if a corporation, or, if any other person, $50,000, or be imprisoned for not more than 5 ***years,*** or both	Class H KEEP OLD MAXFINE
133.03(2)	Monopolization of any part of trade or commerce	Fine not more than $100,000 if a corporation, or, if any other person, $50,000, or be imprisoned for not more than ***5 years*** or both	Class H KEEP OLD MAXFINE
134.05(4)	Bribery of an agent, employe or servant	Fine of not less than $10 nor more than $500, or by such fine and by imprisonment for not more than one year	Class A misd. penalties (9 mos. or $10,000 or both)
134.16	Fraudulently receiving deposits	Imprisoned in the Wisconsin state prisons not more ***than 10 years*** nor less than one year or fined not more than $10,000	Class F

Statute	Offense	Current Penalty (prior to 1997 Act 283)	Proposed Class: A - I System
134.20(1)(intro)	Fraudulent issuance or use of warehouse receipts or bills of lading	Fine not more than $5,000 or imprisoned not more than 5 ***years,*** or both	Class H
134.205(4)	Issuance of warehouse receipts without entering item into register with intent to defraud	Fine not more than $5,000 or imprisoned not more than 5 ***years,*** or both	Class H
134.58	Unauthorized use of armed persons to protect persons or property or to suppress strikes	Fine not more than $1,000 or imprisoned not less than one year nor more than 3 years or both	Class I
134.74(7)(b)	Intentional violation of prize notification laws	Fine not more than $10,000 or imprisoned for not more than 2 ***years*** or both	Class I
139.44(1)	Use or manufacturing of counterfeit cigarette stamps	Imprisonment not less than one year nor more than ***10 years***	Class G (from F)
139.44(1m)	Tampering with cigarette meter	Imprisoned not less than one year nor more than ***10 years***	**Class G** (from F)
139.44(2)	False or fraudulent report or attempts to evade the cigarette tax	Fine not less than $1,000 nor more than $5,000, or imprisoned not less than 90 days nor more than one year, or both	Class A misd. penalties (9 mos. or $10,000 or both)
139.44(8)(c)	Unlawful possession of cigarettes if the number exceeds 36,000	Fine not more than $10,000 or imprisoned not more than 2 ***years*** or both	Class I
139.95(2)	Possessing a schedule I or II controlled substance not bearing drug tax stamp	Fine not more than $10,000 or imprisoned not more than 5 ***years*** or both	Class H
139.95(3)	False or fraudulent drug tax stamp	Fine not more than $10,000 or imprisoned not less than one year nor more than ***10 years*** or both	Class F
146.345(3)	Sale of human organs for transplantation prohibited	Fine not more than $50,000 or imprisoned for not more than ***5 years*** or both	Class H KEEP OLD MAXFINE

Statute	Offense	Current Penalty (prior to 1997 Act 283)	Proposed Class: A - I System
146.35(5)	Female genital mutilation	Fine not more than $10,000 or imprisoned for not more than ***5 years*** or both	Class H
146.60(9)(am)	Second violation of failing to comply with notice of release of genetically engineered organisms into the environment requirements	Fine not less than $1,000 nor more than $50,000 or imprisoned for not more than one ***year*** or both	Class A misd. KEEP OLD MAX FINE
146.70(10)(a)	Filing of false 911 report	Fine not more than $10,000 or imprisoned not more than 5 ***years*** or both for any other offense committed within 4 years after the first offense	Class H
154.15(2)	Falsification or withholding of information related to a declaration to a physician	Fine not more than $10,000 or imprisoned not more than ***10 years*** or both	Class F
154.29(2)	Falsification or withholding of information related to a do-not-resuscitate order	Fine not more than $10,000 or imprisoned for not more than ***10 years*** or both	Class F
166.20(11)(b)1.	Knowing and willful failure to report release of a hazardous substance, first offense	Fine not less than $100 nor more than $25,000 or imprisoned for not more than 2 ***years*** or both	Class I KEEP OLD MAX FINE
166.20(11)(b)2.	Knowing and willful failure to report release of a hazardous substance, second and subsequent offenses	Fine not less than $200 nor more than $50,000 or imprisoned for not more than ***2years*** or both	Class I KEEP OLD MAX FINE
167.10(9)(g)	Violation of fireworks manufacturing licensure requirement	Fine not more than $10,000 or imprisoned not more than 10 ***years*** or both	Class G (from F)
175.20(3)	Violation of amusement place licensure requirements	Fine of not less than $25 and not more than $1,000, or by imprisonment for not less than 30 days in the county jail and not more than one year in the state prison, or by both such fine and imprisonment	Class A misd. penalties (9 mos. or $10,000 or both)
181.0129(2)	Filing of a false document with DFI, business corporation	Fine not more than $10,000 or imprisoned for not more than ***2years*** or both	Class I

Statute	Offense	Current Penalty (prior to 1997 Act 283)	Proposed Class: A - I System
181.69	Filing of a false document with DFI, nonstock corporations	Imprisoned in the Wisconsin state prisons not more than 3 ***years*** or in the county jail not more than one year or fined not more than $1,000	Class I
200.09(2)	Fraudulently obtaining or using a certificate of authority to issue any security by a public service corporation	Fine of not less than $500, or by imprisonment in the state prison not less than one or more than ***10 years***, or by both tine and imprisonment	Class I (from F)
185.825	Filing of a false document with DFI, cooperatives	Fine not more than $1,000 or imprisoned not more than 3 ***years*** or both	Class I
214.93	Filing of a false document with the Division of Savings and Loans	Imprisoned for not more than 20 years	Class F (from D)
215.02(6)(b)	Illegal disclosure of information by employes of the Division of Savings and Loans	Fine not less than $100 nor more than $1,000, or imprisoned not less than 6 months nor more than 2 ***years*** or both	Class I
215.12	Falsification of records and dishonest acts, savings and loans	Imprisoned in the Wisconsin state prisons for not to exceed 20 years	Class F (from D)
215.21(21)	Giving or accepting money for loans, savings and loans	Fine not to exceed $10,000 or imprisoned in the Wisconsin state prisons not to exceed 2 years or both	Class I
218.21(7)	False statement related to a motor vehicle salvage dealer license	Fine not more than $5,000 or imprisoned not more than 5 ***years*** or both	Class H
220.06(2)	Illegal disclosure of information by employes of the Division of Banking	Fine of not less than $100 nor more than $1,000, or imprisonment in the Wisconsin state prisons not less than 6 months nor more than 2 years, or both	Class I
221.0625(2) *(intro)	Illegal loans to bank officials	Imprisoned for not more than ***10 years***	Class F

Statute	Offense	Current Penalty (prior to 1997 Act 283)	Proposed Class: A - I System
221.0636(2)	Theft by bank employe or officer	Imprisoned for not more than 20 years	Class H (from D)
221.0637(2)	Illegal commission to bank office and employes	Fine not more than $10,000 or imprisoned for not more than 2 ***years*** or both	Class I
221.1004(2)	False statements related to records, reports and legal processes, state banks	Fine not less than $1,000 nor more than $5,000, or imprisoned not less than one year nor more than 10 years, or both	Class F
285.87(2)(b)	Intentional violations of air pollution statutes and rules, second and subsequent convictions	Fine not more than $50,000 per day of violation or imprisonment for not more than 2 years or both	Class I KEEP OLD MAXFINE
291.97(2)(b)	1. Transportation of hazardous waste to an unlicensed facility or site 2. Storage, treatment, transportation or disposal of any hazardous waste without a license	Fine not less than $1,000 nor more than $100,000 or imprisoned not more than 5 ***years*** or both	Class H KEEP OLD MAX FINE
291.97(2)(c)1.	Second or subsequent violation of hazardous waste handling reporting requirements	Fine not less than $1,000 nor more than $50,000 or imprisoned not more than ***one year*** in state prison or both	Class 1 KEEP OLD MAX FINE
291.97(2)(c)2.	Second or subsequent violation of hazardous waste transportation, storage, treatment or disposal	Fine not less than $5,000 nor more than $150,000 or Imprisoned not more than ***10 years*** or both	Class F KEEP OLD MAX FINE
299.53(4)(c)2.	False statement to DNR related to used oil facilities, second or subsequent violations	Fine not more than $50,000 or imprisonment for not more than 2 ***years*** or both	Class I. KEEP OLD MAX FINE
302.095(2)	Illegal delivery of articles to inmates by prison or jail employes	Imprisoned for not more than 2 ***years*** or fined not more than $500	Class I

Statute	Offense	Current Penalty (prior to 1997 Act 283)	Proposed Class: A - I System
341.605(3)	Unlawful transfer of license plates, insert tag, decal or other evidence of registration or the transfer of counterfeit, forged or fictitious license plates, insert tag, decal or other evidence of registration.	Fine not more than $5,000 or imprisoned not more than 5 ***years*** or both	Class H
342.06(2)	False statement in an application for a vehicle title	Fine not more than $5,000 or imprisoned not more than 5 ***years,*** or both	Class H
342.065(4)(b)	Failing to obtain title for salvage vehicle, with intent to defraud	Fine not more than $5,000 or imprisoned not more than 5 ***years,*** or both	Class H
342.155(4)(b)	Violation of mileage disclosure requirements with intent to defraud	Fine not more than $5,000 or imprisoned not more than 5 ***years,*** or both	Class H
342.156(6)(b)	Transfers of leased vehicles, with intent to defraud	Fine not more than $5,000 or imprisoned not more than 5 ***years,*** or both	Class H
342.30(3)(a)	Alteration of vehicle identification number	Fine not more than $5,000 or imprisoned not more than 5 ***years,*** or both	Class H
342.32(3)	Counterfeiting and unlawful possession of certificate of title	Fine not more than $5,000 or imprisoned not more than 5 ***years,*** or both	Class H
344.48(2)	Forged proof of security for past accidents	Fine not more than $1,000 or imprisoned not more than ***one year*** or both	Class A misd. penalties (9 mos. or $10,000 or both)
346.17(3)(a)	Fleeing an officer	Fine not less than $300 nor more than $10,000 and may be imprisoned not more than 2 ***years***	Class I A new Class A misd. Fleeing is being proposed.
346.17(3)(b)	Fleeing an officer resulting in bodily harm, or damage to property	Fine not less than $500 nor more than $10,000 and may be imprisoned not more than 2 ***years***	Class H (from I)

statute	Offense	Current Penalty (prior to 1997 Act 283)	Proposed Class: A - I System
346.17(3)(c)	Fleeing an officer resulting in great bodily harm	Fine not less than $600 nor more than $10,000 and may be imprisoned not more than 2 ***years***	Class F (from I)
346.17(3)(d)	Fleeing an officer resulting in death	Fine not less than $600 nor more than $10,000 and may be imprisoned not more than 5 ***years***	Class E (from H)
346.65(2)(e)	OWI - 5" or subsequent offense	Fine not less than $600 nor more than $2000 and imprisoned not less than 6 mos. nor more than 5 ***years***	Class H KEEP MIN. FINE **&** MIN. MANDATORY 6 MOS. JAIL
346.65(5)	Negligent use of a vehicle causing great bodily harm	Fine not less than $600 nor more than $2,000 and may be imprisoned not less than 90 days nor more than ***18 months***	Class I
346.74(5)(b)	Striking a person or attended or occupied vehicle and not remaining at the scene if the accident involves injury to a person-but the person does not suffer great bodily harm	Fine not less than $300 nor more than $5,000 or imprisoned not less than 10 days nor more than one year or both	Class A misd. penalties (9 mos. or $10,000 or both)
346.74(5)(c)	Striking a person or attended or occupied vehicle and not remaining at the scene if the accident involves injury to a person and the person suffers great bodily harm	Fine not more than $10,000 or imprisoned not more than 2 ***years*** or both	Class I
346.74(5)(d)	Striking a person or attended or occupied vehicle and not remaining at the scene if the accident involves death	Fine no more than $10,000 or imprisoned not more than 5 ***years*** or both	Class H
350.11(2m)	Causing death or injury by interfering with snowmobile route or trail sign or standard	Fine not more than $10,000 or imprisoned for not more than 2 ***years*** or both	Class H (from I)
446.07	Violation of Chiropractic Examining Board statutes	Fine not less than $100 nor more than $500 or imprisoned not more than one ***year*** or both	Class A misd. penalties (9 mos. or $10,000 or both)

Statute	Offense	Current Penalty (prior to 1997 Act 283)	Proposed Class: A - I System
447.09	Violation of Dental Examining Board statutes, second or subsequent offenses	Fine not more than $2,500 or imprisonment for not more than 2 ***years*** or both for the 2nd or subsequent conviction within 5 years	Class I
450.11(9)(b)	Delivery or possession with intent to manufacture or deliver a prescription drug in violation of the Pharmacy Examining Board statutes	Fine not more than $10,000 or imprisoned not more than 5 ***years*** or both	Class H
450.14(5)	Illegal delivery of poisons	Fine not less than $100 nor more than $1,000 or imprisoned not less than one ***year*** nor more than ***Syears*** or both	Class H
450.15(2)	Placing of prescription drugs: (a) in public place; or (b) upon private premises without consent of owner or occupant	Fine not less than $100 nor more than $1,000 or imprisoned not less than ***one year*** nor more than ***5 years*** or both	Class H
551.58(1)	Willful violation of securities law	Fine not more than $5,000 or imprisoned not more than 5 ***years*** or both	Class H
552.19(1)	Willful violation of corporate take-over laws	Fine not more than $5,000 or imprisoned not more than 5 ***years*** or both	Class H
553.52(1)	Willful violation of fraudulent and prohibited practices statutes under state franchise investment law	Fine not more than $5,000 or imprisoned for not more than 5 ***years*** or both	Class G
553.52(2)	Fraud in connection with the offer or sale of any franchise	Fine not more than $5,000 or imprisoned for not more than ***5 years*** or both	Class G
562.13(3)	Facilitation of off-track wagering and possession of fraudulent wagering tickets with intent to defraud	Fine not more than $10,000 or imprisoned for not more than 2 ***years*** or both	Class I

Statute	Offense	Current Penalty (prior to 1997 Act 283)	Proposed Class: A - I System
562.13(4)	Tampering with race animals; illegal killing of race dogs; counterfeiting race tickets with intent to defraud; illegal race activities	Fine not more than $10,000 or imprisoned for not more than ***5 years*** or both	Class H
565.50(2)	Forged or altered lottery ticket	Fine not more than $10,000 or imprisoned for not more than ***5 years*** or both	Class I (from H)
565.50(3)	Possession of forged or altered lottery ticket	Fine not more than $10,000 or imprisoned for not more than 2 ***years*** or both	Class A misd. penalties (9 mos. or $10,000 or both) (from I)
601.64(4)	Intentional violation of any insurance statute or rule	Fine not more than $5,000 or imprisoned for not to exceed 3 years or both	Class I
641.19(4)(a)	Willful violation or failure to comply with statutes or false statements related to employe welfare funds and plans	Fine not more than $5,000 or imprisoned not more than 5 ***years*** or both	Class H
641.19(4)(b)	Willful and unlawful use of employe. welfare funds	Fine not more than $10,000 or imprisoned not more than 5 ***years*** or both	Class H
765.30(1)(intro)	Marriage outside state to circumvent state law	Fine not less than $200 nor more than $1,000, or imprisoned not more than one ***year,*** or both	Class A misd. penalties (9 mos. or $10,000 or both)
765.30(2)(intro)	False marriage license statement; unlawful issuance of marriage license; false solemnization of marriage	Fine not less than $100 nor more than $1,000, or imprisoned not more than ***one year,*** or both	Class A misd. penalties (9 mos. or $10,000 or both)
768.07	Violation of actions abolished statutes	Fine not less than $100 nor more than $1,000 or imprisoned for not more than one year, or both	Class A misd. penalties (9 mos. or $10,000 or both)
783.07	Failure or neglect to respond to a writ of mandamus	Fine not more than $5,000 per officer or imprisonment for a term not exceeding 5 years	Class H

Statute	Offense	Current Penalty (prior to 1997 Act 283)	Proposed Class: A - I System
946.85(1)	Engaging in a continuing criminal enterprise	Imprisoned not less than 10 years nor more than ***20 years***, and fined not more than $10,000	Class E (from D)
968.31(1)(intro)	Illegal interception and disclosure of wire, electronic or oral communications	Fine not more than $10,000 or imprisoned for not more than 5 years or both	Class H
968.34(3)	Illegal use of pen register or trap and trace device	Fine not more than $10,000 or imprisoned not more than one ***year*** or both	Class A misd. penalties (9 mos. or $10,000 or both)
968.43(3) [formerly 756.13(3), affected by Supreme Court Order 98-08]	Violation of an oath by a stenographic reporter or typewriter operator in connection with a grand jury	Imprisoned for not more than *5 years*	Class H
977.06(2)(b)	False statement to qualify for assignment of a Public Defender	Fine not more than $10,000 or imprisoned for not more than 5 *years* or both	Class I (from H)

H. Miscellaneous Recommendations

Maximum Term of Institutionalization for Persons Found Not Guilty by Reason of Mental Disease or Defect. Under present law the maximum term of institutionalization for persons found not guilty by reason of mental disease or defect (NGI acquittees) is set at two-thirds of the maximum sentence for the underlying offense (including any penalty enhancers).[261] If the underlying offense is punishable by life imprisonment, institutionalization may be for life, subject to termination as provided for by statute.[262]

When the legislature specified that institutionalization of NGI acquittees may not exceed 2/3rds of the maximum imprisonment for the underlying offense, it was obviously pegging maximum institutionalization for these individuals to the maximum an ordinary offender would serve in prison prior to being mandatorily paroled on a maximum sentence. With the advent of truth in sentencing and the abolition of parole, the Committee concluded that the period of maximum institutionalization should be adjusted accordingly. It recommends that the NGI statute be amended to provide that the maximum period of institutionalization for felonies not exceed the maximum term of confinement the court may impose for the underlying offense. The recommended maximum periods of institutionalization were therefore be as follows:

Class A felonies	Life
Class B felonies	40 years
Class C felonies	25 years
Class D felonies	15 years
Class E felonies	10 years
Class F felonies	7.5 years
Class G felonies	5 years
Class H felonies	3 years
Class I felonies	18 months

There is no recommendation to change the 2/3rds formula for misdemeanants. Nor is there a recommendation to change the statute addressing the interaction of NGI commitments with court orders for lifetime supervision of serious sex offenders.[263]

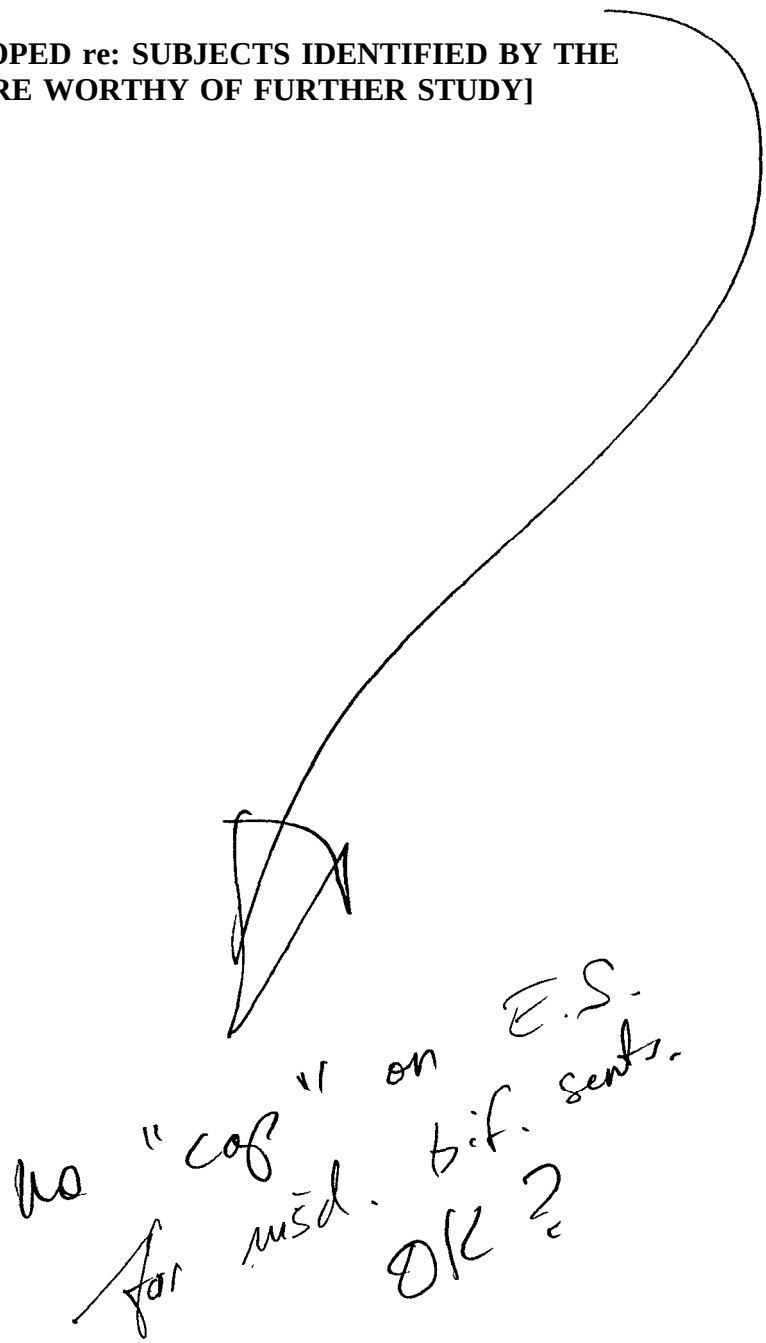
Bifurcated Sentences for Misdemeanants Sentenced to State Prison. There is serious doubt whether Act 283's requirement that felons sentenced to prison receive bifurcated sentences also applies to misdemeanants sentenced to prison. The Committee has concluded that if a misdemeanant is dangerous enough and/or has committed offenses serious enough to warrant incarceration in prison, then that individual should receive a bifurcated sentence that includes both a term of incarceration and a term of extended

[261] Wis. Stat. sec. 971.17(1).
[262] Wis. Stat. sec. 971.17(1).
[263] See Wis. Stat. sec. 971.17(1j).

supervision. The same philosophy of managed supervision upon release from prison that applies to convicted felons supports application of extended supervision to dangerous misdemeanants as well.

Accordingly, the Committee recommends that the relevant statutes be amended to require bifurcated sentences for all misdemeanants sentenced to prison and to further require that the extended supervision component of these sentences be at least 25% of the amount of confinement ordered by the court.

[TEXT STILL BEING DEVELOPED re: SUBJECTS IDENTIFIED BY THE COMMITTEE WHICH ARE WORTHY OF FURTHER STUDY]



III. Temporary Advisory Sentencing Guidelines

Statutory charges:

"e. Development of temporary advisory sentencing guidelines for use by judges when imposing a bifurcated sentence." [264]

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,[265] all actors in the criminal justice system, but especially judges who will be making irrevocable decisions on sentence lengths, will need guidance as to proper sentences in this "new world."

2. Study of other states' sentencing guidance svstems

The full Committee studied the sentencing guidance systems of several 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 quick deadline to issue its final report, other states' systems were examined closely to determine if any one stood out as an attractive option to import into Wisconsin.

Committee members noted the following regarding those other systems:

North Carolina - mandatory guidelines using grid with 54 cells

Strengths - 1) prison population and cost projection capabilities
2) emphasis on community corrections for lower-end felonies
3) use of intermediate sanctions as an alternative to prison

Weaknesses - 1) less flexibility for judges, prosecutors, and defendants than Wisconsin may desire
2) incompatible with 1997 Wis. Act 283 mandate that guidelines be "advisory"
3) some discomfort with community corrections as a possibility for punishment for serious/violent felonies

Virginia - voluntary guidelines using grid with 6 to 11 cells

Strengths - 1) voluntary nature of grid

[264] See **1997 Wis. Act 283** sec. 454(1)(e)4-5.
[265] See p. ____.

2) although voluntary, achieved 75% compliance by mandating that a report form be filled out at sentencing
3) strong program of educating the public through handouts to the public
4) card given to offender exiting system delineating penalties if offender re-offends
5) allows release of elderly, unhealthy prisoners if they pose no risk to the community

Weaknesses -- 1) risk of reoffense calculation was controversial
2) midpoint sentence enhancements for violent felonies were controversial
3) recommendation of imprisonment for longer period of time for younger offenders was controversial
4) VA will bear great corrections expenses in the coming decades due to longer sentences

Delaware - voluntary guidelines; does not use a grid, but certain crimes have presumptive sentence lengths in certain types of institutions

Strengths -- 1) by tying the level of supervision of offenders to their behavior, "good" actors are transferred into less expensive incarceration modes more quickly

Weaknesses -- 1) 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 - 1) 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 - 1) 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 with 258 cells

Strengths -- 1) accurate prison population and cost projection capabilities

Weaknesses - 1) less flexibility for judges, prosecutors, and defendants than Wisconsin desires

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 a grid with 6 to 16 cells

Strengths -- 1) 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. Conversion Table

The Committee developed a conversion table, the purpose of which is to numerically convert "old world" indeterminate sentences to "new world" Truth-in-Sentencing determinate sentencing ranges.[266]

On the back of this table, information was provided converting old indeterminate sentences to Truth-in-Sentencing converted sentences based on the average prison time served to first release for (a) assaultive, (b) sexual assaultive, (c) drug, and (d) property/other crime categories. The time served percentages are based on very broad crime categories,[267] to give judges an idea on where new world sentences could fall based on 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.

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

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[266] A copy of the conversion table is included at Appendix D.
[267] Based on the most detailed Department of Corrections data available.

4. Goals of Sentencing Guidelines Format

None of the other 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 format developed is unique - no other state has attempted to do what Wisconsin has done in this format.

The Committee discussed 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;[268] (5) predictability, so that the legislature, the governor, and the DOC may plan for what judges will do under the new system and how much it will cost; and (6) neutrality.

The Committee also discussed that it did not want any sentencing guidelines system to undermine: (1) the independence of the judiciary, or remove from the judiciary any key decisions; or (2) the community's response to a crime.

5. Particular Issues Discussed

The Committee discussed numerous particular issues as it considered various sentencing guideline formats.

The Committee discussed at length the merits and demerits **of "grid" versus "non-grid"** guidelines formats. A grid system would incorporate a graph with two axes upon which offender risk (horizontal axis) and offense severity (vertical axis) are measured. A non-grid system would ask a series of narrative questions to guide the judge's sentencing logic.

All members agreed on the **necessity to preserve advocacy** in the sentencing process. Advocacy humanizes victims, as well as the defendant, and elucidates offense characteristics necessary to make the best sentencing decision. Accordingly, where possible, the guidelines format posed particular questions for the judge's consideration, and for litigants to use in advocating their client's position before the judge.

The Committee wanted the guideline format and any accompany documents to provide **valuable information** to the sentencing judge, and to the litigants. More than a checklist, the guideline format brings before the judge and litigants key issues and topics to be covered such that the sentencing exercise would be more accurate and productive for all involved.

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[268] 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. Proportionality should be vertical - the crimes should be in properly descending order, most serious to least serious - as well as horizontal - comparable sentence lengths should be given for comparable crimes statewide.

The Committee discussed the issue of how the guidelines format should consider **concurrent versus consecutive sentences.** Rather than attempt to include such calculations, the Committee decided to let this issue be handled as it was under the former Wisconsin sentencing guidelines: a separate calculation would be made for each count, and the judge calculates the total sentence as the judge wishes.

Concern was expressed that if **non-violent misdemeanors were included in the criminal history calculation,** it would result in an undue impact on racial minorities, as historically misdemeanor cases might go forward against residents of the City of Milwaukee, but not that city's surrounding suburbs. Accordingly, non-violent misdemeanors were not included in the criminal history calculation in the guideline worksheet.

Appellate review was also discussed. There was not sentiment on the Committee to recommend a change in the current law and practice.

Whether and how much **guidance to give to extended supervision** was also discussed. Act 283 provides that the period of ES must be equal to at least 25% of the confinement period in the sentence. Given the potential contingent liability of long periods of ES, the Committee discussed whether each guideline should include recommended ES ranges. But because the characteristics and needs will differ greatly of the various offenders who judges will sentence, it was decided not to recommend a standard time period of ES, and instead leave it to the individual sentencing judge's discretion. The Committee did address this issue by capping the possible period of ES.[269]

6. The Different Guideline Formats Discussed

The 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 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

[269] See **Part II.C.3, pp. __ - __**

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 the offender's legal status at the time of the crime, the offender's age, and his 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 would tell the judge how to weigh these circumstances by asking two 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 grid. This lack of a grid was the essential difference between this 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.

Critics of this proposal found it amorphous, and that its use could lead to very contradictory results sentencing similarly situated offenders. They saw this proposal having no ability to predict corrections numbers or resources. They also 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 in an objective manner. If the judge was not given an objective indication of what criminal history should result in what level of punishment, that judge could use any excuse to punish a defendant of one race one way and a defendant of another race in another way. Another concern with the narrative approach was 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, know 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 judge and litigants could still be familiar with it. Further, if this theory is followed, and if judges follow the guidelines, neither the number of prisoners nor costs would increase any more than they would have before Truth-in-Sentencing was instituted. 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, and sometimes 10 years old at the time work ceased on these guidelines in 1995. 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 grid did not sufficiently take into account an individual offender's circumstances. A grid created a starting point into which an individual is automatically plugged; that starting point for any negotiation could inflate sentence lengths.

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 decreasing the discretion of 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 a version of criminal-history scoring from the former Wisconsin 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.

Supporters 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.

7. 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**[270] with accompanying **notes**.[271]

The worksheet was drafted such that before sentencing, the presentence writer or a person designated by the judge could fill 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.[272]

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 worksheet poses normative questions concerning an offender's prior criminal history as a guide toward certain risk levels. It also asks 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.

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[270] See **Appendix E.**
[271] See **Appendix F.**
[272] See _____

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 detailed **notes**[273] that elucidate for judges and litigants many of the considerations and concepts underlying the questions posed on the worksheet.

This format has the strengths of assessing offender risk using a variety of factors, including criminal history, and employing narrative questions that allow the judge's sentencing reasoning to be guided. The guideline system is not overly complex so it is able to be used in a busy felony court. Further, the use of a graph will 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 for the flexibility of judges and litigants.[274]

8. 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.

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

[273] Appendix F.

[274] See Appendix E for the sentencing guideline worksheets.

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 that the ranges were insufficiently punitive, 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 filling 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 this Committee could do in the short time-frame in which it was given to report.

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. Given time and resource constraints, the Committee could not validate either the format or the monthly ranges in the graphs.

9. 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 worksheets includes that the judge should consider such statutory sentencing aggravators. See Appendix E.

IV. The Sentencing Commission

Statutory charges:

"d. Creation of a sentencing commission to promulgate advisory sentencing guidelines for use by judges when imposing a bifurcated sentence."[275]

As this Committee studied the Wisconsin corrections system, it quickly became clear that the various criminal justice and corrections agencies and departments within state government did not speak with each other. Often the left hand does not know what the right hand is doing. Even if one agency was aware of the activities of another, that agency's computer system was not compatible with any other department's such that the two entities could work together to solve problems that cross departments or agencies.

The Committee envisions a Sentencing Commission as a large, broad-based group that will review sentencing policy for the state. The Sentencing Commission should act as a link between various state criminal justice agencies, and as a bridge between the legislature and the Department of Corrections ("DOC"), to discuss corrections and criminal justice issues. The Sentencing Commission also should have a research role.

1. Justification for Sentencing; Commission

Even if there were no legislative mandate for a Sentencing Commission, the creation of a Sentencing Commission is desirable for a number of reasons:

a. Truth-in-Sentencing significantly increases judicial responsibility to sentence fairly and for the appropriate length of time because of the elimination of parole which has functioned in the past as a safety valve in ameliorating unduly harsh or severe sentences. A Sentencing Commission can be of assistance to sentencing judges by suggesting sentence standards through sentencing guidelines.

b. Presently, judges sentence with very little knowledge of empirical studies of the effectiveness of one kind of sentence versus another, or the indicia of dangerousness of an offender, or of the effectiveness and availability of treatment programs. A Sentencing Commission can monitor sentences, carry out sentencing studies, collect data and publish information relating to the effectiveness of sentencing options.

c. The Committee found that there was a paucity of sentencing data for Wisconsin courts, that what data there was, was not reliable or not organized in such a way as to provide useful information concerning sentencing practices, and that there was no electronic transfer of data between the court system and DOC, each of which had data the other would find useful. Furthermore, there was little or sporadic communication between the court system, the prosecution, the public defenders and corrections regarding the effectiveness of sentences. A Sentencing Commission can act as a bridge between the prosecution, the

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

public defenders, the courts and the DOC to promote a more rational and coherent approach to the sentencing of criminals.

d. The Committee found the prediction of future probation, parole and prison populations to be a surprisingly unsophisticated process. A Sentencing Commission can assist the executive and the legislature by more accurately predicting prison and probation populations for budgeting purposes through its utilization of both the CCAP and DOC data bases.

e. Frequently, the legislature feels pressure to pass criminal penalty laws in response to notorious crimes, without the benefit of a cost analysis of the impact of that new law on the court system or the prison population. Such quick response legislation is frequently passed without the understanding of its effect upon other criminal laws or that criminal laws already exist which can adequately handle the problem. The result has been a hodge podge of overlapping and conflicting criminal penalty provisions which create confusion at trials and impede the effective administration of justice. A Sentencing Commission can review proposed criminal legislation as to its impact on the court system, the probation and prison population, and cost to the state.

2. Sentencing Commission functions: its role and authority

The Sentencing Commission should monitor sentencing practices in the state to modify sentencing 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 Sentencing 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 Sentencing Commission should use the computer model developed by this Committee to accomplish this.

The Sentencing Commission should 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. The Committee foresees this function not dissimilar to that contained in legislation recently considered by the Joint Finance Committee requiring fiscal estimates for legislative bills with penalty provisions, colloquially referred to as the "prison pay-as-you-go" plan.

At least on a limited basis, the Sentencing Commission should take the lead in teaching about the sentencing guidelines. It should also aid in educating judges, prosecutors, public defenders, and the private bar concerning sentencing guidance.

The Sentencing Commission should 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, Racine-Kenosha Counties, and the rest of the state. These reports should be distributed to all judges.

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

3. Sentencing Commission membership

The Committee decided that the new Sentencing Commission should have a make-up similar to the Criminal Penalties Study Committee. The Sentencing Commission should 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 Sentencing Commission also would have 3 ex officio, non-voting members:

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

The Governor should appoint the chair of the Sentencing Commission.

A term of service on the Sentencing Commission should be for 3 years. No limit on the number of terms which a member could serve is recommended, because of the importance that Sentencing Commission members accrue specialized and detailed knowledge regarding sentencing. The terms should be staggered so that members already on the commission could educate new members.

4. Sentencing Commission staff and budget

Through research of other states' sentencing commission's, especially Virginia's, it was decided that a Sentencing Commission staff size of 6 would be desirable. Although the Sentencing 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 C.

5. Duration of Sentencing Commission

The Committee debated whether the new Sentencing Commission should be temporary or permanent. The Committee recommends that after the Sentencing Commission's initial run of 5 years, the Sentencing Commission would sunset with a provision for legislative review to decide whether or not the Sentencing Commission should continue.

6. Character of Sentencing Commission

The Committee proposes that the new Sentencing Commission be attached to the Department of Administration for all administrative support services, as was the previous sentencing commission.

7. Scope of Sentencing 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.

8. Enactment and modification of guidelines

The Sentencing Commission should promulgate annually new sentencing guidelines or revisions to existing guidelines.

V. 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 promptly and for an appropriate period **of** time."*[276]

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.[277]

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 give background information, and to answer members' questions. 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 should look like, and then sought reactions from the DOC.

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

[277] Explanation of some of the details of ES and its revocation procedure in Act 283 may be found in Legislative Council Staff Information Memorandum 98-11 at pp. 9-13, and in Legislative Fiscal Bureau Informational Memorandum # 55 at pp. 4-7.

The Committee believes that ES should 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 may earn their way to lesser degrees of supervision as a result of good behavior. Considerations as to the appropriate level of supervision should 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 used 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.[278] Its primary goal is to enhance public safety. In the Panel's strict supervision model, offenders may 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 would 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 will allow for reduced caseloads in contrast to current parolee-to-agent ratios. This lower ratio will allow increased frequency of contact with offenders. Offenders may take advantage of mandatory services for employment, education, treatment, and community services. Also, there will be consistency in the consequences for violations of supervision rules. The model employs streamlined due process procedures for confinement of offenders for violations of supervision. Other goals 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 ("DCC") took these recommendations from the committee as to what ES could look like and gave them detail. The DCC also made a detailed cost breakdown of this strict supervision model. That estimate was an annual cost of $8,881 per offender, with a startup cost of $10,464 per offender.[279] This annual cost is less than one-half of the annual cost of a prison bed in Wisconsin, which is $19,330,[280] and slightly more than six times the annual cost of

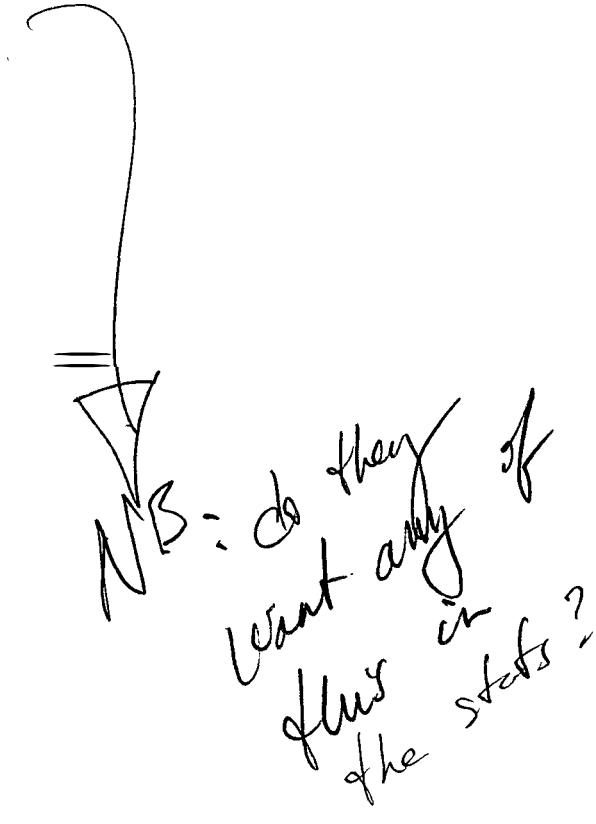
[278] See pp. 15-18 of that report.
[279] See Grosshans Jan. 20, 1999 memorandum to Judges Barland and Fiedler, attached as Appendix ___.
[280] See Grosshans handout at July 9, 1999 CPSC meeting, a copy of which is in the committee's file.

probation and parole supervision in Wisconsin, which averages $1 ,400[281] 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 strict supervision model is recommended as the initial stage of ES 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:



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

	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 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 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, 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 $2,190/offender
E. Hours of Work	Sevens days/week, 24 hour operation in select areas of the state
	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. Absconders	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)
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 required 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 required - at agent'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 0ffenders 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/ceil 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
O. 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 Comrnittee 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 Committee 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 the 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.[282]

The Committee heard from many individuals unhappy with the current interpretation of the Plotkin criteria. It is 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 could 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.[283]

B. "Time-Out"

No legal sanction currently exists between an alternative-to-revocation and full revocation. Each of the entities involved in the Committee's work - 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 will provide 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.

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[282] 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.

[283] See Appendix G.

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,[284] 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 will have to be approved by a DOC supervisor who was not be involved in that individual defendant's supervision; "time out" lasting 46-90 days will have to be approved by a regional DOC chief.

The attorney general's office has opined that a 90-day "time out" will be defensible if the offender admits the violation. This remains true even though there is no due process other than supervisory approval.

C. Revocation-and-return to prison

The Committee studied the current revocation process, and heard from various entities involved in the process, including administrative law judges, as well as the administrator of the DOA-division of hearings and appeals ("DHA"). Pursuant to the letter of its statutory charge, the Committee 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 Committee 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 will continue to conduct the revocation hearing, to prepare a report containing specific findings of fact, and to make the revocation decision. If the ALJ decides to revoke, the ALJ will also recommend the period of prison time the revoked offender should serve.

[284] Study yielded that supervisees admit approximately 90% of violations of condition of parole and probation.

Wisconsin has spent many years and millions of dollars constructing the current ALJ system. The Committee finds this system to be working relatively well. In 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 DHA decided 576 cases by hearing. Of those 576, in 546 of them parole was revoked, and in 30 of them parole was not revoked.

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. Also, higher costs will result should the revocation process be shortened too much. It is DHA'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 DHA'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 will continue to be to the DHA administrator. This allows for errors to be caught before circuit court review. But the administrative review of the ALJ's decision will be discretionary rather than mandatory.

The ALJ's report (and the administrator's written decision, if appealed) will be forwarded to the circuit judge who originally sentenced the offender, or that judge's successor. The circuit judge will 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 will decide the new bifurcated penalty (prison + extended supervision) that the supervisee will serve as punishment in this revocation. The judge will be limited to the total amount of ES time the individual has remaining from which to calculate this new bifurcated penalty. This will 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.)

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. The committee understands 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 decide the new bifurcated penalty.

The Committee 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 Committee agrees that the DOC should be allowed to seek certiorari review of an ALJ's decision not to revoke. Althoueh the Attorney General's office believes that DOC currently has the authority to seek a writ of certiorari for review of an ALJ's decision not to revoke a parolee, the proposed statutory language will clarify that authority. The internal DOC process would not change by which an agent initiates an ATR or the revocation procedure.

The Committee recommends that Act 283 be revised such that the judge have the authority to modify the conditions of ES. At the time of sentencing, the judge may not be aware of all possible supervision options available at the end of a long period of confinement. The Committee believes that a supervisee should be able to petition for modification of ES conditions, but not before 1 year before the offender's confinement portion of his sentence is to end, and not more than once annually after the period of ES begins.

Pursuant to its statutory charge, the Committee studied the time period for revocation decision to try to ensure it is as short as advisable. Currently, it takes 84 days from alleged revocable conduct to decision on administrative appeal. The Committee saw the need to reduce this time period (with the qualifications described above regarding natural attrition, cost, and preparation time for the SPD), as only if offenders understand that punishment for revocable conduct will follow quickly will such conduct decrease. The Committee proposes modifications to expedite the revocation decision and decrease the timeline to 21 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 or the DHA's discretion, no due process problems exist with this new shortened timeline.

The Committee envisiones 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 AL J 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 47	**Full hearing** **ALJ written decision**
57	**Appeal due - if no appeal, trial court notified**
64	**If appeal, response due**
71	**Administrator's decision - trial court notified**

5. Hearing location - Regional ES detention facilities

In the "new world" of Truth-in-Sentencing, where ES violations take place, where the offender is located, and whether the offender's attorney and ES officer have access to him are each important considerations.

The DHA has held these hearings in county jails. Although the DHA frequently chooses to use the jail in the county where the offender was last being supervised, it also often substitutes the jail where the offender is actually confined for a new crime or sentence. But jails often move offenders to other "contract" locations due to overcrowding. 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 some distance from the actual hearing site. The hearing site cannot simply be moved to the offender's location because that would raise problems with the assignment of counsel (usually a public defender). 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.

The Committee's solution to these problems is the creation of regional detention facilities for probation and extended supervision detentions. (Such a facility is now being constructed in Milwaukee at 10th & State Streets.) These 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 DHA a resource to use in treatment situations and would provide a location for "time out" placements. Finally, these facilities would provide some advantage to DHA 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 other situations, the state may want to "lease" regional detention facilities from interested counties. Or 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 has opined for the Committee that applying the new revocation procedures to "old world" parolees as well as ES supervisees under Truth-in-Sentencing would not violate the principles of ex post facto. These procedures included the modified interpretation of the Plotkin criteria and the shortened revocation time line. The Committee does not intend for the new "time out" procedures to apply to old world parolees.

7. Recommended statutory and administrative law changes

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

VI. 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.[285] 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 desires of Committee members, it was concluded that, although not part of the Committee's express statutory charge, it 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 maior 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 - Bureau of Technology Management ("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, ("Offender Population Unified System"), DOC's new prison population tracking system, 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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[285] 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 may contain a corrections population projection component, but it is not expected to be installed completely 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 Committee 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 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 Sentencing and 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 how long have they 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.[286] 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 identified or 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

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

to do it. Given that the Committee has neither such a staff, nor more than a few 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 fit 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 intended use of the computer model is to study the effects of different scenarios. The model gives the user the flexibility to change input parameters, allowing different policies to be forecasted.

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. **1st 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. **Traffk-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 individuals knowledgeable about the current indeterminate and future determinate sentencing systems, SSC developed a transitional matrix. Transitions among different corrections 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 ultimately relied 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 portions 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 used 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 revised.

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.

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

The computer model was used in different ways.

It was used to assess code reclassification decisions to ensure that when a crime was placed in a new class (Class A through Class I), the new maximum period of time in prison for that class "fit" with the majority of the time periods offenders were serving for that crime. If offenders currently serve much more time than the new maximum, the crime was classified with too short of a maximum. If offenders currently serve much less time than the new maximum, the crime was classified with too long of a maximum.

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 those crimes. The results were encouraging. The proposed crime classifications (H, F, H, and G, respectively) captured high

percentages of the time-served sentences for each of these crimes (79%, 82%, 78%, 92%, respectively). The Committee's choice of felony classes for these crimes was thus judged to be correct.

The model was also used to forecast corrections population and corrections costs. Immediately following this section may be found population projection graphs for scenarios 3 and 5. Also immediately following this section may be found cost projection graphs for scenarios 3 and 5.[287] These scenarios make a number of assumptions:

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) = 1-12; 15-18; 29-35 (from a handout to the committee)

Nonviolent crime categories = 13-14; 19-28; 36-47 (same)

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.

[287] Cost estimates used the following figures: $19,330 per prisoner per year; $1,400 per parolee per year; and $3,103 per ES supervisee per year. (This last figure assumes $8,881 per supervisee per year for the 4.5% of that population on strict supervision; $3,500 per supervisee per year for the 43.1% of that population on "maximum" supervision; $2,450 per supervisee per year for the 43.9% of that population on "medium" supervision; and $1,400 per supervisee per year for the 8.5% of that population on minimum or administrative supervision.) All figures were arrived at from DOC materials.

A brief synopsis of these results are as follows:

Scenario 3	2001	2005	2010
Prison Population	21,000	26,500	28,000
Cost Per Year	$405 million'	$505 million*	$550 million'
E.S./ Parole Powlation	14,500	13,500	12,000
Cost Per Year	$20 million	$21 million	$21 million

Scenario 5	2001	2005	2010
Prison Population	21,500	26,000	27,500
Cost Per Year	$405 million'	$500 million'	$525 million*
E.S./ Parole Population	14,500	14,500	13,500
Cost Per Year	$20 million	$25 million	$27.5 million

* For purposes of comparison, the DOC budget for the fiscal year ending 6/30/98 allocated approximately $320 million to institutions.

10. Future issues

The Committee 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.[288]

Finally, this computer model which the Committee has developed can be used by the new Sentencing Commission to accomplish some of its data and policy analysis needs. The computer model was constructed such that it can be added on to and improved. The impact of Truth-in-Sentencing on Wisconsin's corrections population and resources probably will not be felt for a number of years. It is hoped that the Commission can use the computer model to spot danger points, and make guideline changes, with plenty of time to prepare and recommend changes to the governor and the legislature.

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

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

As the Committee's work progressed, members realized that educating the bench, the bar, and the public about this new law will 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 will be replaced. A simpler, more straightforward system which employs some new terminology will control.

This educational challenge is 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 the judiciary, the bar, and the public 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 all actors understand Act 283 and the new laws the committee is recommending 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 an easier understanding of the criminal justice system, but also must be taught the new system through the media. 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.[289]

[289] A copy of this plan is attached as Appendix J.

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 sentencing 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.*"

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

290 A copy of this spreadsheet analysis is attached at Appendix H.

sentence recommendations was done. In general, prosecutors proposed bifurcated 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.[291]

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 to begin a dialogue between their off-ices 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

Many Committee 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 16-17, 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
October 14-15, 1999 -- Wisconsin Clerks of Court (court personnel) in Oshkosh
October 22, 1999 - District 1 Felony Division Retreat (judges) in Milwaukee
November 5, 1999 - State Judicial District 7 (court personnel) in Spring Green
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 Committee 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

[291] A copy of this spreadsheet analysis is attached at Appendix I.

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 Criminal Penalties Study 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 Lawver, as well as in its quarterly section newsletters and on its website. Other education ideas include forming "training teams" involving a judge, an attorney, and maybe one 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.

VIII. 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 during much of this Committee's study. The issue of prison overcrowding is intertwined with another topic of much discussion - lack of confidence in probation supervision, especially in Milwaukee.

1. The "Milwaukee Problem"

Throughout this Committee's work it has received anecdotal comments by Milwaukee judges, and witnesses knowledgeable about the criminal justice system in Milwaukee, that probation supervision in Milwaukee is insufficient. This Committee is not the first to identify this problem.[292] 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 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 to 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. The strength of probation supervision effects whether a judge will sentence an offender to prison or place that offender on probation. Also, the attractiveness of extended supervision may influence judges to use prison with extended supervision rather than probation in a 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

[292] See Governor's Task Force on Sentencing and Corrections (December 17, 1996) pp. l-2; "Privatizing Parole and Probation in Wisconsin," Wisconsin Policy Research Institute Report (April 1999) pp. 6, 10, 14-15.

of a felony were placed on probation. The comparable figure for Milwaukee County was 52%.

Some 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 uncooperative 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.

2. DCC's attempts to solve the "Milwaukee Problem"

The DOC and its DCC are working hard to strengthen probation. As reported to this Committee at its July 9, 1999 meeting, DCC has strengthened its relationship with the Milwaukee police department. A DOC regional chief, attends all police command staff meetings. DCC also has developed an absconder unit to actively search for people who violate their supervision and who do not report to their agents. Twenty probation agents are active seven days a week in that unit. The Milwaukee police department has designated six officers who work along with this absconder unit to go out and find absconders. DCC also has implemented a re-offender prevention enforcement ("ROPE") program, in which probation officers team with Milwaukee police officers to go out into neighborhoods in non-traditional working hours and on weekends to knock on doors to ensure that probationers or parolees are where they should be. These are unannounced visits; if a probationer or parolee is not there, or if contraband is found, the probationer is located and jailed. In Milwaukee, DCC has set up intake units in the Milwaukee County Courthouse and Safety Building so that immediately after offenders are placed on probation they have contact with a DOC representative, rather than a long interval taking

place between sentencing and reporting to DCC. DCC is attempting to move away from "fortress probation" by developing neighborhood supervision. DCC works with the Milwaukee police department in neighborhood precinct offices.

Most importantly, more secure beds have been added in Milwaukee. DCC has arranged with the Milwaukee County Sheriff to add 125 beds, and has also provided 300 beds at the Racine Correctional Institution just for violators from Milwaukee County. A 400-bed addition has been constructed at the Milwaukee County House of Corrections, and for the next 3 years 300 of those beds will be used to hold probation offenders accountable for their conduct. Further, in February 1999, the division broke ground for a 1,048 bed secure facility in Milwaukee, which will be run like a jail to hold probation and parole violators. Also, agents can now incarcerate offenders and place them in the county jail without their supervisor's approval for 10 days, a suggestion made by the Intensive Sanctions Review Panel chaired by Judge Lamelas. DCC has created community advisory boards across the state, including in Milwaukee, and the Milwaukee region has been assigned two regional chiefs to handle the magnitude of the caseload in that area,

3. Can the Racine and Dane County experiments help solve the "Milwaukee Problem"?

Stricter supervision has been tested in the Racine and County probation experiments. In these experiments, DCC has tried to develop a partnership with the community, to have strategies for local crime prevention, to supervise offenders actively, and to commit additional resources to enhance supervision. DCC has also evaluated these programs' successes and failures.

The enacting legislation for these experiments mandated that the programs take place in southern Wisconsin, so DCC chose Racine and Dane Counties. The legislature provided $7.6 million for 64 additional staff, 47 of whom are agents. The offices equally split $1.6 million for purchase of services. The agent-to-offender ratio was l-to-17. In Dane County, neighborhood supervision has been developed in which housing for the probationers has been located in the probationer's neighborhood and community police stations have been set up. In Racine County, DCC has located its facility in the same houses as community police stations and community-oriented policing houses.

After one year, the International Committee of Corrections Association independently reviewed the experiments. The Racine County project scored 1st, and the Dane County project scored 3rd, of the 150-200 such programs in the United States.

The experiments have produced close positive working relationships with local law enforcement. Day-reporting centers have been developed. The experiments have demonstrated that offenders need to be programmed for at least 70% of their day. In addition to work, they need to be involved in other treatment, parenting, and/or cognitive skills programming. The staffs attitude is positive because they believe the caseloads are manageable, and resources are available to purchase services the supervisees require. Technology is also being used. Geographical information systems in Racine and Dane

Counties are used to plot where offenders are. Both programs have community advisory boards.

It is the Committee's recommendation that the results of the Dane and Racine County experiments be applied in Milwaukee to help solve its probation difficulties.

4. Alternatives to Incarceration

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. Because under Truth-in-Sentencing the minimum prison sentence is one year, if the sarne 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 believes 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 his entire prison sentence so a l-year sentence under the new system is equivalent to a 2½-year sentence under the old system. Since non-violent and non-dangerous felons generally have received shorter sentences under the old system, the greatest danger of sentence inflation and hence prison overcrowding and expense lies with those felons whose crimes call for these 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

As described above in part VI, this Committee struggled mightily to get accurate data to use in its study and in meeting its statutory charges. It succeeded only partially. 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. But policy- and decisionmakers need to understand how woefully inadequate Wisconsin's criminal justice information and corrections computer systems are for fundamental public policy debate. Until these problems are solved,

This Committee's model is state property. The Committee encourages the new Sentencing Commission, the DOC, and other state entities to use, revise, and build onto the computer model so that it may continue to help policy debate in this area.

C. Cost of Committee's proposals

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 part VI.

Throughout the Committee's work, members discussed the role cost should play in the Committee's discussions and its conclusions. Concerns about the increasing

corrections budget are not unfounded due to the ever-increasing portion of state spending devoted to this issue. Some members worried 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 will quickly clog the system, forcing dangerous "old world"-parolable offenders out of the system, many of whom would go to Milwaukee; and

(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.

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

(a) education, especially of judge and prosecutors, to whom much discretion has been shifted under new law;

(b) alternatives to orison - so a judge need not always use a $20,000 per year per offender solution; this includes the strengthening of probation; and

(c) sentencing guidelines - to funnel a "typical" case into the proper sentencing range.

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.