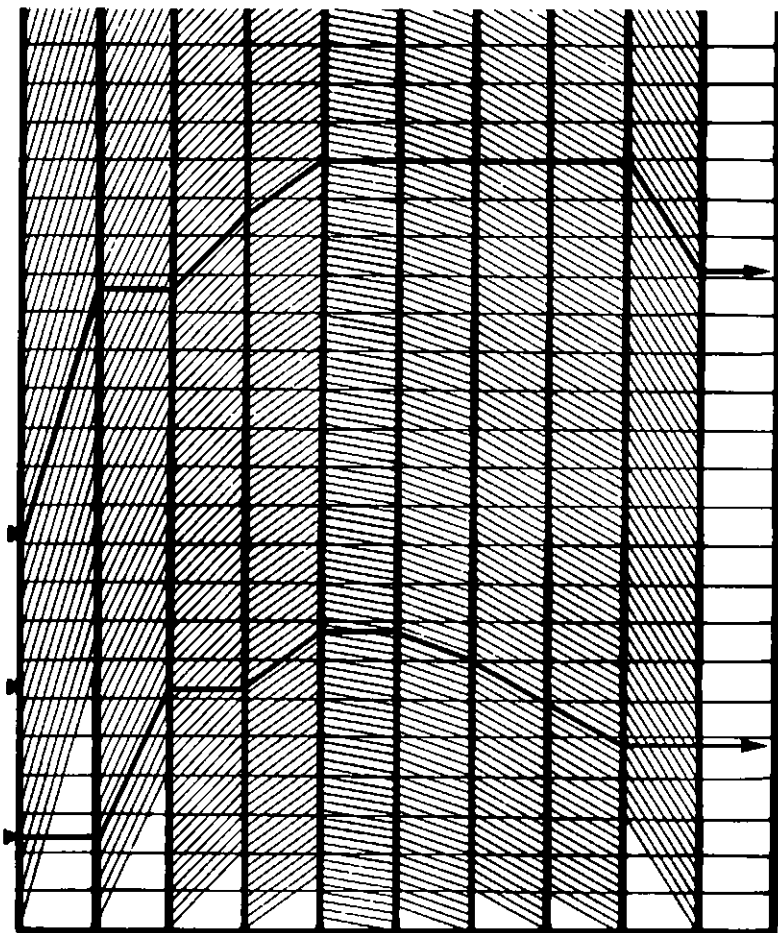


# Sentencing the Federal Drug Offender:

An Experiment in Computer-Aided  
Sentencing

Ivan Potas  
and  
John Walker

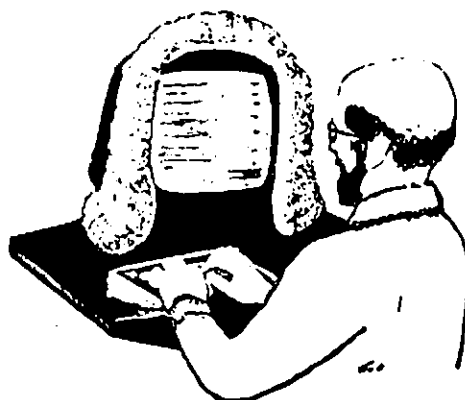


AUSTRALIAN INSTITUTE OF CRIMINOLOGY

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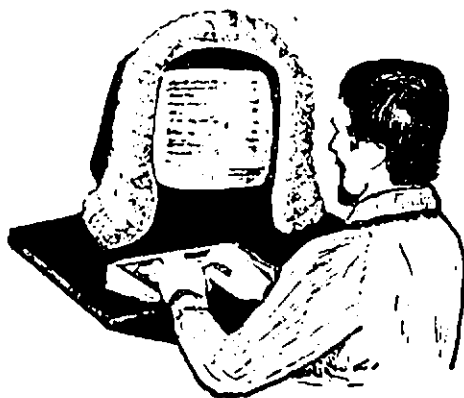
An Experiment in Computer-Aided Sentencing.

Ivan Potas



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John Walker



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## Chapter 1

### THE DISPARITY PROBLEM

In its recent Report on Sentencing,<sup>1</sup> the Australian Law Reform Commission recommended that "Commonwealth laws should implement the principle that offenders against the law of the Commonwealth should be treated as uniformly as possible throughout Australia."<sup>2</sup> In reaching this conclusion the Commission was hampered by the lack of adequate data on sentencing practices in all Australian jurisdictions. It stated that this situation made it extremely difficult "to document in an entirely satisfactory way discretionary disparities in decision making among judicial officers."<sup>3</sup> It added that the difficulty was exacerbated by the "general lack of comparative empirical research" relating to sentencing in Australia, and that most of the research had been directed towards "the distillation of legal principles" usually from sentencing judgments of appeal courts, rather than being concerned with "an examination of the specific sentencing practices of the mass of judicial officers in the trial setting."<sup>4</sup>

These observations, together with an admission that the "cumulative evidence" in its Report was "largely circumstantial and impressionistic", did not deter the Commission from concluding that a serious lack of sentencing uniformity existed at the Federal level.<sup>5</sup> Indeed the Commission found that the evidence was most persuasive that

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1. Australian Law Reform Commission, Sentencing of Federal Offenders, Report No.15 Interim (D. Chappell, Commissioner in Charge) A.G.P.S. Canberra 1980 (hereafter the Sentencing Report).
  2. Sentencing Report, ibid, Recommendation 16, p.xxxiii.
  3. Ibid, p.88.
  4. Ibid.
  5. Ibid, p.89.



[unjustified] disparities in the penalties imposed by the courts presented a serious problem in the administration of criminal justice.

Given that there is a lack of relevant data, what cumulative evidence did the Commission rely upon for its conclusion that there was a serious problem with regard to sentencing disparity? The main discussion relating to this aspect of its findings is contained in Chapter V of its Report, under the sub-heading - Discretionary Disparities: A Consideration of the Evidence. The evidence presented consists of views expressed by surveyed judicial officers, surveyed offenders and the purported views of the public. In addition to these considerations, reference is made to the various rates of imprisonment in the Australian States and Territories in order to support the view that disparate sentencing practices exist and that this constitutes a problem of major proportions for which urgent action is required.

The evidence given in the Sentencing Report supporting the conclusion that unjustified discretionary penalties abound at the Federal level is shortly to be reviewed. Meanwhile it is important to appreciate that the Australian constitutional arrangements are such that State courts are empowered to, and consequently do, exercise Federal jurisdiction. This arrangement is commonly referred to as the autochthonous expedient.<sup>6</sup> Thus it may be thought that because State courts are likely to have their own sentencing values, a comparison between or amongst States is likely to disclose significantly greater degrees of disparity than the disparity disclosed by intra-State

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6. R. v. Kirby; ex parte Boilmakers Society of Australia (1956) 94 C.L.R. 254, 268 per Dixon J. (as he then was).

sentencing practices alone.

The position of the drug offender is further complicated by the existence of overlapping or concurrent laws at the State and Federal levels. Most crime is the exclusive concern of individual States and Territories. However jurisdiction over the illicit possession or trafficking in certain drugs<sup>7</sup> is shared by State, Commonwealth and Territorial agencies, with the result that different laws may apply to substantially similar conduct. It should be noted however that the present study is not concerned with whether persons sentenced for drug offences under State laws are treated similarly to, or differently from, persons dealt with under Federal laws. Rather the study is concerned with the issue of internal consistency in sentencing (i.e. whether, within a particular State, like Federal cases are decided alike and with the issue of external consistency in sentencing (i.e. whether Federal drug offenders in one State receive much the same sentences for similar crimes as Federal drug offenders in another State). This study therefore, is not concerned with sentencing offenders convicted of State offences.

There are two reasons for restricting the present study to an analysis of sentencing Federal drug offenders only. The first is because it presents a case load of manageable proportions. The second is because it involves one set of laws that applies simultaneously and uniformly to all Australian States and Territories.

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7. D. Biles (Ed) Crime and Justice in Australia  
Australian Institute of Criminology, Canberra 1977, p.61.

Is there a disparity problem?

It is submitted that a careful reading of the Australian Law Reform Commission's Sentencing Report does not support the conclusion that there is in fact a disparity problem. Nor on the other hand does it support the contrary proposition - that there is not a disparity problem. What it does demonstrate however, is the total inadequacy of the data gathering systems in providing the information upon which a reliable evaluation of the extent of sentencing disparity (or sentencing uniformity) can be determined.

The present study will demonstrate a method for collecting relevant sentencing data in a way that facilitates the measurement and evaluates the extent of sentencing disparity. In addition, if the methodology is properly applied and the analyses of the data are adequately disseminated, understood and applied, there is every prospect for believing that the incidence of unjustified sentencing disparities can be reduced if not eliminated altogether.

Our study is small and is intended to be no more than a feasibility or pilot project. Its concern is solely with sentencing to imprisonment of offenders who have been convicted of the more serious drug offences - offences that are defined in terms of section 233B of the Customs Act 1901 (Cth) as amended. Occasionally offenders prosecuted for section 233B offences may be given bonds or other non-custodial sanctions, but these are not considered in this study. Even so our methodology can be applied to any area of sentencing. In particular it

may be useful where, with regard to a particular type of offence, there is seen to be a lack of information, or where there is a desire to measure the extent of unjustifiable disparities, or where there is thought to be an insufficient degree of uniformity in the sentencing practices of the courts and there is a desire to reduce the incidence of disparate sentencing.

### The judicial survey

The national survey of judges and magistrates, to which reference has already been made (and which was carried out in 1979), was developed with the assistance of the Law Foundation of New South Wales. The aim of the survey was to discover the views of judges and magistrates throughout Australia upon various aspects of sentencing. The preliminary report, outlining the views of 350 judges and magistrates is contained in a lengthy appendix to the Law Reform Commission's Sentencing Report.<sup>8</sup> The survey elicited a response of approximately 74 per cent of all judges and magistrates to whom a questionnaire was sent, and therefore can be regarded as a fairly reliable description of the views of the judiciary with regard to the subject matter of the survey. Some of the questions were concerned directly with the attitude of the respondents to issues of sentencing uniformity. For example, judicial officers were asked, inter alia, to answer the question, "In your State or Territory, to what extent is there uniformity in sentencing amongst judicial officers?". The respondents were asked to tick one of the boxes labelled 'high degree of uniformity', 'some degree of uniformity', 'little uniformity', and 'don't know'.

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8. Sentencing Report, Appendix A, p.342.

The survey showed that slightly over half the respondents (54.2%) considered that there was a need for greater uniformity in sentencing in their particular State or Territory. About a third of the respondents considered there was no need for greater sentencing uniformity, while the remaining respondents (approximately 12%) answered in equivocal terms.<sup>9</sup> When the question related to whether there was a need for greater uniformity in sentencing throughout Australia, only 14.6% of the respondents considered that no such need existed.<sup>10</sup> In summary, 50.2% of the magistrates and 44.4% of the judges considered that greater uniformity in sentencing in Australia was needed. Of significance also were the figures 26.7% and 28.7% which represented the proportion of magistrates and judges respectively, who responded to the latter question by answering 'don't know'.<sup>11</sup>

While in general the responses to the survey indicated that a significant proportion of judicial officers do perceive a need for sentencing uniformity, the high level of 'don't know' responses cannot but lead to the conclusion that there is insufficient sentencing information at the Federal level. Indeed the lack of data must inevitably cast doubts upon the reliability of the answers. While the responses may truly reflect the attitude of the judiciary towards uniform sentencing, the responses themselves may be highly impressionistic and perhaps even moulded by public opinion derived from press statements and the like rather than emanating from expert or informed sources of knowledge.

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9. Ibid, para.2.2

10. Ibid, para.2.3

11. Ibid, Tables 2H and 2I, p.365

The meaning of sentencing uniformity

A difficulty of fundamental importance is the determination of what is meant by uniformity in sentencing. Those respondents who answered 'don't know' may have been responding to the vagueness and uncertainty of the term 'uniformity' as much as to their knowledge of sentencing practices in jurisdictions other than their own. Is uniformity in sentencing intended to imply the existence of general tariff policies from which there ought to be little or no departure? If a tariff sentencing policy obtains for offences of a particular type (for example drink-driving offences) but, say, one offender in every four convicted of this particular offence receives a sentence outside the tariff, is the overall response to a question about uniformity to be answered affirmatively, negatively or in the 'don't know' category? Similarly if there is an acceptable degree of uniformity in sentencing with respect to some offences (e.g. drink-driving) but not with respect to other offences (e.g. possession of a prohibited drug) how then is a question upon uniformity of sentencing to be answered? Of course there may be areas of sentencing which manifest greater or lesser degrees of uniformity in sentencing practices through Australia, but it is nonsense to extract anything other than a general impression as to the existence of a problem in sentencing practices merely on the basis of an overall response to a very general question.

A more meaningful question would be one that is framed to apply to certain offence categories, where the nature of a typical offence and some relevant background material relating to a typical offender are specified with some degree of detail. Thus judicial officers could be asked whether, in their opinion, there is a disparity problem in

sentencing by asking them to answer a number of specific questions of the following kind

"In your State or Territory to what extent is there uniformity of approach in sentencing with respect to a person who has no prior criminal record, is not a drug addict but who has been convicted of the illegal importation of ten grams of heroin?"

By asking a series of such questions the proportion of 'don't know' responses would probably increase. This is because, given a particular set of circumstances, only where judges and magistrates can claim to know the probable outcome of sentences in each and every jurisdiction would they be in a position to tender an informed answer to the question posed.

Furthermore it is submitted that the concept encapsulated by the phrase 'uniformity of approach' should be used in preference to the concept implied by the single word 'uniformity'. The phrase 'uniformity of approach' would signify that a degree of departure from the normal range of sentences would be tolerated provided that these could be justified or supported by general principles of sentencing. For example, if in a particular locality and time there is a spate of offences of a particular kind it may be proper to impose slightly more severe sentences than would otherwise be appropriate by application of the principle of general deterrence. Conversely, where such offences are not common and a deterrent sentence would seem inappropriate, less severe sentences than what may be regarded as 'the norm' may be appropriate. Thus the sentence may vary despite a uniform approach to sentencing. The point is that sentences need not be uniform where the reasons for disparity can be satisfactorily explained.

The Offender Survey

In further support of its claim that there is a sentencing disparity problem, the Law Reform Commission drew upon its findings from its survey of Federal prisoners.<sup>12</sup> It concluded that there was widespread belief amongst offenders that sentences imposed were uniform neither within or between jurisdictions.<sup>13</sup> In its Report, the Law Reform Commission cited six examples from an unstructured part of the offender survey, in which individual prisoners voiced their dissatisfaction with the level of sentencing uniformity. Regrettably the Report fails to quote examples of offenders who generally felt that the system was fair (a more reliable opinion because it is not self-serving). Like the observation made earlier, the real issue is the extent to which there is disparity in sentencing, and, more importantly, the extent to which the disparity that does exist is unjustified. This can only be measured by reference to relevant considerations relating to the offence, the offender and in some cases to circumstances extraneous to these. There was no attempt to determine whether the perceptions of the surveyed offenders reflected the true situation.

To repeat a point made previously, it may be that in one part of Australia drug offences are more prevalent than in another. If then the principle of deterrence is applied consistently throughout Australia it may be appropriate (all other things being equal) to impose slightly heavier penalties on offenders who commit crimes in locations where such offences are prevalent, and conversely impose less severe penalties on persons who commit similar crimes but who come from locations where such

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12. Sentencing Report (supra) Appendix D.

13. Ibid, at p.89.



crimes are not frequently committed.

Another consideration relating to the issue of unjustifiable disparity is to recognise that the statutory maximum penalty for drug offences has been altered.<sup>14</sup> Thus a person sentenced to a term of imprisonment before statutory penalties were increased might find himself or herself sharing custodial confinement with a person sentenced for a similar offence after penalties had been increased. All things being equal, one would expect the former person to have received a less severe sentence than the latter. If such is the case, then although these sentences may be fairly described as disparate, they may nevertheless be described as being justifiably disparate.

These issues are pointed out in order to scotch the view that uniformity per se is a test of fairness in the administration of justice. What ex facie may appear to be examples of unfair sentencing practices may on closer examination prove to be fair. Conversely sentences that appear to be fair may on closer examination prove to be grossly unfair.

#### The views of the public

Public opinion is to a significant extent based upon and moulded by the media. However any attempt to provide an accurate assessment of

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14. Thus for example, by s.10 of the Customs Act Amendment Act 1977 (Cth), the penalty for drug trafficking was increased from a fine of \$4000 or ten years' imprisonment or both (introduced into the Customs Act in 1971) to a fine of \$100000 or 25 years' imprisonment or both. A person sentenced under the earlier Act could find himself serving a sentence alongside a person sentenced under the later Act. The penalties imposed for similar conduct would justifiably be disparate, even though the second offender might consider himself as being unfairly treated.

the public's attitude towards the existence of a lack of uniformity in sentencing must be viewed with great scepticism. Assertions as to what the community attitude to this problem is must inevitably be contentious. Does the public have a view on the matter at all? And if it does have a view, is that view based on informed opinion or on ignorance?

The Australian Law Reform Commission seems to assume that the public's concern is reflected in observations made by the press.<sup>15</sup> However journalists often reflect the views of individual members of the community and may, by selecting particularly good cases for their purposes, serve to generalise and exaggerate the extent of the problem. The fact is that journalists are unlikely to focus on run-of-the-mill cases and consequently are unlikely to provide a reliable reflection of the extent of disparity in sentencing practice. 'Good copy' often seeks out and reports upon the more unusual or sensational. Such an approach is not necessarily to be deprecated for it provides a useful and important watchdog function upon the administration of justice. Indeed while the media may often be responsible for forming a distorted or exaggerated view of the true situation, it may also help to identify genuine abuses as they occur or when they come to light. In this way individual cases may be singled out for public scrutiny and administrative action. Sometimes also, well researched and accurate reporting does help to educate the public. However with regard to the sentencing of Federal drug offenders, it would be surprising indeed if the general public were found to be sufficiently informed to express a considered opinion upon the subject. The honest lay person would probably have to concede that there is insufficient information upon which he or

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15. Sentencing Report, supra at p.90.

she can express a firm opinion.

The impressions created by newspapers, radio and television cannot be a substitute for researching the facts and placing all the facts, rather than selective ones, before the public and before judicial and political decision-makers. The main value of the Australian Law Reform Commission's Sentencing Report is that it highlights the inadequacy of the data relating to sentencing. Accordingly all expressions of attitude relating to the problems of sentencing disparity must be viewed with this basic consideration in mind. The temptation of slipping from what is perceived to be a problem to what is in fact a problem must be resisted until the perceptions are proved to be accurate. In short, action should be taken on the basis of information rather than upon unsubstantiated data, prejudice, guesswork, or wishful thinking.

#### Appellate review of sentences

The Report of the Law Reform Commission advocates urgent remedial action on the ground that empirical research is too slow to remedy the problem of sentencing disparity. It asserts that to wait is a formula for inaction.<sup>16</sup> The difficulty is that unless the extent of the disparity problem is known it is difficult to evaluate the direction in which action should be taken. The Report points out that reliance on appeal court decisions to correct anomalous decisions can only affect a small proportion of cases. While it is true that only a small proportion (perhaps 10 per cent) of sentencing decisions are subject to appeal, this overlooks the value of the principles which appellate courts enunciate in the course of examining individual cases and the impact of these upon

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16. Sentencing Report, op.cit. at p.89.

sentencing policy. Decisions of appeal courts influence not only the cases that are brought before them but also serve to provide the broad guidelines which the majority of courts are required to follow. It is true, as the Law Reform Commission points out, that appeal cases do not often turn out to be representative cases, and that decisions are infrequently upset because of the wide margin of discretion exercised by courts of first instance, but this merely reflects the degree of tolerance, and the cost as well as the benefit, of enabling a system of sentencing that is flexible rather than rigid, to be continued. It enables a degree of certainty in sentencing to be traded for a degree of vagueness and thus allows the trial judge some scope to do justice in the individual case. Perfect justice is injustice. The unrepresentative cases (those in which it is felt that the sentences imposed are perceived as being either too lenient or too severe) are in fact the best cases for setting the parameters or limits of just sentencing.<sup>17</sup>

#### The Common Law System of Sentencing

Ultimately the question remains as to whether the common law system of sentencing is a satisfactory method of sentencing. If it is not, then alternative systems, such as flat-time, presumptive or mandatory sentencing systems should be substituted.<sup>18</sup> A description of the common law system of sentencing as presently obtains in all States and Territories of Australia, is crystallised in the following passage from the judgment of Street C.J. in R. v. Rushby:<sup>19</sup>

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17. See Potas Just Deserts for the Mad, Australian Institute of Criminology, Canberra 1982, Chapter 10.
18. A brief description of these forms of sentencing systems are contained in Wilkins, Kress, Grottfredson, Calpin and Gelman Sentencing Guidelines: Structuring Judicial Discretion, U.S. Dept. of Justice 1978.
19. [1977] 1 N.S.W.L.R. 594

The determination in any given case of the appropriate sentence involves an adjudicative balancing of a number of differing and not entirely consistent elements. Inevitably a sentencing judge will be influenced by subjective considerations. There is the ever-present human situation of a man or woman standing before the court to suffer the solemn pronouncement of criminal judgment. But a judge is not cast adrift on an uncharted sea involving his bearing unaided a personal burden of attempting to achieve abstract justice. The judicial discretion underlying the formulation of a sentence must be exercised with due regard to principles of law deducible from authoritative decisions. The philosophy of the Common Law required adherence to established doctrines and principles that have over years, and in multiple instances, been found to be best calculated to serve the ends of justice. The adjudicative process, if it is to be consistent and ordered, must observe and apply these doctrines and principles, and thus must necessarily be attended by a requisite disengagement and detachment. It is cool reason, not passion or generosity, that must characterize sentencing, as all other acts of judgment. Although the discretion left to the judge is wide, the doctrines and principles established by the Common Law in regard to sentencing provide the chart that both relieves the judge from too close a personal involvement with the case in hand, and promotes consistency of approach on the part of individual judges.<sup>20</sup>

The sixty-four thousand dollar question is whether the present common law system of sentencing (including the systems of appellate review) functions adequately, particularly when applied across State boundaries. If it does not, then alternative more effective systems must be devised. If it does prove to be a satisfactory system the residual question is how, if at all, can the common law system be streamlined so that it can more effectively serve the ends of doing justice throughout Australia. Inevitably no system will be perfect but all systems can be improved.

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20. Ibid, 597. For the general description of restrictions applying to the exercise of judicial discretion see Potas Limiting Sentencing Discretions: Strategies for Reducing the Incidence of Unjustified Disparities, Research Paper No.7., Australian Law Reform Commission (1979), 34-79.

### Determining the level of unjustified disparities

From what has been said it is clear that the measurement of sentencing disparities presents serious difficulties. It must be acknowledged that variations in sentences do occur and should occur. Some variations in sentences imposed for particular offences are justified while others are not. How then can the difference between justified and unjustified variations be identified and measured? The answer can be simply stated:

In order to identify and measure the extent of unjustified disparities in sentencing it is necessary to take into account those differences in the actual sentences (the sentences imposed in practice) that can be explained by reference to variations in the facts.

The method we devised for identifying and measuring the extent of disparity can also be simply described. The first and crucial consideration is that our study has focussed upon a particular type of offence, and therefore is not concerned with the disparity that obtains in sentencing for different kinds of offences. We are not concerned to show that persons convicted of larceny for example, are treated differently from persons convicted of assaultive crimes. We are only concerned with s.233B Customs Act offences and, as will soon be seen, even these offences are sub-classified in order to ensure that like cases are compared with like.

The method we devised for identifying and measuring disparities in the sentencing of Federal drug offenders can be described in three stages:

- (i) Those factors that appear to have a consistent impact or effect on sentencing decisions (aggravating and mitigating factors) were identified and the extent and the direction of their influence were measured.
- (ii) The results of the analysis obtained in step one were applied to the circumstances of each case in order to derive a notional or predicted sentence.
- (iii) Finally the difference between the actual sentence and the notional sentence was taken to reveal the extent of disparity that was unjustified or otherwise unexplained by the factors extracted from the cases.

Shortly our methodology will be more particularly described. Here it is sufficient to explain that this study employs relatively simple statistical methods for evaluating the degree of disparity that exists in sentencing for similar offences and as the means for determining the factors which appear to be significant in explaining these disparities. We purport to make no value judgments regarding the appropriateness of the general levels of sentences imposed upon drug offenders. These are important social and ethical questions but are not the subject of our concern. We may simply describe our study as an attempt to describe statistically the relationship existing between the actual sentences imposed by the courts and the circumstances of each particular case. Ultimately our object is to evaluate the sentencing consistency that exists with regard to the particular type of offence that is under consideration.

## Chapter II

### THE OFFENCE AND THE PENALTY

An offender who pleads or is found guilty of a particular offence may be sentenced in respect of that offence. In normal circumstances, the court records a conviction and then proceeds to consider the sentence. In serious cases the hearing upon sentence will not follow hard upon the trial, but will be deferred in order to enable the parties to prepare submissions relevant to the inquiry upon sentence. The most obvious matters that the court will take into account are the proven circumstances of the offence (particularly those relating to the gravity of the offence) and the offender's prior record of criminal behaviour. In addition many other factors personal to the offender, regarded as either aggravating or mitigating to the offender's cause, are taken into consideration. The court will generally be aided by a pre-sentence report prepared by a probation officer. Medical or psychiatric reports may also be considered, particularly if the offender's mental condition is in issue. These may assist the court in its task of evaluating the offender's culpability for the offence and also in the task of determining the most suitable form of disposal.

There may also be policy considerations to be weighed in the balance. For example, should the prisoner be given a non-custodial sentence with the emphasis on treatment or should the court pursue the more punitive objective of imprisonment by placing the dominant emphasis on such considerations as deterrence and retribution? Whatever the choice it is clear that the sentence must be imposed for the offence (or offences) in respect of which conviction has been recorded. In this regard the sentencer is limited by what he or she has authority to do. The outer limits of judicial discretion are constrained by the offence or



offences in respect of which the offender has been found culpable, and by the legislatively prescribed penalties relating to that offence or those offences. In this way the criminal law provides a brake on the coercive powers of the state. The innocent may not be punished, nor may the guilty be subject to punishment that exceeds the limits prescribed by law.

As a general rule the statutory penalty is a maximum penalty that is reserved only for the most serious crimes of its type. In most cases less severe penalties are imposed, including penalties of a different kind altogether, unless of course statutory requirements provide otherwise. This may occur where the prescribed penalty is mandatory, or where, in the particular circumstances, the law prescribes a mandatory minimum sentence.<sup>21</sup> However the uppermost boundaries of just sentencing are circumscribed in the first instance by statute, and then by the requirement that the judge must act judicially. This ensures that due regard is given to what may broadly be described as the principles of sentencing.<sup>22</sup>

These preliminary considerations are important if the dynamics of common law sentencing systems are to be understood. Our starting point for analysing judicial discretion therefore, must be with the definition of the offence together with a consideration of its corresponding, legislatively prescribed, penalty. We have already stated that our focus has been restricted to sentencing drug offenders who have been convicted

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21. Consider for example s.243 of the Customs Act 1901 (Cth) which provides, inter alia, that the minimum pecuniary penalty for an offence under the Act is one-twentieth of the maximum pecuniary penalty specified in the Act for that offence. See below at p.22.

22. See above at pp 13-14.

of section 233B Customs Act offences and who, as a consequence, have been sentenced to imprisonment. Therefore it is appropriate that we should commence by quoting the governing section before considering the penalties.

Section 233B(1) provides as follows:-

233B (1) Any person who \_\_\_\_\_

- (a) without any reasonable excuse (proof whereof shall lie upon him) has in his possession, on board any ship or aircraft, any prohibited imports to which this section applies; or
- (b) imports, or attempts to import, into Australia any prohibited imports to which this section applies or exports, or attempts to export, from Australia any prohibited exports to which this section applies; or
- (c) without reasonable excuse (proof whereof shall lie upon him) has in his possession, or attempts to obtain possession of, any prohibited imports to which this section applies which have been imported into Australia in contravention of this Act; or
- (ca) without reasonable excuse (proof whereof shall lie upon him) has in his possession, or attempts to obtain possession of, any prohibited imports to which this section applies which are reasonably suspected of having been imported into Australia in contravention of this Act; or
- (cb) conspires with another person or other persons to import into Australia any prohibited imports to which this section applies or to export from Australia any prohibited exports to which this section applies; or
- (d) aid, abets, counsels, or procures, or is in any way knowingly concerned in, the importation into Australia of any prohibited imports to which this section applies, or the exportation from Australia of any prohibited exports to which this section applies; or

- (e) fails to disclose to an officer on demand any knowledge in his possession or power concerning the importation or intended importation into Australia of any prohibited imports to which this section applies or the exportation or intended exportation from Australia of any prohibited exports to which this section applies;

Shall be guilty of an offence.

An examination of section 233B(1) reveals a range of proscribed behaviours that makes it difficult to describe these as a single offence. For our purposes we may summarise these as consisting of two basic categories - those relating to

- (i) the importation and
- (ii) the possession

of illegal imports, being narcotic goods.<sup>23</sup> The breakdown of our sample revealed that there were marginally more charges under the importation than under the possession categories, and these are more particularly analysed in the following chapter.

#### The Prescribed Penalties

Provided that the quantity of drug involved is not less than "the trafficable quantity applicable to the substance"<sup>24</sup> the penalty for

23. See note 25.

24. The trafficable quantity in respect of a particular prescribed drug is listed in Schedule VI of the Customs Act 1907. The trafficable quantities range from as little as 0.002 (Lysergic Acid) up to 100 grams for Cannabis plants. For most narcotic substances in their refined forms the trafficable quantity is 2.0 grams.

possessing or importing a narcotic substance<sup>25</sup> other than cannabis leaf is a fine not exceeding \$100,000 or imprisonment not exceeding 25 years or both.

Where the substance is cannabis leaf, a fine not exceeding \$4,000 or imprisonment not exceeding ten years, or both is prescribed.<sup>26</sup> Section 240 of the Act allows the maximum fine to be increased in certain circumstances. It states as follows:

240. If any penalty hereby provided shall be less than 3 times the value of any goods in respect of which the offence has been committed the maximum penalty shall be thrice the value of the goods.

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25. Customs Act 1901 s.233B(2) provides:

(2) The prohibited imports to which this section applies are prohibited imports that are narcotic goods and the prohibited exports to which this section applies are prohibited exports that are narcotic goods.

Narcotic goods are defined in s.4 of the Customs Act 1901. It refers to 'goods that consist of a narcotic substance'. In turn 'narcotic substance' is defined as a substance that is specified in Column 1 of Schedule VI of the Act. Schedule VI also includes cannabis and its derivatives with the usual list of 'hard drugs', ie, opiates and narcotics.

26. S.235(1)(d). In any other case the maximum penalty is a fine not exceeding \$2,000 or imprisonment for a period not exceeding two years or both. See Customs Act 1901, s.235(2)(e) and s.235(3).

The Act also prescribes a minimum pecuniary penalty. Section 243 states that:

243. The minimum pecuniary penalty for any offence against this Act shall be one-twentieth of the maximum pecuniary penalty specified in this Act, other than in Section 240, in respect of that offence.

A complicating feature of our study was that significant alterations were made to the statutory penalties applicable to federal drug offenders during the period under study (1974 to 1980). Thus by s.10 of the Customs Amendment Act 1977, which took effect on 10th November 1977, the maximum penalty for section 233B offences was increased from a fine of \$4,000 or ten years' imprisonment or both (introduced into the Customs Act in 1971) to the penalty referred to above - i.e. a fine of \$100,000 or 25 years' imprisonment or both. Only in the case of cannabis plant was the penalty for trafficking left as it was.

By a further amendment to the Customs Act in 1979, a person, in certain circumstances, could thenceforth be sentenced to life imprisonment for drug trafficking.

The relevant provision is 235(2)(C). This provides inter alia that where the court is satisfied that the quantity of narcotic goods is not less than the commercial quantity applicable to that substance, or that the quantity of narcotic substance is not less than the trafficable quantity and that on a previous occasion the Court had convicted the person of a similar offence (or found that the person had committed such similar offence but had not proceeded to record a conviction in respect of it) then it may impose the sentence of imprisonment for life or such

other sentence of imprisonment as the Court thinks fit.

'Commercial quantity' is defined in section 4(1) of the Customs Act and refers to narcotic substances specified and quantified in Schedule VIII of the Act, as well as those declared to be of commercial quantity by the regulations under the Act. Schedule VIII is set out below.

SCHEDULE VIII <sup>27</sup>

Column 1 Name of substance	Column 2 Commercial quantity
	Kilograms
Cannabis	100.0
Cannabis Resin	50.0
Cocaine	2.0
Heroin	1.5
Lysergic Acid	0.002
Lysergide	0.002
Morphine	1.5
Opium	20.0
Tetrahydrocannabinols	5.0

Our analysis was designed to take the penalty changes into account with the more usual variations in offence circumstances (such as the nature, quality, value of drug involved etc). This was important for the task of comparing like cases with like. However we did not find any cases in our sample which involved the imposition of life imprisonment. Indeed, in later analyses we agreed to concentrate on cases decided after 1977 in order to minimise the influence upon sentence of variations in the statutory penalties.

There are of course other provisions of some complexity, such as those relating to the recovery of pecuniary penalties from dealers in

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27. Customs Act 1901 (Cth) s.235(2), as amended by Customs Act Amendment 1979 (No.92 of 1979, Date of commencement 14 September 1979)

narcotic goods,<sup>28</sup> but these need not detain us. As indicated previously our concern was solely with the sentencing to imprisonment of persons convicted of s.233B(1) Customs Act offences. With this in mind we now turn to describe our sources and samples of data.

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28. Customs Act 1901, Division 3 ss243A-243S

The present study may be taken as showing the way for more sustained, thorough and long term empirical research into the area of sentencing at the Federal level. A similar approach may also be usefully adopted, with minor modifications, in the study of sentencing offenders convicted of any offence in any jurisdiction. However as already explained our aim was to examine the issue of sentencing disparity applying to persons convicted of s.233B Customs Act offences. It should also be noted that the study was essentially a descriptive one, involving an analysis of those factors, relating to the circumstances of the offence and the background of the offender, that appeared to have influenced courts in reaching their decision on sentence.

The data were obtained from two sources. The primary source consisted of 301 judgments mainly of trial court level, relating specifically to the sentencing to imprisonment of drug offenders who had been convicted of section 233B offences. Only those parts of the transcript of proceedings that related exclusively to the sentencing decision were scrutinised for the purposes of collecting relevant data. In 48 cases, however, the information obtained from the transcripts was inadequate for many analytical purposes. In the result only 253 adequately documented cases were used.

Our secondary source of data was obtained from material previously collected by the Institute for the S.K. Mukherjee study Profile of Federal Prisoners.<sup>29</sup> These data were useful in filling in some gaps that were

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29. A.I.C. Canberra 1981.



found to exist in our sample of sentencing judgments. For example, very few judgments were found to contain details relating to the place of birth or age of the offender although such information would have been available to the court and may have implicitly or explicitly affected the sentence eventually handed down. Such details were supplied, at least in the majority of cases analysed, by utilising the computerised data from the Mukherjee study.

Our first task was to devise a standard work-sheet seeking basic information that would facilitate the collection, computerisation and analysis of the sentencing data. Considerable thought went into the design of the work-sheet. We set out to collect as much material as possible that could fairly be described as being relevant to the sentencing decision. At the same time we were aware of the advantages of keeping the form as simple and as unambiguous as possible.

Because of the great variety of cases, the work-sheet had to be able to cope with multiple answers to questions such as "type of charge" or "factors relevant to sentence imposed". Moreover, for each charge listed, it was necessary to obtain such information as 'type, quantity and value of drug involved'. Consequently, while some cases required a relatively straightforward set of responses, the more complex ones required a fair degree of ingenuity to determine how to accurately describe the features of the case. The work-sheet and coding schedule are set out in Appendix A and B respectively.

We sought to determine when and where, and by whom each case was dealt with, the level of court involved, the type of offence, and the

actual sentence imposed, including any specified non-parole period. In addition to these 'hard data', certain other factors involving findings by the court were also collected for the purpose of analysis. These included expressions of opinion by the trial judge (e.g. that the offence was prevalent, that the offence was premeditated, that the offender was a drug addict, etc). A list of 60 factors likely to be relevant to sentencing in a drugs case was drawn up and those factors relevant to each case were noted. The list was extended whenever it was found that an obviously relevant item (relevant in the sense that it seemed to influence the decision-making process) had not been included in the initial list.

This information was then transferred via the work sheet into the computer. In this regard we were fortunate in obtaining the assistance of Ms Robin Ellis, who was responsible for filling in the work-sheet and entering the data thus acquired into the computer. The use of a single person who could both extract the relevant information and then enter it into the computer ensured a degree of consistency in the data collection process.

Sometimes key features of the case, such as dates and criminal records, were simply not obtainable from the transcripts. Indeed, it is quite possible that various passages in the transcripts, which may have been quite intelligible to the court, may also have been misinterpreted in the completion of the work-sheet. This study did not, for example, examine pre-sentence reports, but rather relied upon the court's evaluation of the evidence when summing up and delivering its reasons on sentence. Thus, facts which were not adverted to but nevertheless

affected the decision on sentence obviously could not be measured. However, only where the data available from the relevant portions of the transcripts proved to be totally inadequate, was the whole case excluded from the sample under study.

We also realised early in the data collection process that it was necessary to assume that the stated reasons for sentence were the real and the only reasons. Judges may often frame their judgments in emotive, exhortatory, or exaggerated language in the hope of impressing upon offenders the wickedness of their ways. This language may not always correspond with the sentencing judge's actual assessment of the offender's culpability. However, the fact that 'hard' as well as 'soft' data were collected, ensured that distortions in language would at least be accompanied by findings of fact. In other words, the judge's reasons were analysed in conjunction with such factual information as could be gleaned from the relevant data sources. Table 1 shows how the 301 cases were distributed by jurisdiction, level of court and year of commencement of the case.

#### Profile of Federal Prisoners

One of the advantages of computerisation is the ease with which it is possible to cross tabulate data, and make simple calculations. An example of this kind has already been provided in Table 1 and further examples are presented throughout this study. Cross-tabulations are also well illustrated in the S.K. Mukherjee study Profile of Federal Prisoners.<sup>30</sup> The latter work took into account such variables as age,

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30. Op. cit.

TABLE 1: NUMBER OF CASES PER YEAR BY STATE AND LEVEL OF COURT \*\*

State/Court	1976	1977	1978	1979	1980	TOTAL
<u>New South Wales</u>						
Court of Summary Jurisdiction	1	2		1		4
District or County Court	16	22	43	36	14	131
Supreme Court				1		1
Court of (Criminal) Appeal	2	1	4	5		12
Federal Court	1					1
Sub Total	20	25	47	43	14	149
<u>Victoria</u>						
Court of Summary Jurisdiction		1	2		2	5
District or County Court	1	9	10	3	3	26
Court of (Criminal) Appeal	1	2	1	1		5
High Court of Australia			1			1
Sub Total	2	12*	15*	8*	9*	46*
<u>Queensland</u>						
Court of Summary Jurisdiction	1				1	2
District or County Court	1	6	2			9
Supreme Court				2	1	3
Court of (Criminal) Appeal	1		1	1		3
Sub Total	3	6	3	3	2	17
<u>South Australia</u>						
District or County Court	1	2				3
Supreme Court		1		2		3
Sub Total	1	3		2		6
<u>Western Australia</u>						
Court of Summary Jurisdiction	3					3
District or County Court	1	12	4	2	2	21
Supreme Court			10	18	3	31
Court of (Criminal) Appeal	1		5	1		7
Sub Total	5	12	20*	21	5	63*
<u>Tasmania</u>						
Supreme Court			1			1
Sub Total			1			1
<u>Northern Territory</u>						
Court of Summary Jurisdiction		1				1
Supreme Court	2		3	8	1	14
Sub Total	2	1	3	8	1	15
<u>Not Known</u>						
		1	1	2		4
GRAND TOTAL	33	60	90	87	31	301

\*\* Includes cases later dropped because of insufficient data.

\* Includes cases where court level not known.

sex, race, nationality, marital status, occupation and offence of federal prisoners, and also sought to examine "the existence or otherwise of disparities in setting prison terms by courts across jurisdictions".<sup>31</sup>

Unlike the present study, Mukherjee's primary source of data was not derived from the sentencing transcripts, but rather was obtained solely from entries in the Register of (Federal) Prisoners. The period covered in his study was from 1974 to 1980. Like the present study these data were obtained from the Commonwealth Attorney-General's Department, and in total involved some 3750 cases. Of these, 494 or 26 per cent related specifically to prisoners who had violated the provisions of the Customs Act.

Mukherjee's study also showed that almost 90 per cent of Customs Act offenders were tried in the higher courts. He concluded that unlawful importation of drugs occupied more time and resources than any other offence in the federal criminal justice system - a conclusion that must be treated cautiously in the light of the fact that his study like the present one, was concerned with imprisonment cases only. Furthermore, although the Profile of Federal Prisoner's study was not concerned with an analysis of the circumstances of these offences the author concluded that regardless of the jurisdiction in which the trial took place, prison sentences were fairly uniform. In this regard Mukherjee's findings and cautious qualification are worth quoting:

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31. Ibid at p.2.

" federal offenders, charged with unlawful importation of narcotic drugs are likely to be tried in the higher courts; if convicted they are likely to receive prison sentences of three years or more, this probability is higher in Western Australia than in any other state. Obviously, more data are needed to substantiate these findings...."<sup>32</sup>

Table 2, which constitutes part of Table 12 in Profile of Federal Prisoners,<sup>33</sup> reveals the sentencing pattern of the higher criminal courts with respect to persons convicted of the illegal importation of prohibited drugs. The data are presented by State and length of sentence. Unfortunately data for the Territories, particularly the Northern Territory where such offences are prevalent, were not included in his study and consequently are omitted from the Table.

Mukherjee's findings immediately suggest that the Australian Law Reform Commission's assessment as to the existence of a disparity problem, at least with regard to the sentencing of federal drug offenders, may be mistaken. Indeed the data presented in Figure 1 show that there is a remarkable similarity in the pattern of sentences imposed for Customs Act offences in the various Australian jurisdictions. Readers are reminded that Table 2 and Figure 1 relate to the relative distribution of sentences imposed upon 494 drug offenders sentenced to terms of imprisonment between the years 1974 to 1980. However, Mukherjee's data can do no more than raise a serious doubt concerning the existence of sentencing disparity. Indeed if, as indicated previously, our concern is with identifying similar cases from dissimilar ones it is necessary to

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32. Ibid at p.31.

33. Ibid at p.30.

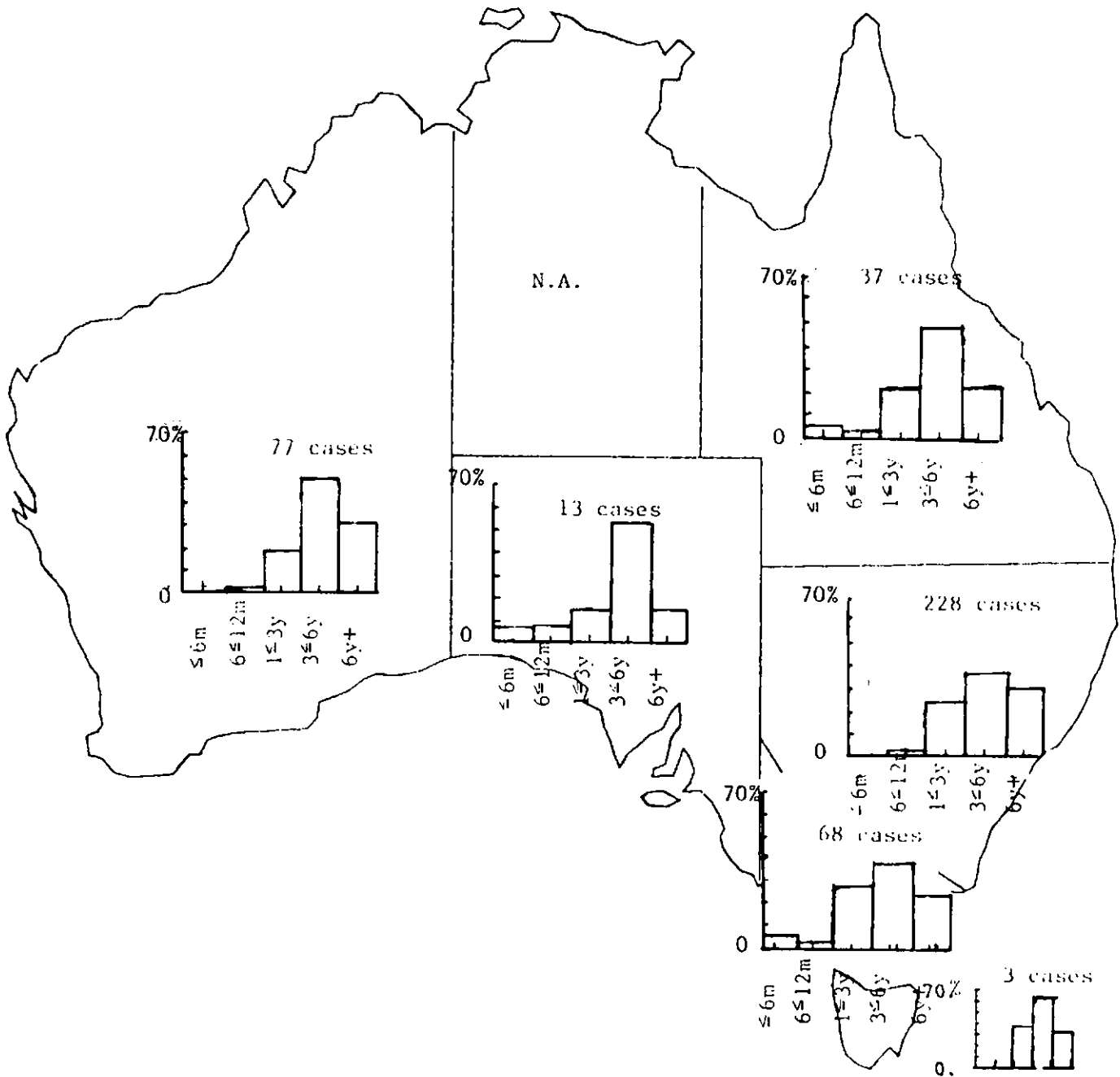
Table 2  
FEDERAL PRISONERS BY STATE AND LENGTH OF SENTENCE  
ILLEGAL IMPORTATION (ETC) OF DRUGS

State	Length of sentence					Total
	< 6mths	6 < 12mths	1 < 3yrs	3 < 6yrs	6yrs & over	
	<u>Higher Courts</u>					
NSW	3 (1.3)	9 (4.0)	58 (25.4)	87 (38.2)	71 (31.1)	228 (100.0)
VIC	4 (5.9)	2 (2.9)	19 (27.9)	26 (38.2)	17 (25.0)	68 (100.0)
QLD	2 (5.4)	1 (2.7)	8 (21.6)	18 (48.7)	8 (21.6)	37 (100.0)
SA	1 (7.7)	1 (7.7)	2 (15.4)	7 (53.8)	2 (15.4)	13 (100.0)
WA	-	1 (1.3)	14 (18.2)	39 (50.6)	23 (29.9)	77 (100.0)
TAS	-	-	2 (66.7)	1 (33.3)	-	3 (100.0)
	10 (2.3)	14 (3.3)	103 (24.2)	178 (41.8)	121 (28.4)	426 (100.0)

Note: Figures in brackets denote percentages.

Source: Profile of Federal Prisoners A.I.C. Canberra 1981 at p.30.

FIGURE 1: FEDERAL PRISONERS BY LENGTH OF SENTENCE EXPRESSED AS A PERCENTAGE OF TOTAL CASES IN EACH STATE





identify the circumstances of each case. It is not sufficient merely to observe that sentences for particular offences vary or coincide to any marked degree.

Nevertheless material collected for Profile of Federal Prisoners enabled data supplementary to those extracted from the sentencing transcripts to be incorporated into our study, and the bulk of our analysis of his data is contained in chapter IV.

#### Characteristics of the Final Sample

The above discussion serves to explain how difficult a task it was to obtain an adequate amount of information about a reasonable number of drug cases, and also serves to excuse the fact that we have not been able to achieve the researcher's ultimate dream - a pure random sample of cases. We must therefore set the scene for the analytical sections of this report by discussing some of the limitation and caveats introduced by the characteristics of the 253 cases we eventually used as our sample.

First, only federal drug offenders who had been convicted of a s233B Customs act offence, and as a consequence were sentenced to a term of imprisonment, were included in the study. Offenders sentenced to other than imprisonment are not included at all, and our conclusions may not be applicable to such cases.

Second, the cases analysed were supplied by the Commonwealth Attorney-General's Department in Canberra. That Department does not hold all federal drug cases but only those where some action on its part is required. Accordingly not all drug cases were included in our study.

For this reason the data given in this report should not be taken as a substitute for official statistics despite our attempt to incorporate the vast majority of serious federal drug cases in our study. However, as our study was mainly experimental in nature, and as our main concern was with devising a methodology, the omission of some cases was not seen as a serious defect. Should our methodology be accepted, and our sentencing project extended with the object of monitoring, evaluating, and providing information concerning the sentences imposed in practice, then it would be most desirable to include all sentencing decisions (relating to the type of offence under study) for analysis.

Third, the bulk of cases under study were dealt with between 1976 and 1980. A breakdown of our sample, including only those 253 cases which were fully coded is given in Table 3. During the relevant period amendments were made to the Customs Act 1901 resulting in substantial alterations to the prescribed penalties for the offences under consideration. Accordingly extreme caution must be exercised when comparing early sentencing decisions with later ones. 81 cases were heard under the old penalties and the remainder (68% of the 253 cases) were dealt with after penalties were raised.

TABLE 3: NUMBER AND PERCENTAGE OF CASES ANALYSED BY YEAR

Date of case (Year)	Number of Cases	Percentage of Total
1976	28	11.1
1977	53	20.9
1978	71	28.1
1979	75	29.6
1980	26	10.3
<b>TOTAL:</b>	<b>253</b>	<b>100.0</b>

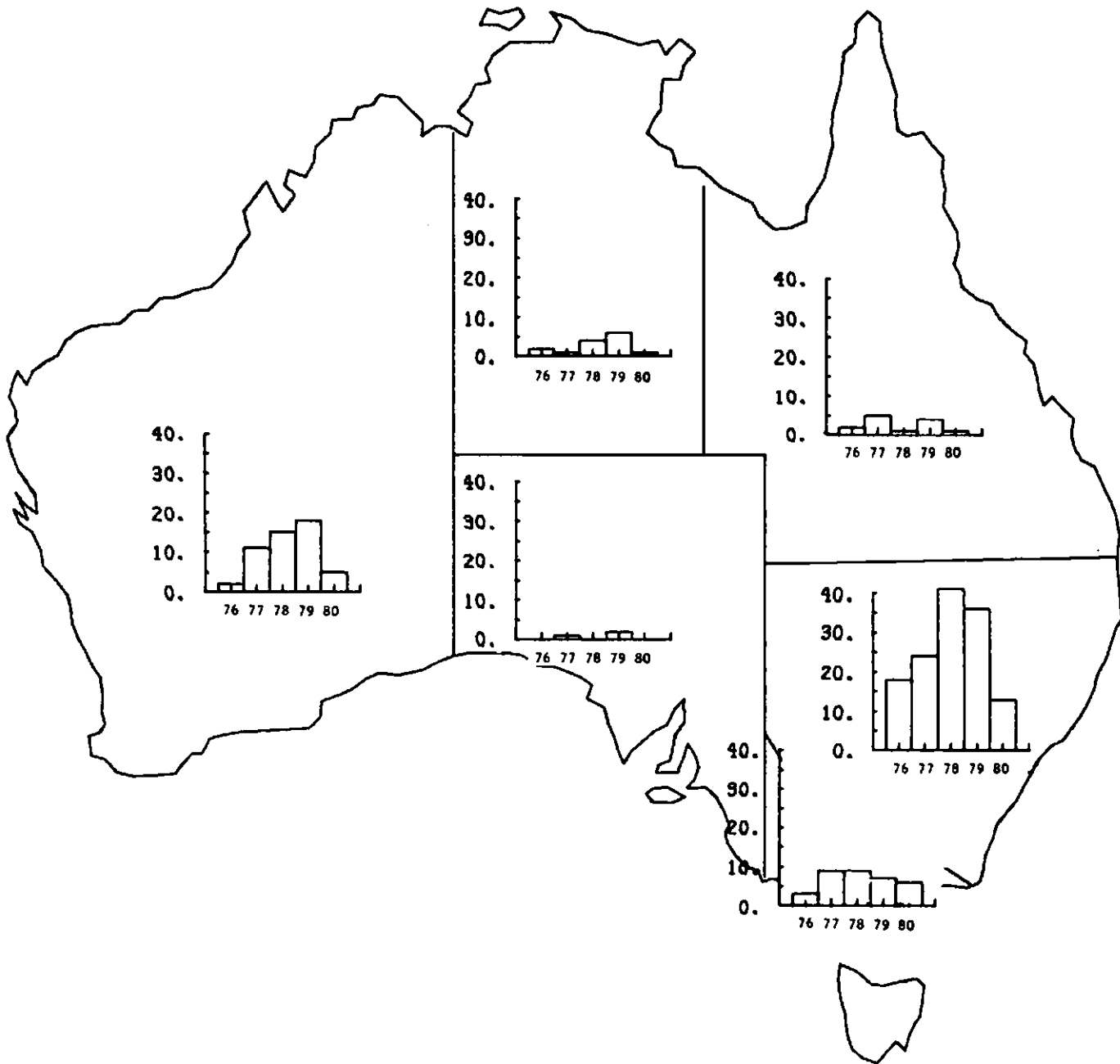
Fourth, although the study is a national one, it was found that data were lacking in some jurisdictions. In Tasmania, the Australian Capital Territory and South Australia there were too few cases in our sample to make meaningful comparisons. The result is that our study has maximum validity in those jurisdictions where cases were numerous - that is: New South Wales, Victoria, Queensland, Western Australia and the Northern Territory. This naturally enough, coincides with the jurisdictions that have the most serious problems in the area of illegal drug importation. Even so, this study may still be regarded as a national one despite a paucity of data emanating from some jurisdictions.

Table 4 and Figure 2 show the distribution of our sample by year and jurisdiction.

TABLE 4: NUMBER OF CASES BY JURISDICTION AND YEAR

Date of case (Year)	NSW	VIC	QLD	SA	WA	NT	TOTAL
1976	18	3	3	-	2	2	28
1977	24	10	6	1	11	1	53
1978	41	10	1	-	15	4	71
1979	36	8	4	2	19	6	75
1980	13	6	1	-	5	1	26
TOTAL	132	37	15	3	52	14	253
PERCENTAGE	52.2	14.6	5.9	1.2	20.6	5.5	100

FIGURE 2: NUMBER OF CASES BY JURISDICTION AND YEAR



As previously stated offences were coded into two basic groups, those involving illegal importation or exportation and those involving illegal possession (see Coding Schedule, Appendix B). The breakdown of the sample by type of offence is given in the following table:

TABLE 5: CLASSIFICATION OF TYPE OF CHARGE

<u>Import/Export</u>	<u>No.</u>
s.233B(1) but para. unspecified although relating to importation <sup>34</sup>	76
s.233B(1)(b)	66
s.233B(1)(cb)	1
s.233B(1)(d)	34
	—
	177
<u>Possession</u>	
s.233B(1)(a) including unspecified para. but relating to possession.	55
s.233B(1)(c)	43
s.233B(1)(ca)	43
	—
	141
	—
TOTAL - Import/Export and possession	318

The total exceeded the number of cases in the study because offenders were sometimes charged with as many as four separate offences. The majority of those cases involving more than one offence were cases where the various forms of cannabis were found, either in combination or with one or more of the other narcotic drugs.

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34. The precise charge was not always identified. Accordingly, the offences were simply classified in the manner shown in order to distinguish importing/exporting offences from those relating to illegal possession.

### Five drug groups

Because of the small numbers of cases involving certain specific drug types, we decided to classify drugs into five groups. Some cases involved drugs in more than one category and quantities of drugs ranged from some comparatively small amounts up to 2.7 tonnes.

Group 1 included Heroin (138 cases), Opium (5 cases), and Morphine (4 cases), and constituted 57.2% of the 253 sample of cases;

Group 2 included Cannabis/Indian Hemp (5 cases), Cannabis plants (2 cases) and Cannabis seeds (1 case) and represented 3.1% of the sample;

Group 3 consisted of Cannabis resin/hashish (51 cases) and represented 19.8 of the sample;

Group 4 consisted of Liquid hashish/hashish oil (14 cases) and represented 5.5% of the sample and

Group 5 consisted of Buddha sticks (47 cases) and represented 18.3% of the sample.

### Aggravating and mitigating factors

Although we initially identified over 60 factors relating to the nature of the individual cases and the characteristics of the defendants, which were originally thought to be potentially significant in the determination of sentence, a large number of these factors were applicable only to one or two cases. Some of the original factors were sufficiently similar to each other to be combined if only one or two cases of each were found - for example 'minor role' and 'mere paid agent'. Table 6 lists the aggravating and mitigating factors which had been referred to by the judges in the transcripts of at least ten cases.

TABLE 6: FACTORS CITED IN 10 CASES OR MORE

Factor	Label	Number of Citations		% of Cases
		Mainly Aggrav.	Mainly Mitigat.	
Trafficking for commercial gain	F21	86		34.0
Prior good character/ first offender	F53		80	31.1
Quantity of drug	F02	75		29.6
Premeditated/planned	F31	55		21.7
Degree of co-operation with Authorities	F74		52	20.6
Type of drug	F01	48		19.0
Prospects for rehabilitation	F76		33	13.0
Guilty plea	F77		31	12.3
High Profit expectation	F23	29		11.5
Age of offender	F58		27	10.7
Highly destructive drug	F13	26		10.3
Drug Addict	F55	25		9.9
Value of drug	F03	24		9.5
Courier	F43	21		8.3
Time already spent in jail	F83		21	8.3
Principal/instigator	F41	21		8.3
Family/domestic circumstances	F62		19	7.5
A serious social evil	F14	19		7.5
Involving co-offenders	F33	18		7.1
Drug for personal use	F22		17	6.7
Remorse	F75		15	5.9
Offender's role in general	F40	13		5.1
Prior drug criminal record	F51	12		4.7
Delay in court hearing	F78		12	4.7
Large scale/major offence	F36	10		4.0

In the coding of the factors, no limits were placed on the number of factors used, so although one case may be described by a string of ten or more factors another case may be described by only one. Strenuous attempts were made to be consistent in the selection of factors used, but since the words used to describe a particular situation or personal attribute varied from judge to judge and from case to case it was not an easy task. We therefore cannot claim that this is an exhaustive list, or that the factors attributed to each case were the only relevant ones or the most important ones. They were, however, the most frequently cited factors and had a critical part to play in our analyses.

Our next chapters attempt to analyse these data with particular emphasis upon the relationships, if any, between the factors we have incorporated in our data set and the lengths of sentences imposed. We analyse the data in three steps: first, the characteristics of the offenders and any relationship these may have to sentence; second, the characteristics of the offence and their influence on sentence; third, the way all the individual effective elements of a case contribute to the determination of sentence length.



## Chapter IV

### SENTENCE AND OFFENDER CHARACTERISTICS

By taking our sample of 253 drug offenders, and adding to it the data obtained from the Profile of Federal Prisoners study we were able to analyse length of sentences imposed by such characteristics of the offender as sex, age, nationality, occupational status, educational attainment, marital status and criminal record. Undoubtedly, these basic sociological variables are important in describing the drug offender per se, but it does not necessarily follow that they have any bearing on sentence - either directly, by the judge taking these factors into account, or indirectly, through their influence on the circumstances of the case. These variables are considered below. To avoid a misunderstanding of some of the tables, it should be noted that sample sizes vary in accordance with the availability of data relating to the particular item under consideration.

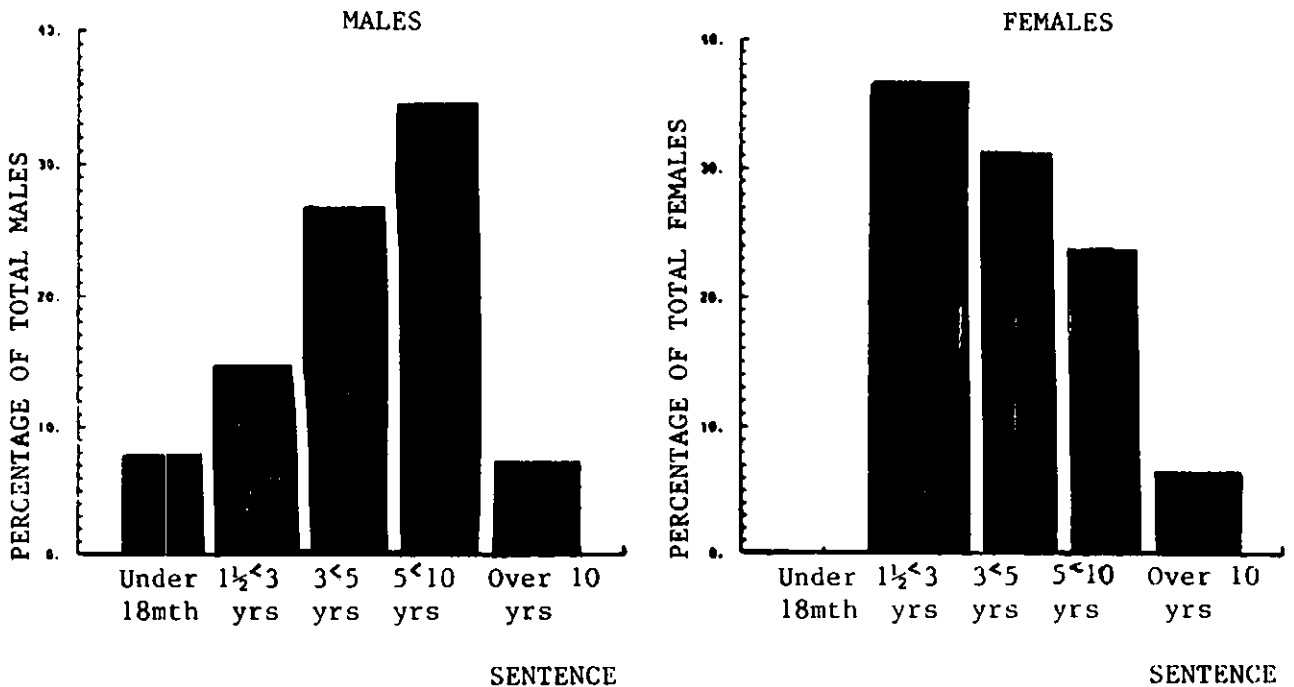
Sentence by sex of offender: Our findings in respect of sentences imposed upon drug offenders by sex are presented in Table 7 and Figure 3. These show that the modal group for males was in the 5 to 10 years' imprisonment category, whereas for females the largest group lay in the 1 1/2 to 3 years' imprisonment range. It may be observed that no females in our sample of prisoners were serving a term of imprisonment of less than 1 1/2 years, whereas 7.8% of the males were found in that category. First impressions could easily lead to the inference that, apart from sentences in excess of 10 years, courts discriminate in favour of women. Thus on average, men received comparatively longer sentences of imprisonment than the females. This pattern is clearly revealed in Figure 3, where the percentage by sentence of males to females is shown to be inversely proportional to the severity of the sentences imposed - at least for all cases other than those

found in the over 10 years' imprisonment range. On closer analysis of the data however, other interpretations tend to negate the hypothesis of discrimination on the basis of sex. For example, a review of factors relating to the offence show that ring-leaders of organised large-scale offences tended to be male. On the other hand females were often found to have acted as couriers and almost invariably were first offenders. If they did have criminal records, their crimes tended to be of a less serious kind when compared with their male counterparts. The imposition of longer sentences for males can therefore be explained without having to accuse the judiciary of male chauvinism or of some other form of sexual discrimination.

TABLE 7: SENTENCE BY SEX OF OFFENDER

Sentence	Males		Females		TOTAL
	No.	%	No.	%	
To 18 months	14	7.8	-	0.0	14
18 mths-3 yrs	44	14.6	15	36.6	59
3-5 yrs	48	26.8	13	31.7	61
5-10 yrs	62	34.6	10	24.4	72
Over 10 yrs	11	7.2	3	7.3	14
TOTAL	179	100.0	41	100.0	220
%	81.4		18.6		100.0

Figure 3 : PERCENTAGE DISTRIBUTION OF SENTENCE BY SEX OF OFFENDER



Sentence by age of offender: An analysis of the sentences imposed on 253 drug offenders showed that nearly half (46.2%) were 25 to 34 years of age at the time they were received into prison. Only a small proportion (4%) of our total sample were under 21 years of age, and this could suggest a tendency in the courts to impose bonds or fines on young offenders.

Table 8 shows the breakdown of the relevant data with regard to age and sentence. The high percentage in the 45 years and over group serves to emphasise the fact that drug offenders are often quite different from the stereotype "young hippie-addict". Indeed the general shape of the age distribution is more akin to that of the white collar offence of fraud, than that of any other type of offence.

TABLE 8: SENTENCE BY AGE OF OFFENDER AT RECEIVAL

Sentence	Under 17	17-20	21-24	25-34	35-44	45+	TOTAL
To 18 months	-	-	3	9	1	2	15
18 mths-3 yrs	-	3	17	36	1	5	62
3-5 yrs	1	5	16	31	1	21	75
5-10 yrs	-	1	15	37	10	22	85
Over 10 yrs	-	-	-	4	4	8	16
TOTAL	1	9	51	117	17	58	253
%	0.4	3.6	20.2	46.2	6.7	22.9	100.0

Sentence by nationality of offender: A study was also made of the nationality of a sample of 201 offenders who were serving terms of imprisonment for federal drug offences. Our findings are given in Table 9. This table shows that approximately two-thirds of the sample were Australians and the balance were overseas born. Table 9 also reveals that a significantly large proportion of sentenced drug offenders emanated from New Zealand and the United Kingdom. Indeed when these two groups are added to the Australian one, they represent 87.8% of the total sample. Furthermore there is no indication that foreign nationals are treated any differently from Australian nationals for the sentences seem to be fairly evenly distributed. Of course the data in respect of some categories of nationals are too few to make any meaningful comparisons as to the possible influences of nationality upon sentence.

TABLE 9: SENTENCE BY NATIONALITY OF OFFENDER

Sentence	Aust- ralia	New Zealand	United Kingdom /Eire	Italy	Nether- lands	Europe	Asia	Leba- non	Other Africa	Canada	United States	Papua New Guinea	Other	TOTAL
To 18 months	9	-	3	1	-	-	-	-	-	-	-	-	-	13
18 mths-3 yrs	35	5	7	-	-	1	-	-	-	1	-	1	-	50
3-5 yrs	39	4	6	-	-	3	1	2	1	-	-	-	-	56
5-10 yrs	45	11	2	2	1	4	2	-	-	-	-	-	1	68
Over 10 yrs	9	-	1	1	0	-	-	-	-	1	2	-	-	14
TOTAL	137	20	19	4	1	8	3	2	1	2	2	1	1	201
%	68.2	10.0	9.5	2.0	0.5	4.0	1.5	1.0	0.5	1.0	1.0	0.5	0.5	100.0

Sentence by occupational status at receipt: Offenders involved in drug trafficking can come from any stratum of society. Table 10 analyses sentences imposed by occupational status at the time that offenders were taken into custody. In this regard there was sufficient information relating to occupational status in 152 cases. Our analysis suggests that there may be a slight tendency for unskilled and semi-skilled persons to receive marginally shorter sentences, but this may be a function of offence seriousness. Such persons may, for example, be recruited as couriers or mere paid agents. Those with means, such as executives or highly paid professionals are more likely to be involved as principals, and also be in a position to purchase larger quantities of illicit drugs. The wealthy of course, would be more likely to travel and therefore be exposed to the greater opportunity or temptation for smuggling drugs into the country.

Sentence by educational attainment: Sentence by educational attainment of offender was examined in 140 cases. Our analysis is presented in Table 11. Almost 15% of offenders had received at least some tertiary education, which is significantly higher than the percentages recorded for the prison population overall and for Federal prisoners as a group. However, no obvious links between length of sentence and educational attainment were found within our sample.

Sentence by marital status: Table 12 gives the breakdown by marital status and sentence, of 201 drug offenders at the date of their receipt into prison. If marital status has any bearing on sentence it is not in the direction one would expect. It would appear that a higher percentage of married persons received sentences in the over 3, 5 or 10 years' imprisonment categories than for those found in the "never married" categories. Those who were separated, widowed or divorced were only slightly more harshly dealt with than those who never married.

TABLE 10: SENTENCE BY OCCUPATIONAL STATUS OF OFFENDER AT RECEIVAL

Sentence	Traditional "professions"	Senior executives	Executives, Consultants, etc., highly paid professionals	Tradesmen, tertiary-educated employees, etc.	Other skilled workers	Semi-skilled workers	Unskilled workers	TOTAL
To 18 months	-	1	1	-	3	2	2	9
18 mths-3 yrs	1	-	1	7	4	14	9	36
3-5 yrs	-	-	3	7	13	14	11	48
5-10 yrs	-	-	3	14	17	14	4	52
Over 10 yrs	1	-	3	2	1	-	-	7
TOTAL	2	1	11	30	38	44	26	152
%	1.3	0.7	7.2	19.7	25.0	28.9	17.1	100.0

TABLE 11: SENTENCE BY EDUCATIONAL ATTAINMENT OF OFFENDER

Sentence	Complete primary	Some secondary	School certificate	Higher school certificate	Some tertiary	Technical	Professional	Degree	TOTAL
To 18 month	-	2	4	1	1	-	-	-	8
18 mths-3 yrs	-	11	9	7	6	-	-	1	34
3-5 yrs	-	23	4	9	3	-	1	2	42
5-10 yrs	3	21	12	10	4	2	-	-	52
Over 10 yrs	-	2	0	1	1	-	-	-	4
TOTAL	3	59	29	28	15	2	1	3	140
%	2.1	42.1	20.7	20.0	10.7	1.4	0.7	2.1	100.0



TABLE 12: SENTENCE BY MARITAL STATUS OF OFFENDER AT RECEIVAL

Sentence	Never married	Now married	Separated/ widowed/ divorced	TOTAL
To 18 months	11	2	-	13
18 mths-3 yrs	39	9	4	52
3-5 yrs	43	11	5	59
5-10 yrs	33	21	12	66
Over 10 yrs	4	5	2	11
TOTAL	130	48	23	201
%	64.7	23.9	11.4	100.0

Sentence by prior criminal record: Of the many variables that relate to offender characteristics, perhaps none is so significant, when it comes to determining sentence, than that of the offender's prior record of convictions. Although the general rule is that a sentence may not be increased beyond a level considered to be commensurate with the gravity of the offence,<sup>35</sup> a criminal record generally operates so as to negate or diminish the affect of mitigating factors. We may hypothesise that all other things being equal, a person who has a criminal record (an aggravating factor) will be dealt with more severely than a person who has no record of convictions. However such a comparison may not be sufficiently 'fine tuned' for it is known that criminal records, like circumstances of offences, vary in degrees of seriousness. One might

35. D.A. Thomas The Principles of Sentencing 2nd Ed.  
Heinemann, London, 1979, P.35.

therefore expect that the nature (type of offences) and extent (frequency and/or gravity) of entries contained in the criminal record would also be relevant to the task of determining the appropriate sentence.

For the purposes of our analysis, we decided that it would be too cumbersome to analyse criminal records in any great detail. Instead we decided to quantify the extent of the offender's criminal record in accordance with the following scale:

Where offenders had no previous convictions or where it was not known whether they had previous convictions, they were given a zero score.

If they had only convictions of a minor nature (e.g. they had been dealt with by fine or bond) they would score one point.

If they had prior convictions of a more serious kind, but had not served a term or terms of imprisonment aggregating to more than six months, they would score two points.

If previously they had been sentenced to more than six months but less than three years of imprisonment, they would score three points.

If previously they had been sentenced to between three and ten years of imprisonment they would score four points.

And finally if persons had been sentenced to terms of ten years or more they would receive a score of five points. However in our sample, no instances of offenders qualifying for a score of 5 points were encountered.

We also decided to analyse criminal records by reference to drug offences only. In addition we sought to examine the circumstance where offenders were described as drug addicts.

Table 13 shows the results of the prior criminal record analysis. From this Table one might reasonably conclude that contrary to expectations there was no immediately identifiable relationship between prior criminal record and length of sentence. As mentioned before, even serious instances of drug offences are often committed by persons without criminal records. The implication is therefore quite strong that the circumstances of the offences themselves are more important determinants of sentence than the prior criminal record of offenders - a finding confirmed in later sections. Here we merely conclude that although the prior criminal record has an important part to play in sentencing drug offenders its influence is often overborne by the sheer weight given to the offence itself.

TABLE 13: SENTENCE BY PRIOR CRIMINAL RECORD OF OFFENDER

Sentence	Index of prior criminal record					TOTAL
	(None/not known) 0	1	2	3	(Prior > 3 yrs) 4	
To 18 months	8	2	4	0	1	15
18 mths-3yrs	29	9	4	4	1	47
3-5 yrs	28	12	6	4	2	52
5-10 yrs	74	23	5	7	2	111
Over 10 yrs	21	3	3	1	0	28
<b>TOTAL</b>	160	49	22	16	6	253
<b>%</b>	63.2	19.4	8.7	6.3	2.4	100.0

## Chapter V

### SENTENCE AND OFFENCE CHARACTERISTICS

Whereas the previous chapter discussed the relationships between the characteristics of offenders and the length of sentences handed down, this chapter sets out to examine the relationships between the characteristics of the offences and length of sentences imposed.

Some of the more important or basic considerations relating to the offence that are capable of affecting the sentence are the charges themselves (in our case the relevant sub-paragraphs of sub-section 233B), the number of offences, the drug-types and the quantity of drug or drugs involved in the offence. Of significance also is the jurisdiction in which the offence (and hence the trial) took place, for, as we have noted, it is reasonable for those jurisdictions which experience serious and frequent violations of a law to impose harsher penalties upon offenders than those jurisdictions which have manifestly fewer violations of the same law. Finally, the detailed circumstances of each offence must be taken into account. For example, whether the drugs were imported for profit or for personal use or whether there was a high degree of forethought and deception involved in the commission of the offence are matters that are normally taken into account by the decision-maker for the purpose of deciding upon the appropriate sentence.

Sentence by section of the Act : Although the prescribed penalties for breaches of the various forms of prohibited behaviour described in the various paragraphs of sub-section 233B(1) of the Customs Act are the same,<sup>36</sup> it is worth considering the possibility that judges treat the

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36. See chapter II, at pp 19-21

various possession and importation charges differently. Table 14 shows that for our sample there was little apparent systematic differentiation amongst penalties imposed under the various categories. This finding is not surprising, for careful reading of section 233B(1) suggests that the various prohibitions contained in the string of paragraphs that fall thereunder, merely serve to specify in detail the different actions which are considered to constitute a common mischief - that of possession

TABLE 14: SENTENCE BY TYPE OF CHARGE UNDER CUSTOMS ACT 1900

Section 233B(1)	Import/Export				Possession		
	*	(b)	(cb)	(d)	(a)*	(c)	(ca)
SENTENCE (rounded to nearest year)							
0	1	-	-	1	-	-	-
1	4	7	-	5	2	3	7
2	8	12	-	5	1	5	8
3	4	6	-	4	5	4	4
4	12	7	-	6	7	4	3
5	12	15	-	4	11	11	7
6	3	7	-	4	6	4	4
7	11	5	1	1	11	3	2
8	7	3	-	1	6	2	2
9	3	1	-	1	-	1	2
10	4	1	-	1	3	4	1
12	3	1	-	1	1	2	1
14	3	-	-	-	1	-	-
15	-	1	-	-	-	-	-
18	1	-	-	-	-	-	-
20	-	-	-	-	-	-	1
23	-	-	-	-	1	-	-
<b>TOTAL</b>	<b>76</b>	<b>66</b>	<b>1</b>	<b>34</b>	<b>55</b>	<b>43</b>	<b>43</b>
<b>Average Sentence (years)</b>	<b>5.97</b>	<b>4.53</b>	<b>7.00</b>	<b>4.15</b>	<b>6.22</b>	<b>5.35</b>	<b>4.56</b>

\* Includes charges in which the relevant sub-paragraph could not be identified in the data supplied. See also Table 5 above.

importation or exportation of a proscribed drug. Later analyses confirmed that with the possible exception of section 233B(1)(d) offences, which revealed relatively lower penalties than for other categories, no significant differences in sentences were detected by reference to the particular charges under s233B(1). This was so even after other factors were taken into account. For this reason therefore the 'type of charge' variable was eventually dropped from the study.

Sentence by number of offences: It would be reasonable to expect that longer sentences would result from a case involving multiple charges compared with those for cases involving only one offence, however this is not the case. The reason appears to be that, although the principal charge may involve either the opiates or the cannabis family of drugs, almost invariably, if other charges are brought, they involve drugs of the cannabis type, and unless the quantities are large these offences appear to be treated with comparative lenience. In fact it appears likely from the distribution of multiple offences by drug-type (see below), that prison terms for cannabis-only offenders are comparatively rare when measured against the numbers of other single-drug offenders sent to prison.

Sentence by drug type and jurisdiction: Since some considerable variation exists between the frequencies of certain drug-types across jurisdictions we present these two variables together in the following paragraphs. An examination of Tables 15-19 shows that in most jurisdictions the type of drug most commonly occurring in our sample of analysed sentencing judgments was in the category "heroin, opium or morphine". In fact most cases in this category involved heroin alone, but, rather than eliminate the small number of cases involving opium and morphine, these so-called 'hard drugs'

were classified along with heroin. For convenience these three drug types will simply be classified and referred to as 'heroin' cases.

It was found that heroin was involved in over 45 per cent of our sample of cases in New South Wales, 77 per cent of the cases in Victoria, 46 per cent of the cases in Queensland, 57 per cent of the cases in Western Australia and 64 per cent of the cases in the Northern Territory.

Except for New South Wales, the next most prevalent drug found in our sample was cannabis resin. Cannabis resin was involved in over 14 per cent

TABLE 15 : SENTENCE BY JURISDICTION - 1976-1981  
OPIUM/HEROIN/MORPHINE

NOTE: Cases involving this drug and one or more other are indicated by a + sign. They are included in the row and column totals

Jurisdiction:	N.S.W.	VIC.	QLD.	W.A.	N.T.	TOTAL
Sentence: (rounded to nearest whole year)						
1	3	3	2	1	-	9
2	11	3+	1	6	-	22
3	5	3	1	1	-	10
4	6	3	-	3	2	14
5	12+	4	2	6	2	27
6	7	5	-	4	-	16
7	4	2	-	3	1	10
8	6	1	-	1	2	10
9	1	1	-	-	1	3
10	3	1	1	2	-	7
11-15	2	1	-	3	1	7
16-20	2	-	-	-	-	2
Over 20	++	-	-	-	-	2
	65	28	7	30	9	139

TABLE 16: SENTENCE BY JURISDICTION - 1976-1981  
CANNABIS RESIN/HASHISH

NOTE: Cases involving this drug and one or more other are indicated by a + sign. They are included in the row and column totals

Jurisdiction:	N.S.W.	VIC.	QLD.	W.A.	N.T.	TOTAL
Sentence: (rounded to nearest whole year)						
1	-	-	-	-	-	-
2	1	1+	-	1	-	4
3	4+	-	1	-	-	6
4	2	-	1	1	1	5
5	3++	2+	-	4	1	13
6	+	-	1+	2	-	5
7	1+	-	-	3	-	5
8	3+	-	-	-	-	4
9	-	-	1	-	-	1
10	3	-	-	-	-	3
11-15	3	-	-	-	-	3
16-20	++	-	-	-	-	2
	28	5	5	11	2	51

TABLE 17: SENTENCE BY JURISDICTION - 1976-1981  
BUDDHA STICKS

NOTE: Cases involving this drug and one or more other are indicated by a + sign. They are included in the row and column totals

Jurisdiction:	N.S.W.	VIC.	QLD.	W.A.	N.T.	TOTAL
Sentence: (rounded to nearest whole year)						
1	2	-	-	-	-	2
2	7	1	-	1	-	9
3	5	-	-	-	-	5
4	4	-	-	3	1	8
5	+++	+	-	1	-	5
6	5+	-	+	-	-	7
7	4	-	-	1	-	5
8	1	-	-	-	-	1
9	1	-	-	-	-	1
10	3	-	-	-	-	3
	36	2	1	6	1	46



TABLE 18: SENTENCE BY JURISDICTION - 1976-1981  
LIQUID HASHISH/HASHISH OIL

NOTE: Cases involving this drug and one or more other are indicated by a + sign. They are included in the row and column totals

Jurisdiction:	N.S.W.	VIC.	QLD.	W.A.	N.T.	TOTAL
Sentence: (rounded to nearest whole year)						
1	-	-	-	-	-	-
2	2	-	-	-	-	-
3	-	-	1	-	-	1
4	-	-	-	1	-	1
5	1+	-	-	-	-	2
6	-	-	-	-	-	-
7	2+	-	-	-	-	3
8	+	-	-	-	-	1
9	-	-	-	-	-	-
10	-	-	-	-	-	-
11-15	4	-	-	-	-	4
	12	0	1	1	0	14

TABLE 19: SENTENCE BY JURISDICTION - 1976-1981  
CANNABIS PLANTS AND SEEDS

NOTE: Cases involving this drug and one or more other are indicated by a + sign. They are included in the row and column totals

Jurisdiction:	N.S.W.	VIC.	QLD.	W.A.	N.T.	TOTAL
Sentence: (rounded to nearest whole year)						
1	-	-	-	1	-	1
2	-	-	-	-	-	-
3	1+	-	-	-	1	3
4	-	-	-	1	-	1
5	1	-	-	-	-	1
6	-	-	-	-	-	-
7	-	-	-	-	-	-
8	1	-	-	-	-	1
9	1	-	-	-	-	1
	5	0	0	2	1	8

of our sample of cases in New South Wales, eight per cent of the cases in Victoria, 26 per cent of the cases in Queensland, 21 per cent of the cases in Western Australia and 14 per cent of our cases in the Northern Territory.

After cannabis resin the next most prevalent drug in our sample was buddha sticks. However, in New South Wales, buddha sticks were involved in more cases than cannabis resin and in fact constituted in excess of 23 per cent of our total sample of cases for that jurisdiction. Liquid hashish also constituted a significant proportion (six per cent) of cases in New South Wales. Only 8 cases in our sample involved cannabis plants.

Altogether twelve cases involved more than one drug. The lack of any clear direction in the tables suggested to us that the range of sentences imposed in respect of offences involving particular drugs can only begin to be meaningfully evaluated if some notion of the quantity of drug is also taken into account. However before turning to consider the results of our examination of the relationships between sentence length and type and quantity of drug something needs to be said about the non-parole period, and its relationship to the sentence imposed by the court.

Sentence and non-parole period : The non-parole period is the minimum period that prisoners must serve in consequence of their having been sentenced to a term of imprisonment.<sup>37</sup> In most, but not all cases, non-parole periods are specified and the majority of offenders are released before the expiration of their sentences. The non-parole period may be contrasted with the sentence (often referred to as the "head-sentence").

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37. Power (et.al) v. R. (1974) 131 C.L.R. 623

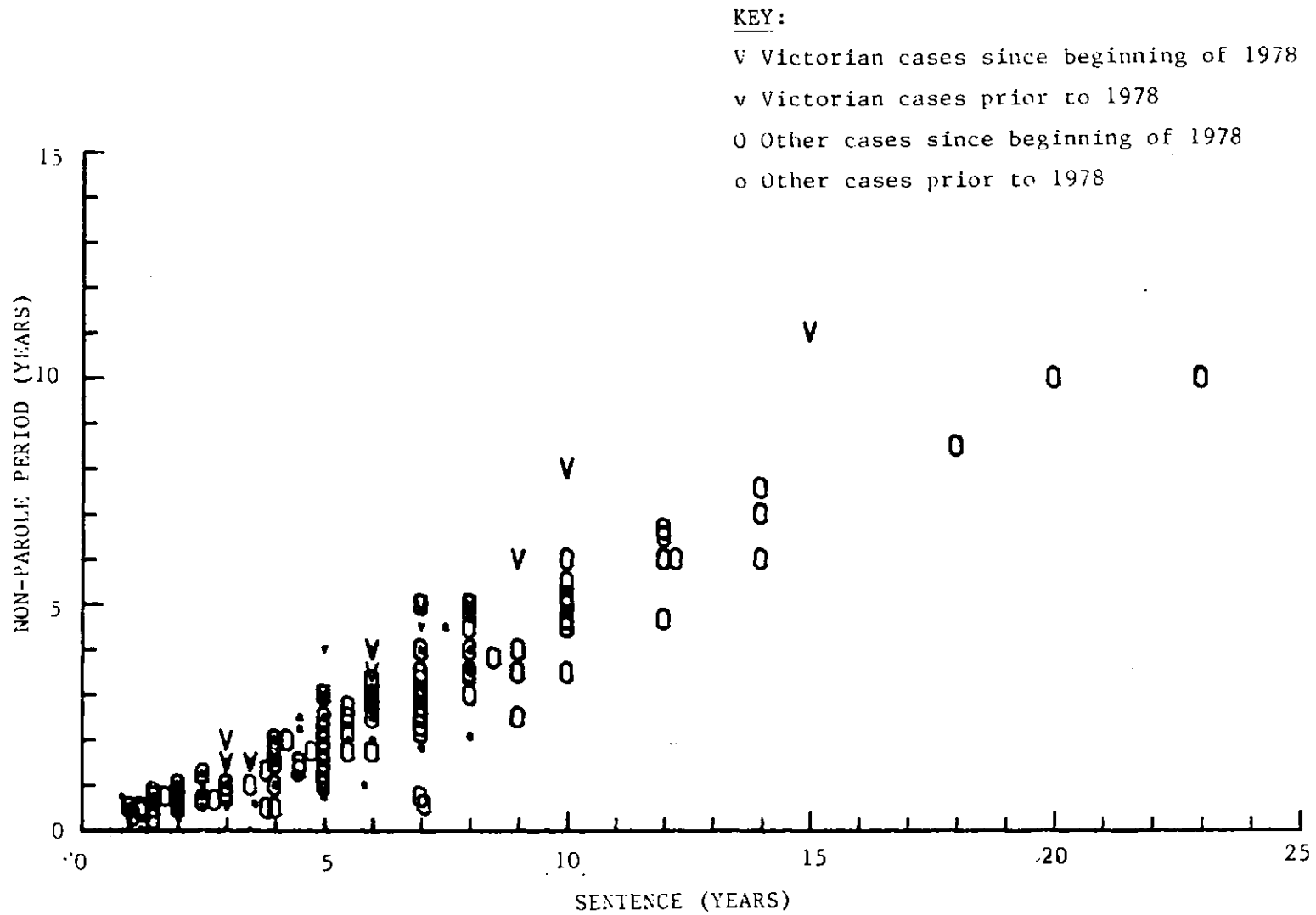
The latter, subject to the remission rules, sets the upper limit or maximum permissible duration of a prison sentence. In most jurisdictions the date specified by the court as the non-parole period is in fact the earliest date upon which the prisoner may be considered eligible for release from prison.<sup>38</sup> However in Victoria, remission rules apply to non-parole periods as well as to head-sentences, with the result that in that jurisdiction prisoners may be considered eligible for release on parole well before the expiration of the date specified as the non-parole period. This means that Victorian non-parole periods cannot ex facie be equated with specified non-parole period in other jurisdictions.

Accordingly, in our analysis we decided to distinguish the Victorian cases in which non-parole period were specified, from the non-parole period specified in other jurisdictions. Our findings are presented in Figure 4, where it can be seen that non-parole periods identified with a 'V' (representing the Victorian cases) were proportionately longer than the non-parole period in other jurisdictions (identified by an 'O'). Once remissions are taken into account the longer Victorian non-parole periods would reduce to a point where they would no longer seem to be out of proportion with the general pattern for other jurisdictions. We concluded from this that, when considering head sentences, we could happily include Victorian cases without fear of introducing any systematic bias resulting from these legal differences.

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38. This needs qualification because in some jurisdictions special remissions enable the non-parole period to be reduced in certain circumstances. For example, in Western Australia, prisoners may earn up to 3 days per month off their non-parole periods, but these discounts do not approach the proportions of the Victorian entitlements of one-third of the term specified.

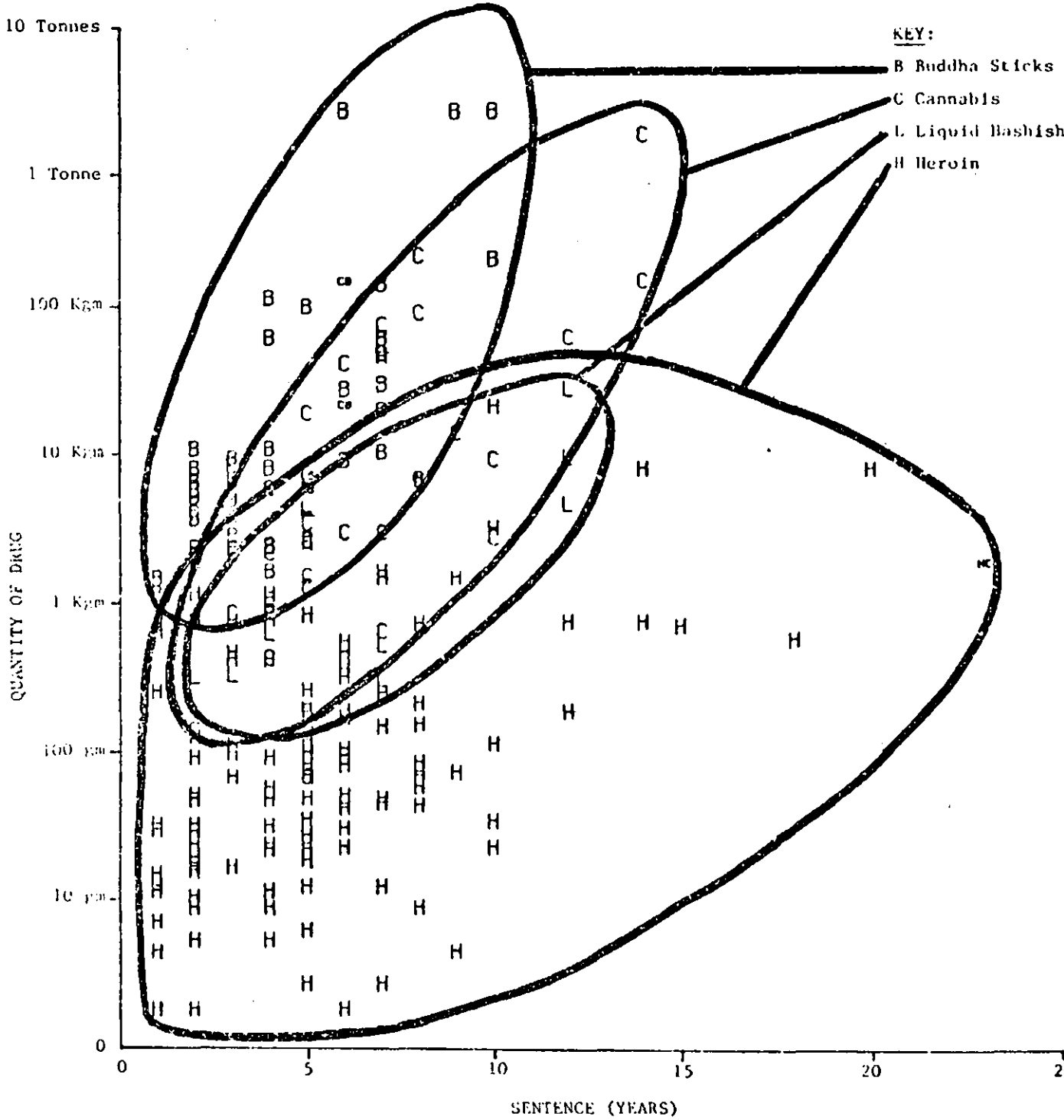
FIGURE 4: SENTENCE LENGTH AND NON-PAROLE PERIODS - VICTORIA AND OTHER JURISDICTIONS



Sentence by quantity of drug : The type of drug is one dimension of offence seriousness. Another is quantity of drug - the assumption being that large quantities attract heavier penalties. Figure 5 shows graphically the sentences imposed by quantity and type of drug for our total sample of cases. Those cases involving heroin, morphine or opium are indicated on the graph by an 'H'. Cases involving Cannabis resin are indicated by a 'C', cases involving Buddha sticks by a 'B', and cases involving Liquid Hashish by an 'L'. Those cases involving more than one drug are indicated 'CB', 'HC', etc. Clearly there is a substantial difference in the sentences handed down for given quantities of drug. The lightest sentences for large quantities of drug were given when Buddha sticks were involved. Cannabis resin attracted generally longer sentences than similar quantities of Buddha sticks, and liquid hashish (a more concentrated form of cannabis) resulted in similar sentences for rather smaller amounts. Heroin cases showed the longest sentences for a given quantity of drug, but also showed great variation - some cases differing by as much as fifteen years for a similar amount of drug. The order of severity for dealing with drug-types is very much in line with the policy of increasing the penalties in accordance with the notion of 'commercial quantities' as described in the Act. We therefore conclude that the type/quantity combination of variables is very important in the determination of sentence, although clearly it is not the only determinant.

Sentence by factors cited: In looking for the main determinants of sentence, we should be fairly confident that those features of the case actually cited by the judge in his sentencing decision should rank highly.

FIGURE 5: SENTENCE LENGTH AND QUANTITY OF DRUG - BY DRUG TYPE\*



\* CASES WHERE QUANTITIES KNOWN ONLY

Table 20 lists 59 of the most frequently cited factors<sup>39</sup> and gives some statistical information on the relationship between each of those factors and the sentence length in our 253 cases. Comparing the average sentence in cases where a particular factor was cited with the average sentence for cases where it was not cited gives an indication of whether in general the factor was seen as aggravating or mitigating. The standard deviation (S.D.) of the sentence, along with the F-value, Significance and Correlation are all statistical measures of the strength of a possible relationship between the factor and the sentence. Low values for the S.D. and significance or high values for F and the correlation (either positive or negative), suggest an important relationship. Considering all of these measures, the most interesting variables turn out to be F2 (quantity of drug), F3 (value of drug), F31 (premeditated/ planned), F36 (large scale/major offence) and F41 (principal/instigator) which all have positive correlation around 0.2 or greater. This level of correlation does not suggest a very high degree of association between the individual factors and the sentence, but statistically-speaking it is a promising start and we shall find that a fairly interesting picture emerges when we put all our variables together in our final chapters.

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39. See appendix for a full list of the factors. Those cited 10 or more times can also be identified from Table 6.

TABLE 20: SENTENCE LENGTH AND FACTORS CITED IN THE SENTENCING REPORTS

	No. of citation	Average sentence when not cited (years)	Average sentence when cited (years)	S.D. of sentence when cited (years)	F. value for ANOVA	Significance	Correlation with sentence		No. of citation	Average sentence when not cited (years)	Average sentence when cited (years)	S.D. of sentence when cited (years)	F. value for ANOVA	Significance	Correlation with sentence
F1	48	5.5	4.8	3.5	1.5	.22	-.08	F43	21	5.3	6.5	3.1	2.4	.12	.10
F2	75	4.8	6.6	4.2	15.5	.00	.24	F46	2	5.4	4.0	2.8	0.3	.58	-.04
F3	24	5.0	8.7	4.6	28.8	.00	.32	F47	1	5.4	3.5	0.0	0.3	.59	-.01
F4	4	5.4	4.0	2.5	0.6	.43	-.05	F51	12	5.4	4.4	2.9	1.0	.31	-.06
F10	4	5.3	7.1	5.7	1.0	.32	.06	F52	8	5.4	3.8	2.2	1.8	.18	-.08
F11	7	5.4	3.5	1.6	2.1	.15	-.09	F53	80	5.5	5.1	2.8	0.7	.42	-.05
F12	2	5.4	1.9	1.2	2.1	.15	-.09	F54	3	5.4	4.3	2.1	0.3	.61	-.03
F13	26	5.2	6.3	4.4	2.2	.14	.09	F55	25	5.5	4.1	3.8	4.0	.05	-.13
F14	19	5.5	4.0	2.4	3.3	.07	-.11	F56	3	5.3	8.4	7.8	6.8	.01	.16
F15	1	5.3	7.0	0.0	0.2	.63	.03	F57	1	5.3	9.0	0.0	1.1	.29	.07
F16	9	5.4	5.2	1.7	0.0	.91	-.01	F58	27	5.3	5.7	3.2	0.3	.61	.03
F17	2	5.3	8.0	1.4	1.2	.27	.07	F59	6	5.3	7.0	3.6	1.5	.23	.08
F20	2	5.4	5.3	2.5	0.0	.97	-.00	F60	9	5.3	7.8	5.3	4.7	.03	.14
F21	86	5.2	5.7	3.4	1.0	.32	.06	F61	8	5.3	7.4	4.6	2.9	.09	.11
F22	17	5.5	3.5	2.9	5.2	.02	-.14	F62	19	5.5	4.0	3.0	3.0	.08	-.11
F23	29	5.2	6.3	2.5	2.8	.10	.10	F63	1	5.4	3.0	0.0	0.5	.49	-.04
F24	1	5.4	5.0	0.0	0.0	.92	-.01	F71	4	5.4	3.4	1.1	1.4	.25	-.07
F30	7	5.3	5.8	2.4	0.1	.71	-.02	F73	3	5.4	2.6	1.1	1.9	.16	-.09
F31	55	4.9	6.8	3.2	13.4	.00	.23	F74	52	5.3	5.6	3.6	0.4	.55	.04
F32	2	5.4	3.8	1.1	0.4	.51	-.04	F75	15	5.2	5.5	2.5	0.0	.87	.01
F33	18	5.3	6.4	3.1	1.7	.20	.08	F76	33	5.5	4.2	2.1	4.5	.03	-.13
F34	2	5.4	1.0	0.0	3.2	.07	-.11	F77	31	5.2	6.2	3.3	2.4	.12	.10
F35	6	5.3	9.1	2.1	7.3	.01	.17	F78	12	5.3	5.8	4.8	0.2	.63	.03
F36	10	5.2	9.7	5.6	17.5	.00	.26	F79	1	5.4	3.0	0.0	0.5	.49	-.04
F37	1	5.4	4.5	0.0	0.1	.80	-.02	F80	1	5.4	3.5	0.0	0.3	.59	-.03
F38	3	5.3	8.0	3.5	1.8	.16	.08	F81	7	5.4	4.5	1.2	0.4	.51	-.04
F40	13	5.3	7.1	2.4	3.5	.06	.12	F82	4	5.4	3.0	2.7	1.9	.17	-.09
F41	21	5.2	7.5	4.6	9.7	.00	.19	F83	21	5.4	4.8	2.5	0.6	.43	-.03
F42	8	5.3	5.5	1.9	0.0	.90	.01	F84	7	5.4	4.7	2.2	0.2	.62	-.03
								F90	1	5.3	9.9	0.0	1.1	.29	.07



## Chapter VI

### TOWARDS A SENTENCING FORMULA FOR DRUG OFFENCES

Finally, we turn to the complex question of how all these elements may be combined to produce a rational system of sentencing. We begin by posing the question as to whether it is legitimate to view a sentence of imprisonment as being composed of a number of elements, each relating to an identifiable and distinct feature of the case. For example, could a ten-year drug offence sentence be separated into components of, say, three years basic sentence, plus two years because the drug was a particularly dangerous type, plus a further two years because the quantity was large, plus eighteen months because the offence was a highly organised crime,..... and so on? Despite the fact that this is not how sentences are set in practice, it would appear logical that, for example, where two cases are identical in all respects but one, then any difference in the two sentences should reasonably and fairly reflect that one circumstance in which the cases differ. It is merely an extension of this way of thinking, that, to be reasonable and fair all sentences should be able to be decomposed into individual components, each relating to identifiable elements of the case.

Fortunately, computers and mathematics can provide a relatively simple way of identifying components of a sentence which are attributable to given circumstances of a case. Armed with a set of data such as we have here, 'multiple regression' procedures will do exactly that. However care must be taken in the interpretation of these analyses since the computer is only equipped for drawing arithmetically-reasonable conclusions and cannot be taught to prefer theoretically-reasonable conclusions.

In performing analyses on multi-variate data there are a number of exploratory techniques which can be used, which can help to show how to

proceed in the later analyses. It is quite instructive at this point to present the results of our first multiple regression run which prepared the way for our later analyses.

### An Initial Regression

Using the full 253-case data set we obtained an initial formula for calculating head sentences which took account of the year and jurisdiction of the trial, the type(s) of drugs involved, the circumstances of the case and the criminal and drug record of the offender. The results of this analysis are presented in Table 21 and are quite promising in that for the most part the variables which one would expect to be influential turn out to make quite significant contributions to sentence.

The reader will however note a number of apparently illogical results in this table. The most incongruous item is the reduction in sentence for offenders with prior (non-drug) criminal records. This result may be explainable, as seen in Chapter IV, by the fact that offenders in the most serious cases are often 'respectable' businessmen and first offenders, while conversely those with prior criminal records are often involved in the least serious cases or play only a minor role attracting a relatively short sentence. However, even if it is explainable it hardly reflects a principle upon which our sentencing decisions should be based. The acceptance of such a principle would be counter-intuitive, being tantamount to holding that offenders with prior non-drug criminal records deserve shorter sentences than those without prior records. Furthermore, caution should be exercised in interpreting the other items in this formula. For example, the fact that 2.20 years are added to sentences imposed in New South Wales may not mean that courts in that jurisdiction

TABLE 21 - INITIAL FORMULA FOR SENTENCING FEDERAL DRUG OFFENDERS

1. Insert <u>Basic sentence</u> of 1.92 years		1.92
2. Calculate 0.17 for every year after 1976 that the trial took place		_____
3. Insert the figure that accords with the jurisdiction in which the trial took place: NSW 2.20 yrs    NT 2.03 yrs    WA 1.66 yrs VIC 1.54 yrs    QLD 1.03 yrs		_____
4. Insert the following figure if the drugs involved included :		_____
cannabis resin/hashish	1.96 yrs	_____
opium, heroin or orphine	1.68 yrs	_____
liquid hashish/hashish oil	1.59 yrs	_____
5. Calculate for every point on a 5 point scale :		
the offender's drug offence record and multiply by 0.26 yrs		_____
the offender's general criminal record and multiply by 0.10 yrs		_____
6. Insert 0.26 yrs if the offender is a drug addict		_____
7. If the following factors are considered relevant to sentence insert the corresponding figures:		
value of drug	4.01 years	_____
principal/instigator	2.29 years	_____
courier	1.46 years	_____
high profit expectation	1.44 years	_____
a highly destructive drug	1.35 years	_____
premeditated/planned	0.84 years	_____
8. Now <u>ADD</u> items 1 to 7 (sub-total)		_____
9. Insert the following figure if the drugs included:		
cannabis plants or seeds	0.46 years	_____
buddha sticks	0.36 years	_____
10. If the following factors are considered relevant to sentence insert the corresponding figure:		
time already spent in gaol	0.56 years	_____
type of drug	1.53 years	_____
prospects of rehabilitation	1.80 years	_____
11. Now <u>ADD</u> items 9 and 10 (sub-total)		_____
12. <u>SUBTRACT</u> item 11 from item 8	=	=====
<u>THE RESULT (item 12) GIVES THE NOTIONAL SENTENCE</u>		

are necessarily more severe than in other jurisdiction, but rather that cases heard in New South Wales tend to be more serious than those heard elsewhere. In other words, although this formula might accurately reflect the true situation with regard to statistical associations between

sentences and features of the cases, it cannot be used prescriptively to determine an appropriate sentence given the circumstances of a particular case.

Among the most immediately identifiable problems reducing the utility of this formula is that, as we have shown previously, the sentence and the quantity of drugs are quite significantly related - the greater the quantity the larger the sentence, and the relationship differs from drug to drug. In this formulation, quantity is not mentioned per se, and although 4.01 years is added to the sentence if the value of drugs is a factor in sentencing, this figure is constant regardless of the drug-type, the jurisdiction, the year of trial and so on. Another problem is that, although the analysis showed that the date of the trial was significant, with sentences being higher for the more recent cases, the formula was clearly distorted by the changes in the statutory penalty in late 1977.

Given the distribution of our cases over time, it appeared more appropriate to concentrate our efforts on the 170 cases heard after 1977, and, because of the drug type/quantity problem, to restrict our analysis to those cases involving a single drug type. Tests showed that different drugs produced different formulae so it was decided to choose the most frequent - heroin cases, of which there were 90 in our sample since the beginning of 1978. Not only did we have too few cases of the other drug-types, but also, as shown previously in Chapter V, of the four most frequent drug-types in our initial sample, the heroin cases showed the greatest variation in sentence for a given quantity of drug. Therefore heroin cases should present the greatest difficulty in linking sentences to explanatory variables. The following paragraphs summarise the results of our efforts to explain those variations in sentences:

Sentencing the Heroin Offender from 1978

Our 90 cases contained widely differing characteristics, with persons as old as sixty or as young as twenty, drug quantities ranging from a few grams to nearly 30 kilograms, and sentences ranging from nine months to 23 years. A very broad range of factors were stated by the judges to be relevant to the sentences handed down. For example, although the phrase 'commercial gain' was used in 38 of the cases, and 'quantity of drug' was mentioned in 28 cases, none of the other 41 factors cited in the 90 cases were mentioned in more than a quarter of the cases. Table 22 summarises the basic data for these 90 cases, all of which were decided after the change in the maximum penalty in 1978.

TABLE 22: HEROIN CASES FROM THE BEGINNING OF 1978 AND ONWARDS:  
A SUMMARY OF BASIC DATA FROM OUR SAMPLE

Number of cases:	90		
Offenders:	73 males, 17 females;		
	average age - 30 years;		
	42 known drug addicts		
Factors cited in sentencing:		Involved drugs in addition to heroin:	
type of drug	16 cases	opium	2 cases
quantity of drug	28	morphine	1
value of drug	8	cannabis resin	1
quality of drug	3	amphetamines	1
'highly destructive' drug	15	other	1
'social evil'	4		
commercial gain	38	Average quantity of drug -	800 grams
personal use	13		
profit expectation	9		
premeditated	17	Jurisdictions:	
co-offenders	9		
large scale	4	NSW	37 cases
principal	9	Vic	17
courier	7	Qld	3
prior drug crimes	7	SA	2
bad character	5	WA	23
first offence	25	NT	7
drug addict	16		
breach court order	4	Judges:	
age of offender	9		
mental state	6	Thorley	10 cases
domestic problems	7	Lavan	6
cooperated	22	Torrington	5
remorse	5	Hicks	3
rehabilitation prospects	17	Leslie	2
pleaded guilty	14	Staunton	2
court delay	5	Cameron-Smith	2
time spent in jail	9	Other	60
other factors	27		

Average sentence - 6 years 3 1/2 months

Average non-parole period - 3 years 1 month

This table shows that because of the reduction from 253 cases to 90, some of our factors were now very poorly represented and would introduce bias into analytical results and a reclassification of the factors was therefore desirable. Rather than lose the information altogether, factors which were intuitively and statistically related were combined, and only where no alternative was available was a variable dropped from the analyses. So for example the factors 'type of drug', 'nature of drug', and 'highly destructive drug' were combined because they were similar in interpretation and three times more likely to be cited together than separately, but the 'violence used' factor which was cited only twice, in cases with counter-intuitively short sentences and without similar factors, was dropped. Twenty-eight factors then remained, some now being more broadly defined than originally. Although superficially it might seem that by this method we introduced a greater degree of subjectivity into the data, it must be remembered that our initial list of factors was itself by and large selected intuitively. In following our own judgment and intuition at this stage we were doing no more than re-defining our own classification of factors.

#### More Exploratory Analyses

Various analyses were performed on the 28 remaining factors to determine how successfully they could be used as predictors of the length of sentence in each case. Variables indicating the jurisdiction of the court, additional personal data on the defendant (such as age, sex, drug and criminal records) and the presiding judge were also entered, virtually repeating the 253-case regression to see what influence they had.

Broadly speaking the results showed that our list of factors, together with the other variables, explained almost half of the variance between sentences. A further data-reduction technique called factor analysis suggested that over sixty percent of this variance could be attributed to nine groups of variables. Each of these variables represented an important area of concern which, intuitively, seemed important in determining sentence lengths. The nine group of variables or 'components' were as follows:-

- Component 1. Qualities of the Drug (harmless, destructive, a lead to hard drugs etc)
2. Quantity of the Drug (however measured - e.g. by weight, volume, value)
  3. Degree of Premeditation (organised crime, isolated individual offence, elaborate concealment, etc)
  4. Degree of Responsibility (principal/instigator, courier/paid agent or dupe)
  5. Degree of Cooperation with Authorities (remorse, guilty pleas, cooperation with police, etc)
  6. Legal Status of Offender (on parole, probation from prior offences?)
  7. Criminal Record of Offender (prior convictions - minor or major offences?)
  8. Drug User/Addict
  9. Rehabilitation Prospects (e.g. age, social, marital, educational and occupational factors likely to affect rehabilitation of offender)

#### An Improved Model of Heroin Sentencing Factors

With these results as a guide further regression experiments, using different combinations of the original variables, improved the logic and 'goodness of fit' of our formula. We used the coefficient of multiple correlation as a measure of goodness of fit, and we manipulated variables

in and out of the formula until the correlation coefficient was maximised. We then concentrated on finding the simplest formula, i.e. the formula with the smallest number of variables, which would achieve a correlation of this magnitude.

The best result obtained is shown in Table 23 and achieved a multiple correlation of 0.56 reflecting the point made earlier that the sentences in the heroin group were the most difficult to explain of all the 253 original cases. The figure of 0.56 indicates that our model only managed to explain around one third of the variance in sentences in heroin cases. However, the formula obtained appears to be consistent with rational sentencing policies, with each step now contributing to sentence in an intuitively reasonable direction. We therefore used it to calculate 'notional' or 'predicted' sentences which we could compare with the actual sentences handed down. We also performed parallel analyses on non-parole periods, but the results were so similar, when the Victoria/other jurisdictions dichotomy was taken into account, that they need not be reported here.

#### The Analysis of Residuals

The next phase of our analysis was a study of residuals - that is, the differences between actual sentences and our predicted sentences.<sup>40</sup> For example, if the actual head-sentence handed down in a particular case was ten years and the application of our formula resulted in a sentence that was one year out (suggesting nine or eleven years), we would not be too disappointed with the formula's accuracy. If, however, the formula was

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40. It may be recalled that the 'predicted' or 'notional' sentence is derived by applying the formula to the facts of the particular case. See above at p.16.



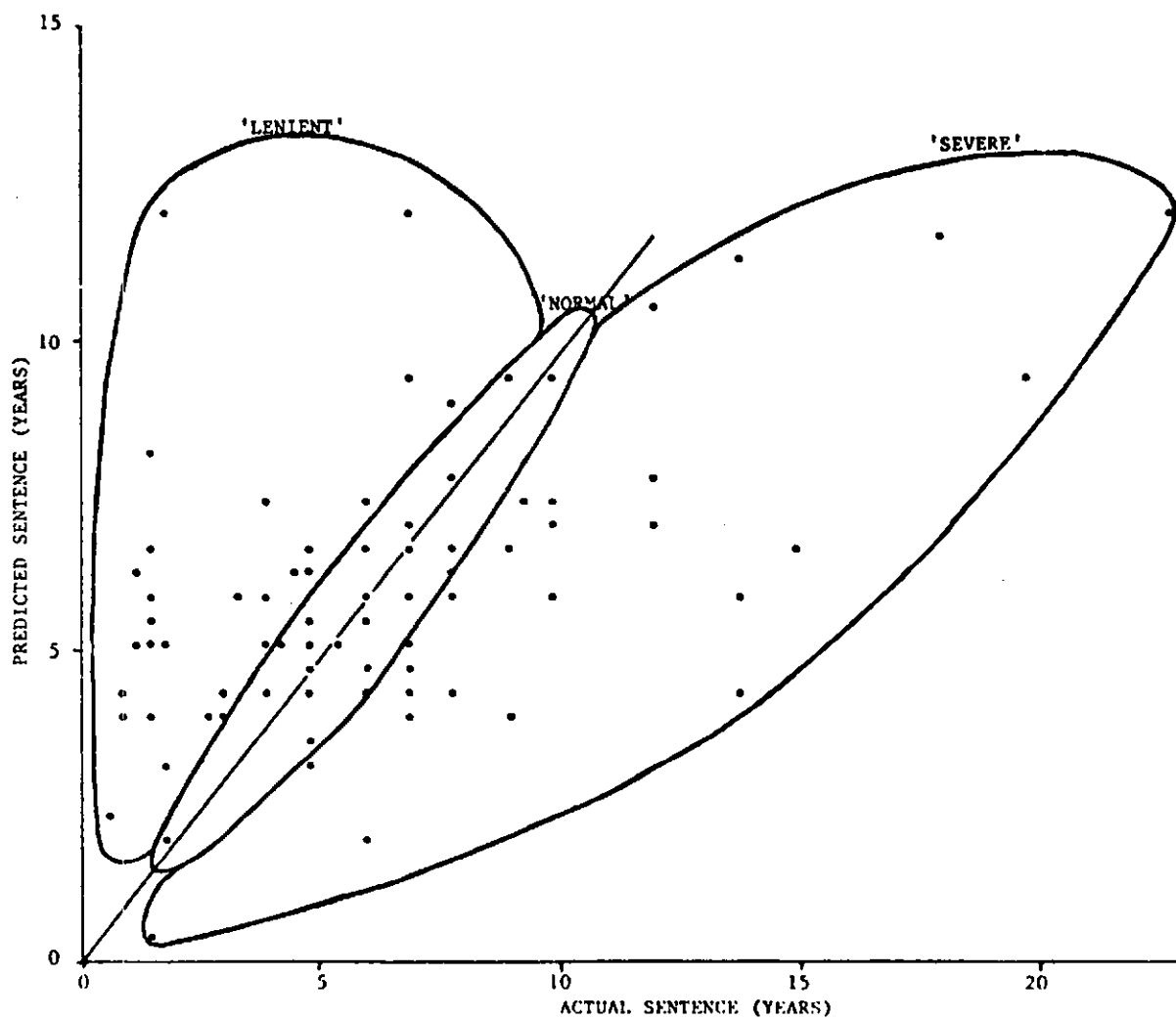


one year out in its prediction of sentence in a case where the actual sentence was only for a term of say, 3 months we might not be so satisfied. Conversely, an error of even fifty percent in a 12 month sentence might seem fairly trivial, whereas a similar percentage error in a ten year sentence would suggest a very poor level of predictiveness.

Figure 6 compares the actual and predicted sentences and shows the 90 cases grouped into three approximately equal-sized categories, according to whether the predicted sentence was significantly less than, greater than or close to the actual sentence. In allocating cases to groups we incorporated the notions of acceptability implied in the previous paragraph by use of the following 'sliding scale':

- for short sentences (one year or less) an error of up to  $\pm 50\%$  of the actual sentence imposed was regarded as acceptable. Those cases were classed as 'normal'. Cases with actual sentences in this range where predicted sentences were more than 50% in excess of the actual figure were classed as 'lenient'. Cases where predicted sentences were more than 50% less than the actual figure were classed as 'severe'.
  
- for long sentences (around 10 years) an error of only 10% was tolerated and cases were grouped in a similar way into severe, normal, lenient groupings.
  
- a sliding scale was used for sentences in between, so a 40% error was accepted for sentences around 2 1/2 years, 30% for

FIGURE 6: ACTUAL SENTENCE PLOTTED AGAINST PREDICTED SENTENCE  
- USING INITIAL MODEL (HEROIN CASES)



sentences around five years, 20% for sentences around 7 1/2 years, and so on.

So when we refer to a sentence as being 'severe' we are simply saying that the actual sentence was 'significantly' greater than our formula's prediction. This resulted in 26 cases being classified as 'severe' 32 as 'normal' and 32 as 'lenient'.

So is there an identifiable set of features in a case which will determine whether the actual sentence will differ from the prediction? A summary of the basic data for these three groups is given in Table 24 and gives a few clues as to the key differences between the severe, normal and lenient groups. Note the distinct differences in average quantity of drugs in particular. A process known as discriminant analysis is appropriate to analyse these differences more systematically by identifying the combination of variables which best discriminates between the groups. In the process, the program also checks the appropriateness of the initial allocation of cases to groups.

Many combinations of variables were tried, but the best results came from a very short list: two of our original factors, F53 and F76; prior criminal history, R1 and R2; and the weight in grams of drug involved. The two factors, F53 (prior good character/first offence) and F76 (good rehabilitation prospects) represented the principal characteristic of the 'lenient' group, while the general crime record (R1), and the drug crime record (R2), characterised the 'severe' group. However the effect of the amount of drug involved appeared to be the most significant factor of all

TABLE 24: SEVERE, NORMAL AND LENIENT GROUPS,  
HEROIN CASES FROM THE BEGINNING OF 1978 AND ONWARDS -  
SUMMARY OF BASIC DATA

	Severe	Normal	Lenient
Number of cases	26	32	32
Offenders: Males	20	28	25
Females	6	4	7
Average age	33 yrs	31 yrs	27 yrs
Known drug addict	9	16	17
Average quantity of drugs	2350 gms	258 gms	114 gms
Jurisdictions: NSW	11	12	14
Vic	5	8	4
Old	1	1	1
SA	-	1	1
WA	7	7	9
NT	2	3	2
Factors relevant in sentencing:			
type of drug	3	7	6
quantity of drug	12	8	8
value of drug	-	4	1
quality of drug	-	1	3
'highly destructive' drug	-	4	5
'social evil'	-	2	2
commercial gain	11	14	13
personal use	4	4	5
profit expectation	4	3	2
premeditated	5	8	4
co-offenders	2	3	4
large scale	2	1	1
principal	-	2	4
courier	3	2	2
prior drug crimes	-	4	3
bad character	-	2	3
first offence	6	9	10
drug addict	4	7	5
breach court order	2	-	-
age of offender	3	5	1
mental state	2	3	1
domestic problems	1	3	3
cooperated	6	11	5
remorse	1	2	2
rehabilitation prospects	1	12	4
pleaded guilty	4	7	3
court delay	1	3	1
time spent in jail	3	4	2
Average Head Sentence:	10.9 yrs	5.7 yrs	3.1 yrs
Average Non-Parole Period:	5.5 yrs	2.8 yrs	1.4 yrs

for it was found that a large quantity of drug was indicative of a severe sentence regardless of any grounds for leniency, while a relatively small quantity would tend to counter any argument for severity.<sup>41</sup>

The discriminant analysis procedure used probabilities to check the allocation of cases into groups and found that 47 (52.2%) of the 90 cases were correctly classified while a further 27 (30.0%) were found to be borderline cases. In only 16 cases did the computer seriously disagree with our own allocations. Of these 16 cases all but four were cases where the facts tended to be contradictory (e.g. serious offence/offender of good character), where the computer selected the severe group as most probable and the lenient group as a second choice, or vice versa. In these circumstances it is clear that the sentencing decision is going to be a difficult one and we think allocation to the normal group is probably an appropriate compromise. The other four cases, given actual sentences of 6, 8, 10 and 18 years were regarded by the computer as deserving normal or lenient treatment whereas they were initially allocated to the severe group. This group of cases, if they were accurately described by the coded data, and if our formulae were capable of handling their particular sets of circumstances, may be regarded then as exhibiting significant and unjustified sentencing disparities.

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41. The standardised discriminant functions were:

	Function 1	Function 2
Amount	- .63	-.78
R1	.51	.89
R2	.04	-.95
F53	.27	.12
F76	.78	-.58
Eigenvalue	.27	.08
Percent of trace	76.8	23.2

Closer examination of the facts of these cases, and the way they were coded, showed that indeed in all four cases the seriousness of the offence was understated by the way the details had been coded. In one, although only a small amount of drugs were found, the offender had been using a light plane to avoid customs, and in another there was evidence that the illegal activities had been going on undetected for some considerable time. Furthermore, three of the four defendants had relatively serious non-drug criminal records also, and yet only in one case had the judge mentioned this fact in his summing up. Our observations therefore indicated that these cases deserved more detailed study before accepting the conclusion that the sentences imposed were grossly unfair and inappropriate. Indeed what was surprising was the degree to which there was concordance in the sentences imposed upon our sample of heroin offenders once the cases had been classified into the three levels of seriousness.

This analysis provided a turning point in our study. We considered that since we could now correctly classify any given case as one deserving severe, normal or lenient treatment, simply on the basis of quantity of drugs, prior criminal record and rehabilitation prospects then we would be able to substantially improve on the predictive ability of our regression model. This indeed proved to be the case.

## Chapter VII

### THE FINAL MODELS

This chapter describes the last step in our analyses. In the previous chapter we showed how we derived a general formula for sentencing drug offenders. It was seen that this formula was not sufficiently consistent with rational sentencing policies for our purposes and therefore we turned our attention to an examination of heroin cases decided after the statutory changes in late 1977. By examining the sentencing pattern in relation to one drug only we were at least able to say that we were analysing like cases with like, and by choosing cases decided from the beginning of 1978 and onwards we avoided the complications presented by the amendment to the statutory penalty. Eventually we derived a list of nine groups of variables which seemed the most important determinants in deciding sentence lengths. These we utilised to further refine our model to a point where we were able to use it to calculate 'notional' or 'predicted' sentences. We further improved the predictive ability of our model by observing that cases could be divided initially into three groups, 'severe', 'normal' and 'lenient', largely on the basis of the single most significant factor, the amount of drug involved in the offence. Indeed when this model was tested it was found that almost all of the cases did in fact fit our mathematically derived formula.

Here we describe how we improved further on our model. Up to this stage we have thought only in terms of what we shall now call an additive model - that is, for each significant factor in a case a fixed term of imprisonment is added to (or subtracted from) the basic sentence. This model can lead to some results inconsistent with rational sentencing policies. One particularly obvious example of this is the penalty for committing the offence in breach of a court order (e.g. parole, probation),



which we have found to be around 6 years. While this figure may be appropriate in a very serious case it may be thought to be excessive when all other factors combined lead only to a very short sentence. A more appropriate model here would be to add a percentage of the sentence suggested by the other factors - i.e. multiply the basic sentence by  $1 + \frac{n}{100}$ , for each factor, where n is the percentage increase indicated for that factor. This type of formulation is called a multiplicative model and is discussed later in this chapter.

1) The additive model

Once again various options were tried including re-running the regressions separately for each group, with 32, and 26 cases each time. When this was done, however, we found that the results differed mainly in the constant term - the 'basic' sentence as we have called it - so a simpler formulation was used. In this we defined an additional variable called DISC, which was given the value 1 for lenient cases, 2 for normal cases and 3 for severe cases, and we ran a single regression with the full 90 cases. Whether we take head-sentence or non-parole periods the results were now considerably improved. A comparison of Figures 7 and 8 with Figure 6 revealed that the predicted sentences were now much closer to the actual sentences, and correlations of over 0.8 were obtained for both head-sentence and non-parole period formulae. Furthermore, with the drug quantity, prior criminal record and components of the offender's rehabilitation prospects all incorporated into the determination of the basic sentence, the actual sentencing formula (see Table 25) became a very simple one of only ten elements.

FIGURE 7: ACTUAL SENTENCE PLOTTED AGAINST PREDICTED SENTENCE - USING ADDITIVE MODEL (HEROIN CASES)

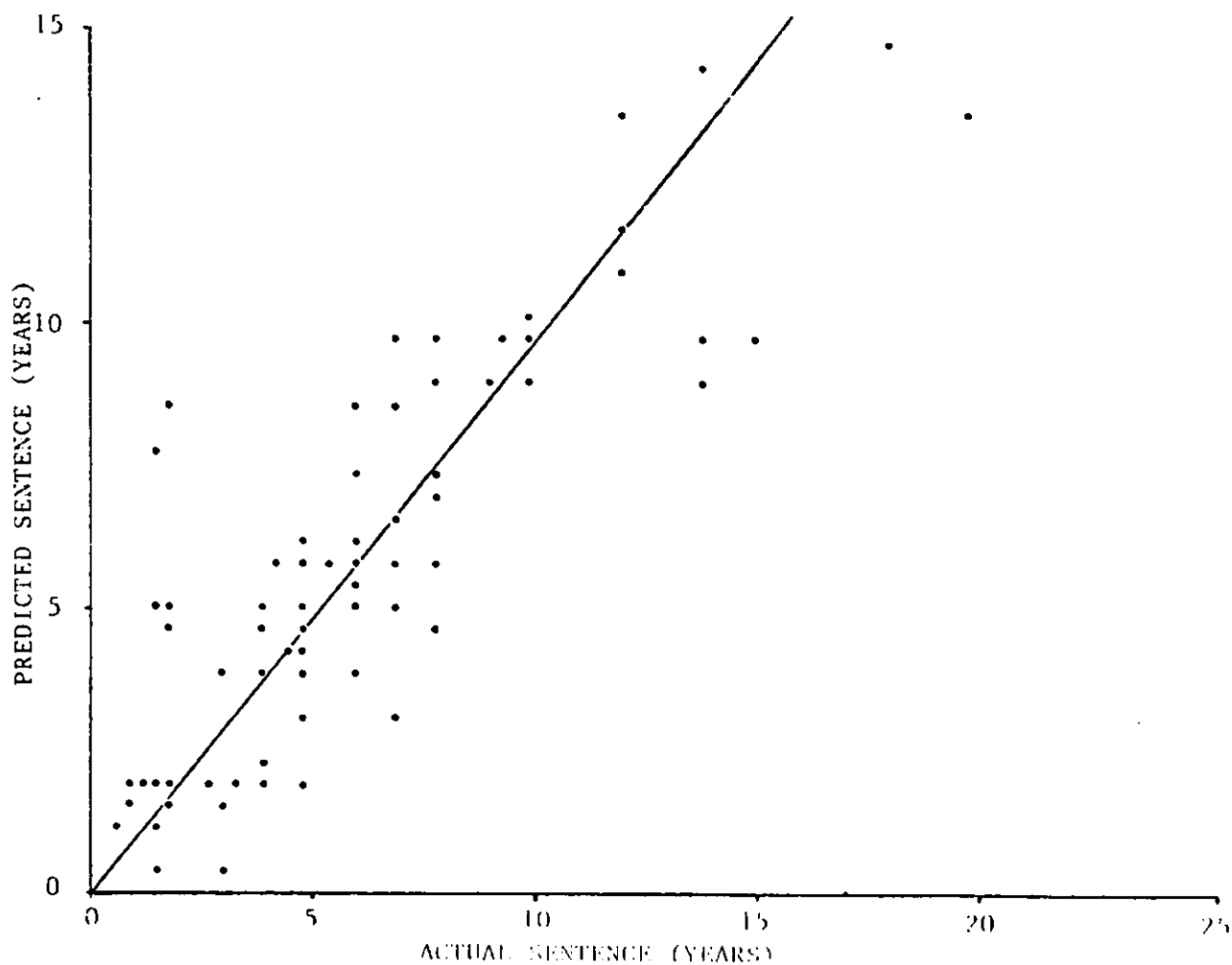
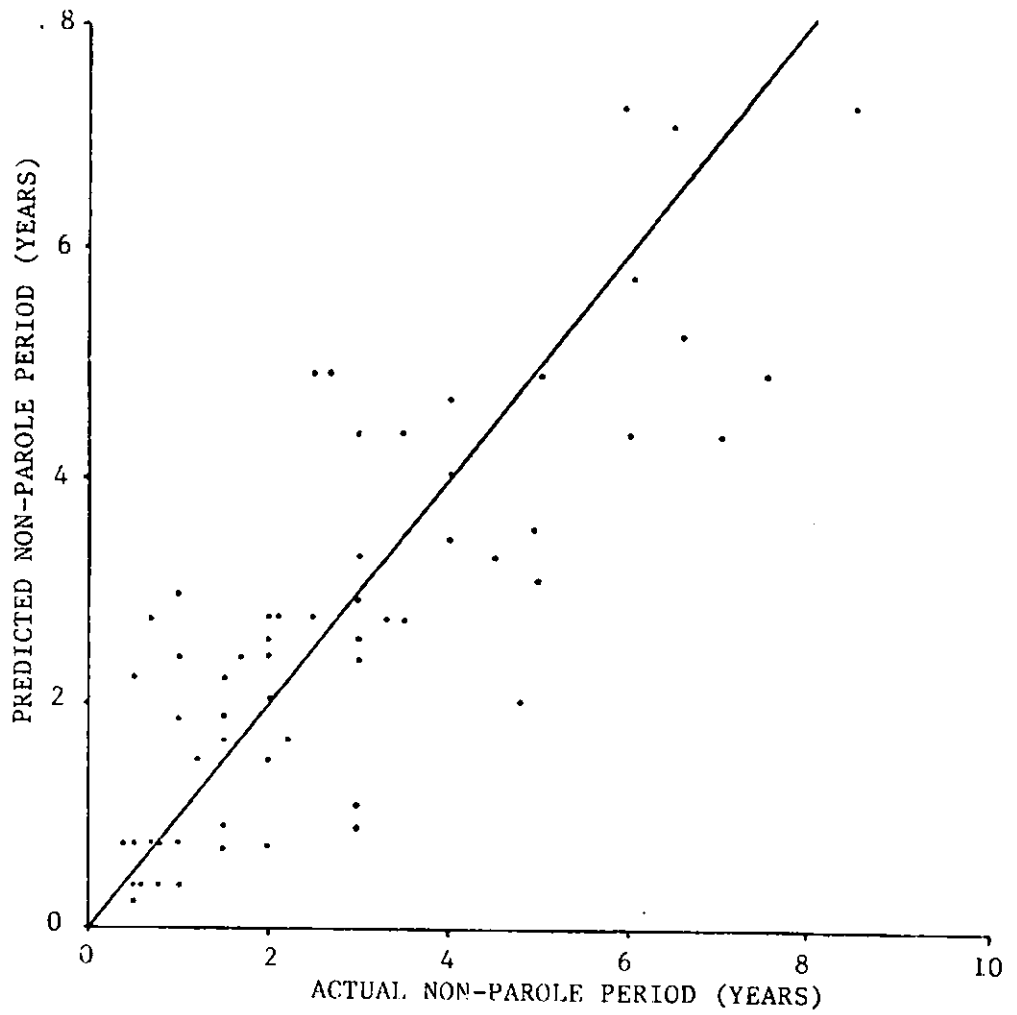


FIGURE 8: ACTUAL NON-PAROLE PERIOD PLOTTED AGAINST PREDICTED  
NON-PAROLE PERIOD - USING ADDITIVE MODEL (HEROIN CASES)\*



\* VICTORIAN CASES NOT INCLUDED

TABLE 25: ADDITIVE FORMULA FOR SENTENCING HEROIN OFFENDERS1. Determine Level of Basic Sentence:

- If the quantity of drugs involved is large and/or offender has a serious record of prior convictions, Treat Severely: Basic sentence = 10.2 years
- If the quantity of drugs is small and rehabilitation prospects are good, Treat Leniently:  
Basic sentence = 2.4 years
- Otherwise, Treat Normally:  
Basic sentence = 6.3 years

1. \_\_\_\_\_

2. Degree of Premeditation

- If co-offenders involved, Add 2.1 years:

2. \_\_\_\_\_

3. Degree of Responsibility

- If principal offender, Add 4.0 years:
- If courier, Add 1.4 years:

3. \_\_\_\_\_

4. Degree of Co-operation with Authorities

- If offender cooperated with authorities,  
Subtract 1.1 years:

4. \_\_\_\_\_

5. Legal Status of Offender

- If in breach of court order, Add 6.6 years:
- If prior good character/first offence,  
Subtract 0.6 years:
- If time already spent in prison,  
Subtract 0.3 years:

5. \_\_\_\_\_

6. Drug use/Addiction

- If offender is an addict/drug for personal use,  
Subtract 3.1 years:

6. \_\_\_\_\_

7. Rehabilitation

- If rehabilitation prospects good,  
Subtract 1.0 years:

7. \_\_\_\_\_

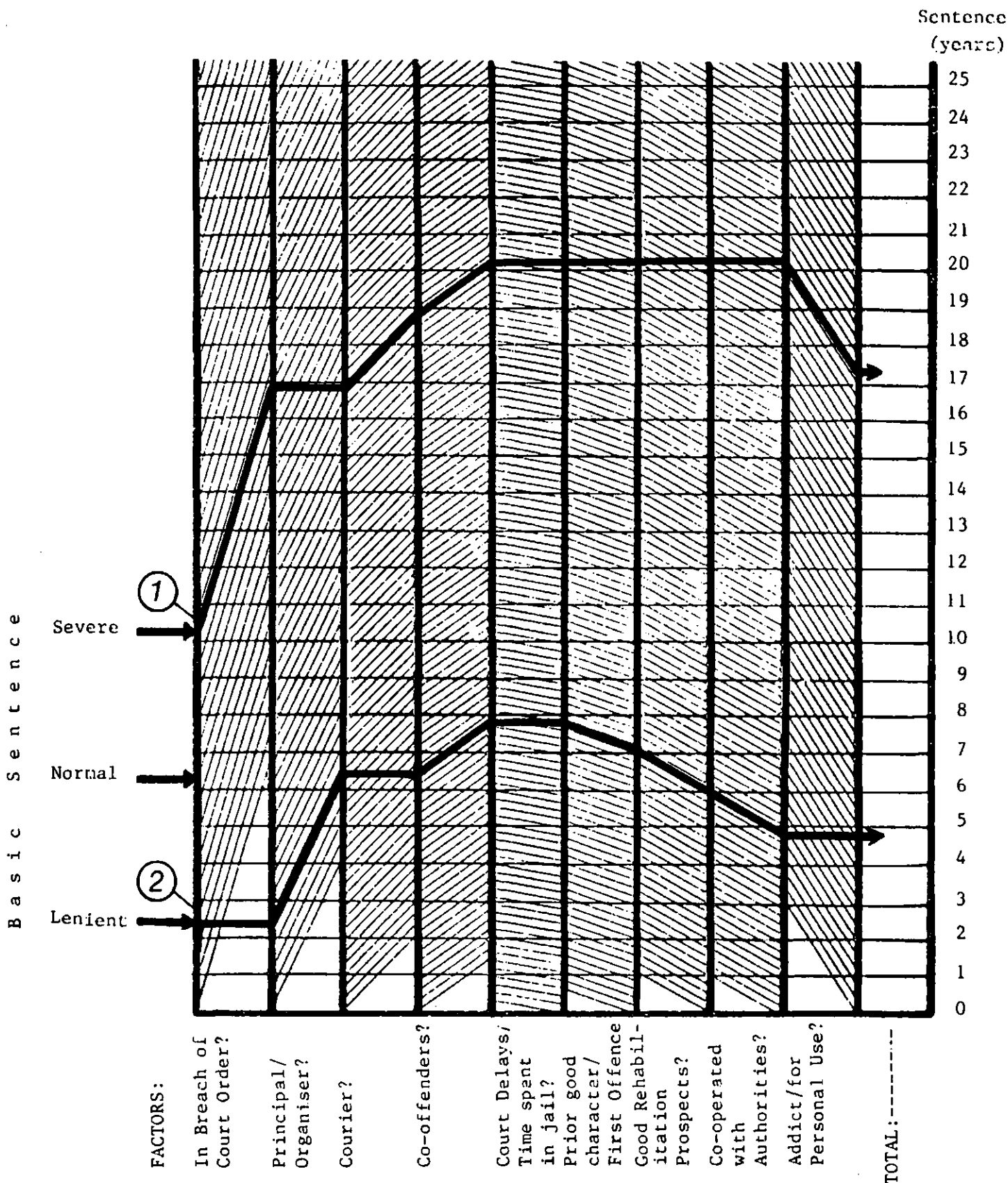
8. ADD the results of steps 1 to 7 to give Total Sentence:

TOTAL: \_\_\_\_\_

A formula such as shown in Table 25 should never be used so unimaginatively as to simply insert the prescribed figure at each step without thinking of the implications. Regression models produce good results because they average out the errors and differences between cases so the results of such analyses are themselves averages in a complex way. The prescribed addition of 4.0 years and 1.4 years for principal and courier respectively should, for example, be regarded as average figures, and a user of this model is entitled to interpolate or extrapolate around these numbers. The principal offender who for example played a particularly vicious role in instigating the offence should perhaps be given 5 years on Step 3, while a reluctant courier might be given only 1 year.

The results of such interpolation can best be seen graphically, and Figure 9, although particularly complex at first sight, is extremely easy to use. Two examples are given of hypothetical cases, and the way the additive model produces a notional sentence. The figure is effectively 9 graphs side by side, one for each of the factors listed along the bottom of the figure, with starting points for Severe, Normal and Lenient basic sentences at the lower left of the graphs. The height on the graph represents the Sentence in years, and we progress from the starting point appropriate for a given case by following either the sloping lines or the horizontal according to whether the factors, in turn, are featured in the case or not. So for example, hypothetical case 1 begins at 'Severe', moves upwards for breach of a court order, then stays at the same level because the offender was not the principal offender, and so on for each factor listed in Figure 9. Hypothetical case 2, however, starts at 'Lenient', moves horizontally because the offender was not in breach of a court order, but then moves upwards because the offender was a principal

Figure 9 - Graphic Method of Sentence Determination using the Additive Formula



Hypothetical Examples:

① Offender has serious record; case involved a large quantity of drugs - Basic Sentence:-Severe. He was on parole at the time, was a courier and co-offenders were involved. No court delays; not his first offence; rehabilitation prospects not good; not co-operative. Drug was however for personal use. Sentence - just over 17years.

② No serious record; quantity small - Basic Sentence:-Lenient. Not in breach of Court Order, but was principal offender. Co-offenders were involved. No court delays. Offender's prior good character, rehabilitation prospects and co-operation were taken into account. Sentence - almost 5years.

and so on.

Intelligent use of the graph might occasionally demand a starting point somewhere between Severe and Normal, or a 'slope' somewhat less than that shown for Breach of Court Order or any other applicable factor. This is not to be regarded as 'cheating' but as a rational use of the model as an aid to sentencing for it recognises that each factor lies on a continuum of seriousness.

Even so there remains something unsatisfactory about this model which effectively only uses the variable DISC to determine what we have labelled the basic term, while fixed additions or subtractions are made according to the aggravating/mitigating factors regardless of the level of severity the case deserved. As discussed above, despite this model's high predictive value, it seemed more appropriate that the additions and subtractions from the basic term should be linked in some way to the level of severity of the case. This led us to formulate the multiplicative model.

ii) The multiplicative model

Our final regression models handled the aggravating/mitigating factors in a rather different way to all previous runs. Having first determined, in the same way as before, whether the case deserves severe, normal or lenient treatment, and thus determining the basic sentence, these new models add or subtract a percentage of the basic term, instead of just a flat figure, for each of the relevant factors. Table 26 shows the final multiplicative models for both head sentences and non-parole periods. For example, instead of adding four years for principals, making 6.4, 10.3 and 14.2

years for lenient, normal and severe cases respectively, this model multiplies the basic term by 1.80, making 4.3, 11.3 and 18.4 years respectively. The multiplicative model tends to produce better estimates of the lenient and severe extremes in sentences and again produced correlations around the 0.8 mark (0.82 for head sentences, 0.78 for non-parole periods.)

Once again we have presented a graphical method of determining sentence lengths (Figure 10) which is used in basically the same way as the additive model. The divergent nature of the oblique lines reflects the multiplicative relationships whereas the parallel oblique lines of Figure 9 reflected additive relationships. The same two hypothetical examples are given for comparison with Figure 9. The sentences suggested by the two models in these cases are very similar, although that is not necessarily always the case.

One feature of the multiplicative graph is the absence of oblique lines for the factor Co-operated with Authorities, indicating that, as the Table shows, this factor makes no difference to the head sentence. The only reason the factor was included at all was because of its significance in determining non-parole periods, for which a similar graph could easily be constructed.

It is interesting to note that quite subtle differences emerge in this model in respect to the effects the various factors have on head-sentences and non-parole periods. Factors such as quantity of drug, drug record and rehabilitation prospects tend to affect the head-sentence and non-parole period equally. The same is true of several of the other factors used as mitigating or aggravating circumstances, but not so in

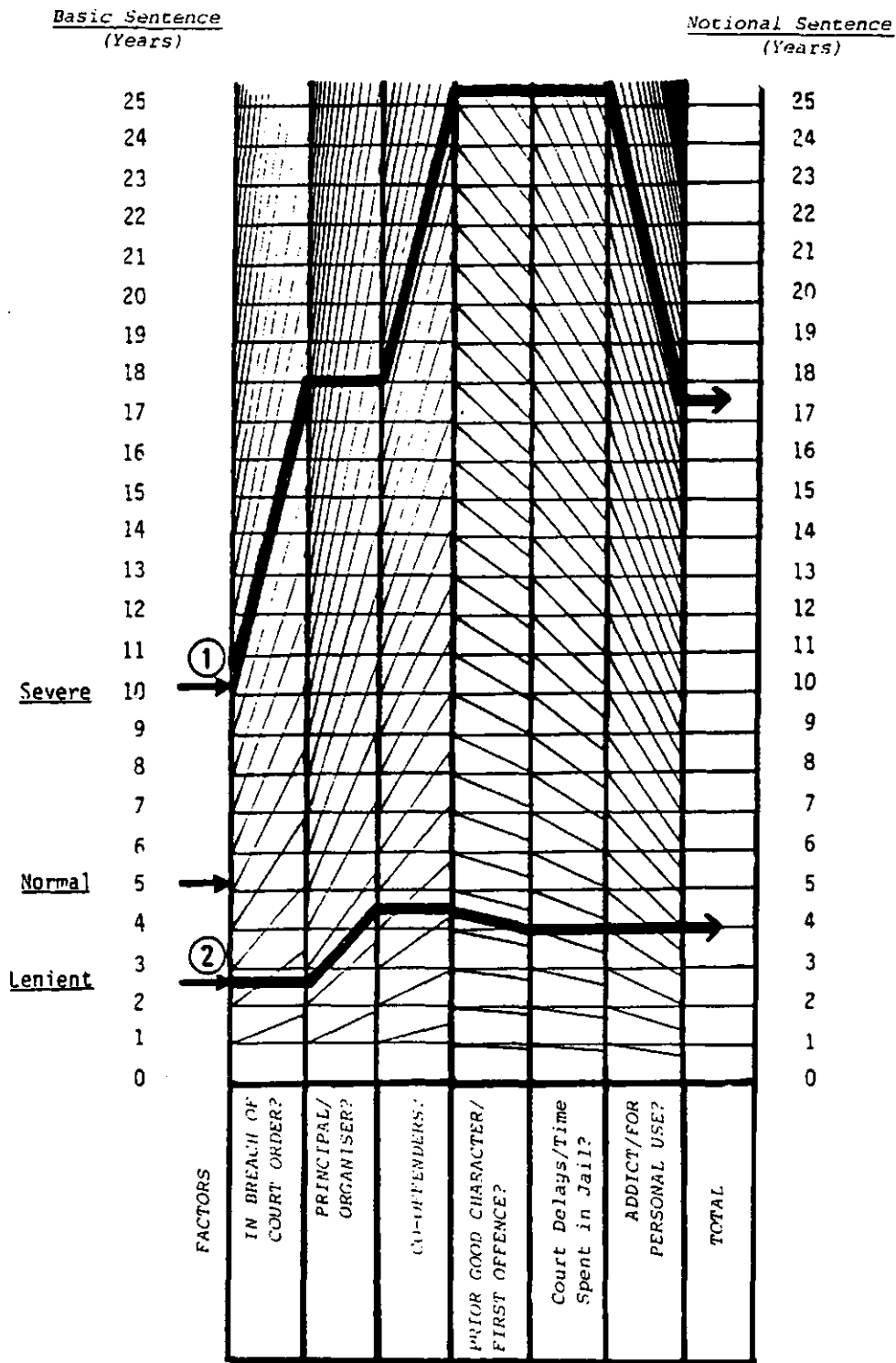


TABLE 26: MULTIPLICATIVE FORMULAE FOR SENTENCING HEROIN OFFENDERS

	<u>Head Sentence</u>	<u>Non-parole Period</u>
1. <u>Determine Level of Basic Sentence:</u>		
(Allocate cases as per Table 25 above)		
Severe cases : Sentence = 10.2 years, NPP = 4.7 years		
Normal cases : Sentence = 5.2 years, NPP = 2.3 years		
Lenient cases: Sentence = 2.3 years, NPP = 1.1 years	1. _____	_____
2. <u>Degree of Premeditation:</u>		
If co-offenders involved: Multiply Sentence by 1.45		
Multiply NPP by 1.50	2. _____	_____
3. <u>Degree of Responsibility</u>		
If principal offender : Multiply Sentence by 1.80		
Multiply NPP by 1.95	3. _____	_____
4. <u>Degree of Co-operation with Authorities</u>		
If offender co-operated with authorities:		
Multiply Sentence by 1.00		
Multiply NPP by 0.90	4. _____	_____
5. <u>Legal Status of Offender</u>		
If in breach of court order: Multiply Sentence by 1.75		
Multiply NPP by 2.20		
If prior good character/first offence:		
Multiply Sentence by 0.90		
Multiply NPP by 0.90		
If time already spent in prison:		
Multiply Sentence by 0.85		
Multiply NPP by 0.55	5. _____	_____
6. <u>Drug Use/Addiction</u>		
If offender is an addict/drug for personal use:		
Multiply Sentence by 0.70		
Multiply NPP by 0.70	6. _____	_____
7. <u>MULTIPLY the results of steps 1 to 6 to give total Sentence and Non-Parole Period:</u>		
	<u>TOTAL:</u>	_____

Figure 10 -

GRAPHIC METHOD OF SENTENCE DETERMINATION  
USING THE MULTIPLICATIVE FORMULA



HYPOTHETICAL EXAMPLES

1. Offender has serious record; case involved a large quantity of drugs - Basic Sentence:- severe. Was on parole at time, was a courier and co-offenders were involved. Not a first offence; rehabilitation prospects not good. No significant court delays or time spent in prison were taken into account. Drug was however for personal use. Sentence - 17½ years.
2. No serious record; quantity small - Basic Sentence:- Lenient. Not in breach of court order, but was principal offender. Co-offenders were not involved. The offender's prior good character, and rehabilitation prospects were taken into account. Court delays were insignificant. The drug was however for profit. Sentence - 4 years.

relation to the offender on parole/probation, time served during court delays, or cooperation with authorities. In these circumstances the emphasis of the judges is clearly on 'rewarding' the offender by modifying the time he or she is actually likely to spend in gaol, rather than modifying the head-sentence itself. The effect of this is to retain the general deterrent effect of the head-sentence while at the same time enabling marginal adjustments to be made to the punitive component of the non-parole period.

Our analysis does not prove the existence of a logical sentencing decision-making process. At best it shows that the statistics are consistent with the existence of such a process. The analysis shows that the statistics are in fact consistent with a highly plausible and ethically defensible process - made all the more plausible by the subtleties outlined in the previous paragraph. The correlations between the actual sentences handed down and those 'predicted' by the models are also sufficiently high (0.82 for head-sentences, 0.78 for non-parole periods) to suggest that the model is an adequate description of the true decision-making process. It must be reiterated that, logical as these results may be, this analysis has not proved that this is how sentencers work - either consciously or unconsciously. All we have done is shown that there exist mathematical 'formulae' which, when applied to factors apparently important in 90 heroin cases, are able to describe fairly accurately what the actual head sentences and non-parole periods were. By implication therefore, given a new set of circumstances in a particular case, we are also able to predict what the head sentence and non-parole period ought to be for that case.

We can say that, if sentencers were to use this rational set of

formulae, their sentences would be broadly consistent with those handed down in our 90 case sample. Further we can say that, this being the case, our model could be used as a guide, ensuring simply that a sentence for a given case was commensurate with previous cases embodying common features. It could therefore be used equally well by judges, reducing the time spent comparing the circumstances and sentences of a current case with those of its many precedents, and by defence counsels wishing to ensure that their clients have indeed received a just sentence.

#### Summary

It appears that judges use one small group of variables to determine the level of severity in sentencing, while the totality of information is then used to fine-tune the precise sentence. A similar process is involved in the determination of the non-parole period.

Three key factors - quantity of drug involved, prior criminal record of offender and rehabilitation prospects - are fundamental to the judge's decision, and effectively determine the basic sentence. Using the multiplicative model (our preferred model) this is:

2.3 years for lenient decisions (1.1 years non-parole period);

5.2 years for normal cases (2.3 years non-parole period); and

10.2 years for cases demanding 'severe' treatment (4.7 years non-parole period).

This 'basic figure is then modified according to the detailed features of the case and the circumstances of the offender, being

lengthened for aggravating factors such as a high degree of organisational responsibility and shortened for mitigating factors such as cooperation with authorities.

Thus sentencing of drug offences is shown to be a largely methodical and logical process in which, ultimately, the punishment is tailored fairly closely to the circumstances of the offence and to certain other identifiable factors.

## Chapter VIII

### CONCLUSIONS AND IMPLICATIONS OF RESEARCH

This study has shown that it is possible to develop sentencing models with the aid of the computer that can not only mathematically describe, but also prescribe, sentences with a remarkable degree of accuracy. All that is required is certain specific items of information. The fact that the cases analysed fit so neatly into logical and intuitively sound models also suggests that sentencing disparity, in so far as it applies to Federal drug offenders who have been sentenced to terms of imprisonment, is not such a serious problem as has been imagined. We do not claim that there is no disparity, but we do claim that courts in general treat certain aggravating and mitigating factors in a consistent way, with the result that like cases tend to be treated alike, and unlike cases tend to be treated differently.

At the same time we are conscious of the limitations of our study. We did not, for example, study the disparity that obtains between non-custodial and custodial sentencing practices even though a similar methodology could also be devised for this purpose. As previously indicated, a more thorough study would incorporate an analysis of all drug cases. Indeed whenever there is a need to describe and evaluate the extent of unjustified sentencing disparity that obtains with regard to any particular type of offence (e.g. armed robbery, manslaughter, larceny, sexual assault) the same kind of methodology may profitably be applied. In this study we have restricted ourselves to the study of Federal drug offences only, and a natural progression would be to analyse the sentencing pattern of offenders who breach State drug laws. This could be followed by an examination of the disparity (or similarity), between State and Federal sentencing practices. It may be, for example, that the impression of gross

disparity in sentencing drug offenders emanates from the Federal/State jurisdictional dichotomy. A methodology such as ours would be ideally suited for comparing these systems and identifying those variables (if any) that may or may not justify disparate treatment of these two groups of offenders.

Our study identified nine variables which appeared to be most influential in determining sentence lengths. This of course is not the same as saying that references to these nine variables were made in each and every case. Indeed one of the difficulties encountered in our study was that if the judges did not refer to a particular item in their address on sentence (e.g. that the offender was a drug addict) we had no way of knowing whether this factor was relevant to the sentencing decision. We had to assume that the factor was not a consideration. In other words our analysis was restricted to what the judges said and not necessarily to what they thought. However having identified nine variables of great significance it would seem reasonable that henceforth these same variables could be used as a check-list for judges when they are considering sentence. If it is known that all these variables are taken into account in the sentencing process, then the reasons given by judges would become more uniform. We do not suggest that only these factors on the check-list should be taken into account but that none of these factors should be ignored or (if relevant) not adverted to in the reasons given for the sentencing decision.

Our research does not reveal any significant problems with the common law system of sentencing. However it is submitted that the system can be improved or assisted by computerised analysis and monitoring of

sentencing decisions. The kind of models that have been developed in this study serve to highlight what the judges as a group consider to be the important determinants of sentence lengths. It is not suggested that there are not other relevant determinants, only that such determinants are not statistically significant. Accordingly the type of models developed here could be used as guidelines for sentencers and be of particular assistance for new or inexperienced sentencers. The model could be used as a checking device, the sentencing judge first reaching his or her decision in the normal way and then testing it against the 'notional' sentence.

We have submitted that judges would benefit from a sentencing model of a kind referred to in this study. We point out that the Crown prosecutor, counsel for the defence, the prisoner, and indeed appeal courts themselves would also benefit from the availability of such a model. Legislators may also wish to know what considerations are taken into account by the courts in sentencing and whether these are appropriate. In short, a more scientific system of sentencing could prevail, where ignorance would be replaced by knowledge, and where criticisms relating to disparate sentencing can be evaluated, and, if necessary, checked.

To be workable the model would need to be modified from time to time by incorporating the most recent decisions. This would ensure a dynamic sentencing system, retaining all the flexibility of the current system while helping to reduce the frequency of unjustified disparities in sentencing. The model would therefore be guided by the judges decisions themselves, and the judges decisions in turn would be assisted by the model.



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APPENDIX A

SENTENCING FEDERAL DRUG OFFENDERS

WORK SHEET

SENTENCING DATA - FEDERAL DRUG OFFENDERS

Sequence No.

- A. Case Name
- B. Citation
- C. Federal Prisoner Reference
- D. Jurisdiction (State and Court)
- E. Judges [list name(s)]
- F. Date(s) heard
- G. Date sentence imposed
- H. Date sentence commenced

I. <u>Offence</u>	<u>Sentence</u>				
	Type (list each charge sep.)	Plea (G or N)	Verdict (G or N)	Impris.	Fine (\$100)
<input type="text"/> 9	<input type="text"/> 10	<input type="text"/> 11	<input type="text"/> <input type="text"/> / <input type="text"/> <input type="text"/> 12	<input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> 13	<input type="text"/> 14
<input type="text"/> 15	<input type="text"/> 16	<input type="text"/> 17	<input type="text"/> <input type="text"/> / <input type="text"/> <input type="text"/> 18	<input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> 19	<input type="text"/> 20
<input type="text"/> 21 Other	<input type="text"/> 22	<input type="text"/> 23	<input type="text"/> <input type="text"/> / <input type="text"/> <input type="text"/> 24	<input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> 25	<input type="text"/> 26
<input type="text"/> 27	<input type="text"/> 28	<input type="text"/> 29	<input type="text"/> <input type="text"/> / <input type="text"/> <input type="text"/> 30	<input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> 31	<input type="text"/> 32

- J. Net Sentence
- | Impris.  | N.P.P.   | Fine<br>(\$100)  | Other                   |
|--|--|--|-------------------------|
| <input type="text"/> <input type="text"/> / <input type="text"/> <input type="text"/> 33 | <input type="text"/> <input type="text"/> / <input type="text"/> <input type="text"/> 34 | <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> 35 | <input type="text"/> 36 |

WORK SHEET

K. Comment ..... 37  
 .....  
 .....

L. Circumstances of Offence ..... 38  
 .....  
 .....

M. Type of Drug

Drug	Quantity	Est. Street Value (\$100)
<input type="text"/> <input type="text"/> 39	<input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> 40	<input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> 41
<input type="text"/> <input type="text"/> 42	<input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> 43	<input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> 44
<input type="text"/> <input type="text"/> 45	<input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> 46	<input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> 47
<input type="text"/> <input type="text"/> 48	<input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> 49	<input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> 50

N. Prior Criminal Record

Estimate of Seriousness:

- (a) General Criminal Record (include drug offences)  51
- (b) Drug Conviction Record only  52
- (c) Approximate date of last conviction for drug offence   53
- (d) Comparison of present offence with prior drug record  54

O. Drug Addiction Is offender a drug addict?  55

P. Appeal

Type of Appeal

	56
--	----

Result of Appeal

	57
--	----

Prior Sentence

Impris.	N.P.P.	Fine (\$100)	Other															
<table border="1" style="display: inline-table; width: 40px; height: 20px;"> <tr> <td style="width: 15px;"></td> <td style="width: 15px;"></td> <td style="width: 10px; border: none;">/</td> <td style="width: 15px;"></td> <td style="width: 15px;"></td> </tr> </table> <span style="margin-left: 5px;">58</span>			/			<table border="1" style="display: inline-table; width: 40px; height: 20px;"> <tr> <td style="width: 15px;"></td> <td style="width: 15px;"></td> <td style="width: 10px; border: none;">/</td> <td style="width: 15px;"></td> <td style="width: 15px;"></td> </tr> </table> <span style="margin-left: 5px;">59</span>			/			<table border="1" style="display: inline-table; width: 60px; height: 20px;"> <tr> <td style="width: 15px;"></td> <td style="width: 15px;"></td> <td style="width: 15px;"></td> <td style="width: 15px;"></td> </tr> </table> <span style="margin-left: 5px;">60</span>					<table border="1" style="display: inline-table; width: 60px; height: 20px;"> <tr> <td style="width: 60px;"></td> </tr> </table> <span style="margin-left: 5px;">61</span>	
		/																
		/																

State reasons for variation of sentence ..... 62  
 .....  
 .....

Q. Sentencing Factors

TABLE 1. Factors relevant to sentence imposed.

Factors relevant to specified N.P.P.

A. or M		No.		63
	/			

A. or M		No.		64
	/			

TABLE 2. General principles relied on in judgement

A. or M		No.		N.P.P.		65
	/		/			

SENTENCING FEDERAL DRUG OFFENDERS

CODING SCHEDULE

Jurisdiction

This item consists of two numbers: first one which identifies the State, the second identifies the court. E.g. the N.S.W. Ct of Criminal Appeal is coded 2 4

State

A.C.T.	1
N.S.W.	2
Vic.	3
Qld	4
S.A.	5
W.A.	6
Tas.	7
N.T.	8

Court

Courts of Summary Jurisdiction	1
District or County Courts	2
Supreme Court	3
Court of (Criminal) Appeal	4
Federal Court	5
High Court of Australia	6

OffenceTypeImport/ExportCode

Section unspecified

A

233B(1)(b)

B

233B(1)(cb)

C

233B(1)(d)

D

Possession

Section unspecified

E

233B(1)(c)

F

233B(1)(ca)

G

Other Offence

State offence in box e.g.

Robbery s.96



Net Sentence

Imp. Refers to actual sentence imposed in respect of all offences, e.g. if there are two sentences of 5 years each, but are to be served concurrently insert 0500. If they are to be served consecutively insert 1000.

N.P.P. Insert Non-parole period if one is specified. If court refuses to specify a non-parole period insert 9999. If non-parole period is not referred to at all leave blank. Note, if expiry date of N.P.P. only is given calculate period from date sentence imposed.

Fine Note that this is specified in \$100 units. If the fine is less than \$1,000 take to nearest next whole number, e.g. \$850 enter 9. Similarly for \$10,250 enter 103.

<u>Other</u>	Recognizance or bond without supervision	1
	Probation recognizance or bond without supervision	2
	Suspended sentence	3
	Restitution or compensation	4
	Forfeiture of drugs/money	5
	Periodic detention	6
	Community Service or Work Order	7
	Attendance Centre	8
	Rising of the Court	9
	Other (insert in comment section)	0

Type of Drug :Narcotics

Opium	01
Heroin (diacetylmorphine)	02
Morphine	03
Other (unspecified)	04

Cannabis

Cannabis/Indian Hemp	11
Cannabis plants	12
Cannabis seeds	13
Marihuana	14
Cannabis resin/hashish	15
Cannabinol	16
Liquid hashish/hashish oil	17
Buddha sticks	18

Other

Amphetamines	21
Barbiturate/hypnotics	22
Tranquillizers	23
Hallucinogens	24
Other (unspecified)	25

Prior Criminal Record

Estimate seriousness of criminal record in accordance with the following scale. (If borderline insert lower number.)

- 0 Persons with no previous convictions.
- 1 Persons with convictions of a minor nature - usually dealt with by fine or bond.
- 2 Persons with prior convictions for serious offences, but dealt with by probation order or suspended sentence. Include in this category persons sentenced to terms of imprisonment, which in the aggregate do not exceed 6 months. For example two consecutive sentences of 3 months each would just qualify for inclusion here. However if in addition to these sentences the person had previously served a term of imprisonment then the total period of imprisonment would exceed 6 months.
- 3 Persons sentenced previously to imprisonment for more than 6 months but less than 3 years. (As in 2, add sentences together if more than one and if they are not imposed concurrently.)
- 4 Persons sentenced previously to 3 years but less than 10 years' imprisonment. (As above, add sentences together if more than one.)
- 5 Persons sentenced previously to 10 years of imprisonment or more. (As above, add sentences together if more than one.)

Prior Criminal Record (continued)(b) Drug Conviction Record Only

Estimate the seriousness of the offender's criminal record according to the above scale, but disregard all offences except for drug offences.

(c) Approximate date of last convictions

This item is self-explanatory; the last two digits of the year of conviction should be entered only.

(d) Comparison of recent offence with prior drug record

If the offender has a record of prior drug offence(s) indicate whether the present offence (the most serious if more than one) is

- |                    |   |
|--------------------|---|
| (a) more serious   | 1 |
| (b) less serious   | 2 |
| (c) about the same | 3 |
| (d) not sure       | 4 |

than the offence(s) disclosed in the record.

Offenders Particulars

Much of this material has already been coded in the Federal Prisoners Project. Check to see whether the Federal Prisoners Project has been filled in, otherwise there may be problems in locating this information. If no details are available from that project it will be necessary to obtain the following details:

- Sex
- Race
- Date of Birth
- Marital Status
- Occupation
- Nationality, etc.

This can be done by completing Federal Prisoners Project Data sheet.

Drug Addiction

Simply insert whether the offender is considered to be a drug addict

Yes	1
No	2
Unknown	3

Appeal

If this case is an appeal state whether it is:

an appeal against conviction only	1
an appeal against <u>sentence</u> only	
(a) by the offender	2
or	
(b) by the Crown	3
an appeal against conviction and	
sentence	4
not sure	5

Result of Appeal

Indicate whether there was a variation to sentence as follows:

Yes	1
No	2

Prior Sentence

Insert old sentence which now has been varied. For 'other' category refer: (Net sentence).

Sentencing FactorsLISTS I and II

Lists I and II attempt to identify factors that are taken into account when the court determines the sentence to be imposed. They are to be inserted if and only if they are expressly adverted to or clearly implied in the course of the courts deliberations on sentence. The items may be prefixed with 'A' (for aggravating factor) where the court has singled out particular factors which it thinks justifies a harsh approach to be taken, and conversely the factors justifying leniency should be prefixed with 'M' (for mitigating factor). If it is not clear whether the factor adverted to should be labelled A or M, omit the prefix but insert the relevant item nevertheless.

Note that the same considerations may relate to the whole of the sentence as well as to the non-parole period. If so, insert them in both boxes. If for example a factor relates specifically to the N.P.P. but not to the sentence generally, only insert the item in the N.P.P. box.

Where new aggravating factors or mitigating factors are discovered, these should be added to the list and given an appropriate number for future reference.

With regard to the final item, it will be noted no separate boxes are provided for the head sentence and the N.P.P. Where reference is made to the N.P.P. only, the letter N should be inserted after the item number. Thus if the court reduces a N.P.P. on the grounds of rehabilitation the appropriate entry would be M I O N

LIST I

- |    |   |    |   |
|----|---|----|---|
| 00 | <u>Drug</u>   | 50 | <u>Offender</u>                                       |
| 01 | type of drug  | 51 | prior drug criminal record                            |
| 02 | quantity of drug  | 52 | bad character, incl. non-drug offences                |
| 03 | value of drug   | 53 | prior good character/first offender                   |
| 04 | quality of drug   | 54 | unemployed  |
| 10 | <u>Nature of drug</u>   | 55 | drug addict   |
| 11 | as a 'lead' to hard drugs   | 56 | on parole/probation/bond at time of offence           |
| 12 | a comparatively harmless drug                                       | 57 | under influence of drugs/alcohol at time of offence   |
| 13 | a highly destructive or harmful drug                                | 58 | age of offender                                       |
| 14 | drug as a serious social evil                                       | 59 | alien or ethnic background                            |
| 15 | user/addict involved in crime                                       | 60 | mental instability or disorder                        |
| 16 | corruptive, filthy, detestable, vile, wretched                      | 61 | physical illness or handicap                          |
| 17 | as a 'lead' to crime  | 62 | familial, domestic circumstances                      |
|    |   | 63 | pressures (unspecified)                               |
| 20 | <u>Purpose of Offence</u>   | 70 | <u>Other</u>  |
| 21 | trafficking for commercial gain                                     | 71 | effect of sentence on offender's employment prospects |
| 22 | for personal use  | 72 | 'free' to do what one wishes                          |
| 23 | high profit expectation   | 73 | lack of affirmative evidence                          |
| 24 | trafficking in general  | 74 | degree of cooperation with authorities                |
| 30 | <u>Nature of offence</u>  | 75 | remorse   |
| 31 | premeditated/planned  | 76 | prospects for rehabilitation                          |
| 32 | spontaneous   | 77 | guilty plea   |
| 33 | involving co-offender/s   | 78 | delay   |
| 34 | offence carried out alone   | 79 | no reasons given for sentence                         |
| 35 | syndicate/organized or professional crime                           | 80 | prevalence of drug use                                |
| 36 | large scale/major offence   | 81 | isolated offence                                      |
| 37 | small scale offence   | 82 | trafficking to support own habit                      |
| 38 | use of violence, incl. use of weapon                                | 83 | time already spent in jail                            |
| 39 | offender <u>threatened with violence to comply with importation</u> | 84 | influence of other on offender                        |
|    |   | 90 | conversion to religion                                |
|    |   | 91 | ambivalence to gravity of trafficking                 |
| 40 | <u>Offender's role</u>  |    |   |
| 41 | principal/instigator  |    |   |
| 42 | minor role  |    |   |
| 43 | courier   |    |   |
| 44 | mere paid agent   |    |   |
| 45 | mere physical control, incl. having no knowledge of drugs           |    |   |
| 46 | determined by factors beyond offender's control                     |    |   |
| 47 | <u>Relatively less significant role than co-offenders</u>           |    |   |

LIST II \*

- 01 Giving effect to legislative intent
- 02 Desirability for consistency in sentencing
- 03 Deterrence (general or unspecified)
- 04 Deterrence (specific)
- 05 Prevalence of offence
- 06 Retribution
- 07 Just Deserts
- 08 Denunciation
- 09 Community protection
- 10 Rehabilitation
- 11 Mercy
- 12 Incapacitation (separation; isolation of offender)
- 13 Other (specify)

\* NOTE: Owing to the uncertainties encountered with coding the information contained in this list it was decided not to proceed with analysing these data.