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**THE RELATIONSHIP BETWEEN THE NEW YORK STATE 1980 GUN
CONTROL LAW AND THE PROSECUTION OF GUN POSSESSION ARRESTS
IN BRONX COUNTY**

City University of New York

Ph.D. 1985

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**THE RELATIONSHIP BETWEEN THE NEW YORK STATE 1980
GUN CONTROL LAW AND THE PROSECUTION
OF GUN POSSESSION ARRESTS
IN BRONX COUNTY**

BY

LAUREN GRACE PETE

**A dissertation submitted to the Graduate Faculty in Sociology
in partial fulfillment of the requirement for the degree of
Doctor of Philosophy, the City University of New York**

1985

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

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ABSTRACT
THE RELATIONSHIP BETWEEN THE NEW YORK STATE GUN CONTROL LAW
AND THE PROSECUTION OF GUN POSSESSION ARRESTS
IN BRONX COUNTY

by

Lauren Grace Pete

Adviser: Dr. Edward Sagarin

In response to increased use of handguns in violent street crime, New York State amended the Penal Code to provide for a mandatory minimum sentence of one year for illegal handgun possession. The legislators had as their goal, the hope of reducing the chances that such handguns will be used in violent street crime.

The New York State Gun Control Law represents some acceptance of the view that there is a causal relationship between the mere possession of a handgun, the availability of handguns, and criminal violence. The expectations are clear: penalize handgun possession and a strong disincentive toward possession is created. In turn, fewer instances of handgun possession will reduce the gun-related criminal violence. But has the trend in fact occurred? To date, only about half of all defendants charged with illegal handgun possession receive the mandatory minimum sentence. Were the fifty percent who receive jail or prison sentences, responsible for the violent street crime that has made targets of gun possessors?

Although lenient sentencing practices of judges have been made the culprits of increased use of handguns, it is the prosecutor's office which has received little or no attention by researchers, and it is to this failure that I focus my attention in this research.

A study of the relationship between the N.Y.S. Gun Control Law on the prosecution of handgun possession cases presents the opportunity to simultaneously study (1) an attempt to curtail illegal handgun possession by increasing the penalty for such possession and (2) an attempt at restricting plea-bargaining to increase the sentences given those who illegally possess handguns.

Questions answered by my research include: What happens when mandatory sentences are coupled with a policy that forbids plea-bargaining? Are prosecutors left with no option but to go to trial? Does this in turn lead to an over-burdened Prosecutor's Office? Do prosecutors adopt informal methods of plea-bargaining to adjust to the new restrictions? Are prosecutors declining to prosecute handgun possession cases where the one year penalty, although legally correct, would be a harsh sentence in light of the defendants background and other factors?

I used quantitative dispositional data of a random sample of defendants who were indicted for illegal handgun possession. I analyzed data from a one year period before the law took effect and compared that to data one year after the law took effect. The data was supplemented with interviews of assistant district attorneys, defense counsel and judges.

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I. INTRODUCTION AND STATEMENT OF THE PROBLEM

More than in any other Western democracy, Americans own a greater number and variety of firearms, and they use their firearms to assault, maim, and kill one another much more often. Thus, it is reasonable to assume that violence in the United States is greater, and one of the means by which that violence might be reduced—through gun control—is more difficult to accomplish than in other countries. It is the significance of firearms in American life that has led to the current gun control debate in national life.

The controversy of gun control has often turned into a war of statistical data and its interpretation. What makes the use of statistics paradoxical, in the dispute over whether the availability of firearms contributes significantly to violent crime, is that those on either side of the issue often invoke the same statistics to make their points. For instance, there are now some 120 million guns in the United States. Opponents of gun control tend to conclude from that fact that firearms are much too numerous to be effectively controlled. Proponents of gun control, on the other hand, contend that the problem is so serious that stricter controls are necessary.¹

In response to the outcry by proponents of gun control to reduce the availability of firearms, some state legislatures have enacted laws which set mandatory minimum sentences for those convicted of firearm possession. On the other hand local governing bodies like Frankelintown, Pennsylvania and Kennesaw, Georgia have enacted ordinances requiring the head of household to own and possess a gun in the home. If not complied with in Pennsylvania, the head of household faces a penalty of \$300.00 and thirty days in jail. This diversity in the law makes it possible for someone in a restricted access state to purchase a gun elsewhere. Most illegal guns that find their way on to the streets of New York originally come from Ohio, Florida, or Georgia.²

The shots that wounded President Reagan and killed John Lennon added renewed vigor and immediacy to the question of gun control and revitalized the continuing debate; a debate in which many citizens view their right to own guns as an inalienable right and support such beliefs with their support of lobbying groups like the National Rifle Association. They argue that given the number of firearms, the percentage used in crime is small and only violent criminals should be prohibited from owning them.³

However, other citizens view the curtailing of firearm ownership as a means of reducing violent street crime. Reduction of the number and availability of firearms, they argue, will reduce killings and violence. Lobbying groups that support this view, like Handgun Control, Inc. fight for federal legislation to curtail handgun manufacture, distribution, use and possession.⁴

There have been a number of opinion polls and national surveys attempting to describe how Americans feel about gun control. Reviewing their results indicates that a large majority of the public favors measures that would require the registration or licensing of firearms. However, the public would not favor such measures if their costs were inordinately high. The surveys indicate that most Americans believe that a national effort is needed for any gun control law to be effective.⁵ At present, the Federal 1968 Gun Control Act prohibits the sale of weapons through the mail and bans the importation of the so-called "Saturday Night Special." However, it does not proscribe the importation of foreign-made parts that make up those weapons. the Gun Control Act in effect makes it a felony for anyone other than a federally licensed dealer to purchase firearms in one state for sale in another state. The law requires all dealers to keep a record of all firearm sales. A dealer must refuse to sell a firearm to a minor (a person under the age of 21), convicted felon, fugitive, drug addict, mental defective, alcoholic, or a resident of another state. Because no prior check is required, there is no way for a dealer to know if a potential customer is ineligible.⁶

Gun control is further impeded by the fact that each state has its own laws regulating the purchase, possession and manufacture of guns and the laws vary widely in scope, restrictions and penalties. The nation's capital has the most stringent. It is virtually impossible for anyone other than a law-enforcer, security guard or courier to obtain a gun license in Washington. Massachusetts and New Jersey, as in New York State require thorough background checks before a gun purchase permit is issued. However, many states like Florida and Virginia require nothing of a gun buyer, only that he/she show a driver's license at the time of purchase.

Equally large majorities also oppose any outright ban on private ownership, although there is a majority sentiment favoring a ban on the manufacture and sale of cheap low-quality handguns.

Although ninety percent of those polled do not feel that a licensing requirement for handguns would violate their constitutional right to bear arms, only about forty to fifty percent of the same group polled felt that this kind of registration would reduce crime.⁷ A large national survey conducted in 1978, by Patrick Caddell showed that sixty-eight percent of those surveyed strongly favored requiring mandatory minimum prison sentences for persons using a gun in a crime, but only thirty-eight percent strongly favored requiring mandatory prison sentences for all persons carrying or possessing a handgun without a license and seventy-eight percent agreed with the statement that gun control laws affect only law-abiding citizens and that criminals will always be able to find guns.⁸ However, a more recent Gallup Poll, although affirming the public response to similar questions, reported a wide spread feeling among the respondents that stricter gun controls would reduce crime and deaths resulting from family arguments. George Gallup, the direct of the survey stated:

Even significant proportions of Americans who oppose thought handgun control concede that such laws would reduce crime and deaths. Many gun owners as well grant that tougher laws would reduce crime and deaths. Many gun owners as well grant that tougher laws would contribute toward these desirable goals.⁹

There are some 20,000 federal, state and local gun control laws. Notwithstanding the above, it is the opinion of some observers, that the gun control effort has the virtually failed.¹⁰ Firearms continue to proliferate, whereas deaths associated with guns have increased significantly. Approximately 30,000 deaths occur annually as a result of accidental homicidal, or suicidal use of firearms.¹¹ Studies of firearms used in crimes confiscated by police confirm that they are predominately handguns; a sizable fraction enter criminal channels through theft from residences; many are found to have crossed state lines before their use in crime. The handgun is comparatively small, easy to conceal, accounts for roughly 25% of the privately-owner firearms in the country, and is involved in 75% of all gun killings. In the large urban areas, handguns account for more than 80% of gun killings and virtually all gun robberies¹². From its failure, opponents of gun control have reached the conclusion that controls cannot work, while proponents declare that the existing laws must be assiduously enforced, or, failing that, that new and different types of controls attempted.

What is the "gun problem" in the United States? The debate centers upon the relationships among robberies, murders, and firearms. Again, opponents of gun control contend that the overwhelming number of the country's 120 million firearms are not involved in violence and that crime rather than firearms is the real problem. To focus on firearms is to miss the real issue. The slogan, "Guns don't kill people, people kill people," in a trite sense, purports to convey a powerful, commonsensical message that firearms, in and of themselves would not contribute to the seriousness of crime, if crime were not in the first place a serious problem. However, while it is true that the seriousness of crime is the real problem, guns unquestionably add another ominous dimension to the problem of crime. According to the best estimates, serious assault with a gun is two and a half to five times as likely to cause death as a similar attack with a knife, the next most dangerous weapon¹³ and robberies involving a gun are three to four times as likely to result in the death of the victim as are other kinds of robbery¹⁴.

The most frequent reason given for owning a handgun is for household self-defense. However, studies suggest that rather than protect household members, loaded household handguns are more likely to lead to the deaths of family members rather than protect them or save their lives. A Detroit study found that more people died from handguns accidents in one year than are killed by home-invading robbers or burglars in a period of 4-1/2 years¹⁵.

In view of the dangerous of loaded handguns in the household, why then do people retain them and continue to buy them? Would not some sort of unilateral disarmament be more rational? Why don't people give up their handguns voluntarily, and why do they continue to multiply in the cities? Perhaps the feeling of protection and security that, for some, the possession of a handgun provides is based on misinformation and a statistical illusion that they will save lives rather than take them. It may be purely emotional with the only real use of the gun being one that affords its possessor with some relief from fear and uneasiness about home safety. Handguns do not provide any substantial measure of real protection; nevertheless, people continue to buy them. Because these problems are real and fairly clear does not make the solutions any easier.

The belief that much criminal violence, especially homicides, occurs simply because the means of lethal violence, the handgun is readily available, and thus, that much homicide would not occur were handguns generally less available, led to the enactment of New York State Gun Control Law.

The New York State Gun Control Law represents some acceptance of the view that there is a causal relationship between the mere possession of a gun, the availability of guns, and criminal violence. The expectations are clear: penalize gun possession and a strong disincentive toward possession is created. In turn, fewer instance of gun possession will reduce the gun-related criminal violence, if not the actual rate of crimes in certain specified categories. But has the trend in fact occurred? Has there been a decrease in the amount of violence involving a gun? Perhaps violent crime has increased, as well as all other kinds of crime while guns are less frequently used in such crimes.

A year after new law took effect, criminal justice officials in New York City seemed uncertain not only about what the gun law had accomplished, but what it was supposed to accomplish. After the first year, crimes committed with guns have risen at an alarming rate while violent crime in general has shown a decrease, throwing into question the deterrent effect of the new law.¹⁶ The vivid television commercial of Mayor Koch walking along a row of empty jail cells and warnings: "If you get caught carrying an illegal handgun, you'll go to jail for one year. No plea-bargaining, no judges feeling sorry for you. Just one year in jail"¹⁷ may have had little deterrent effect upon those who would possess guns to use in violent street crime or upon those who possess guns for protection.

The State Division of Criminal Justice has reported that since the law went into effect, few possession cases have been reduced to misdemeanor charges and more have been treated as felonies, but that only about half of the defendants convicted of gun possession were sentenced to jail for the one year mandatory minimum sentence.¹⁸ This might indicate that many of the defendants facing the one year mandatory minimum sentence are not likely (at least in the eyes of the prosecutors and judges) to commit violent street crime with their guns.

The large number of non-jail sentences is a reflection of the judges and prosecutors use of their discretion to do "justice". The use of prosecutorial and judicial discretion leads to selective criminalization. Judges and prosecutors must decide which defendants charged with illegal gun possession will face the one year mandatory minimum sentence. They must select and weigh which factors known of each defendant, such as bail status and prior arrests and/or convictions, warrants an incarcerary or non-incarcerary sentence.

The fact that only about 1/2 of the defendants charged with gun possession go to jail or prison may also indicate that there may be an overcriminalization of a particular type of offender, the offender who is not, and has never been involved in violent street crime. This defendant has no prior arrest and/or convictions and possesses his/her gun for protection only. The case that is often used as an example of this overcriminalization is the Bodega owner who only carries his/her gun when transporting the day's receipts to the bank from his family-owned store. Judges and prosecutors are then faced with problems of choosing how to apply the one year mandatory minimum law to those defendants who were not targeted by legislators as those who should experience the full weight of the law.

A. The Problem of Illegal Gun Possession in New York State

In response to increased use of guns¹⁹ in violent street crime, the New York State Legislature in August of 1980 amended the penal code to provide for a mandatory minimum sentence²⁰ of one year incarceration for illegal gun possession. Prior to August 1980, gun possession in New York State, without a license was a misdemeanor or a felony depending upon the circumstances, with no mandatory minimum in either case.²¹

In preparation for the new law, one hundred and ten signs were posted at airport and highway entrances. The three by four foot signs warned: "NEW YORK STATE HANDGUN LAW VIOLATION MANDATORY ONE YEAR JAIL SENTENCE."²² The law had been in effect only five minutes when at 12:05 A.M., a Bronx man was arrested on charges of possessing a loaded gun as he stood on Seventh Avenue near 125th street in Manhattan. The next two arrests occurred within hours. At 2:00 A.M., an Ohio man, who allegedly drew a .45 caliber automatic gun on a plainclothes police officer, was seized in mid-town Manhattan. The police officer said he intervened during the arrest of a suspected prostitute at 38th street and 12th avenue. Two hours later, the police said a woman was arrested in Queens after a .22 caliber revolver was found under her dress while she was being questioned.²³

The legislators had as their goal in enacting the gun law the hope of reducing the chances that the millions of illegal guns on the street would be used in violent street crime. According to the New York City Police Department, there are up to two million illegal guns in the City alone. The police also reported that in 1980, 882 persons were murdered by guns in the city and that 33,519 armed felonies were committed. About 4,000 people are arrested each year in the city for illegal gun possession. By 1982 statewide, there were 13,621 felony gun arrests, 5,599 of these for gun possession and citywide there were 12,252 felony gun arrests, and of those 4,699 for gun possession.²⁴

Assemblyman Melvin H. Miller, a Brooklyn Democrat, stated the legislature's intent in enacting the new gun law:

We believe it reaches the middle ground and will do the job of deterring those who have street possession of a gun

because they intend to use it for a crime distinguished from those who have street possession of a gun because they have a premises license and they happen to be taking money²⁵ to the bank or because theirs expired and they forgot to renew.

Assemblyman Engel stated:

It is a message to the criminals in our society who intend to commit bodily harm with handguns that we have had enough and that we are not going to stand for anymore. There are other measures that I think this legislature could take, measures that I am in full support of like mandatory sentences for a lot of other crimes and I believe that we have to show that people who commit serious crimes with handguns will be punished and put away.²⁶

Richard Brown, counsel to Governor Carey stated:

The message will be delivered loud and clear that we in fact have the toughest gun law in the nation. I am very hopeful that there will be a dramatic reduction in the number of gun assaults, robberies, and homicides committed with handguns as a result of the new law.²⁷

The proponents of the mandatory minimum sentence for gun possession cite a number of studies to show that too few violent criminals are sent to prison for such possession. For example, in 1974, the New York State Commission on Investigations²⁸ examined the sentencing practices of individuals arrested for illegal possession of a gun. From one sample of 342 arrests, the Commission found that although 120 defendants were later convicted, only 13% (N=16) received terms of incarceration.²⁹ Likewise, the Mayor's Office reported the judges had been giving jail sentences to only one in every ten violators, even though the law provided up to 15 years of incarceration for illegal possession of a gun.³⁰ The New York City Police Department in 1979 reported that although 3,900 people were arrested for gun possession, only 375 received jail sentences.³¹ One sitting Bronx Supreme Court justice stated:

In the year that I was in criminal court where I disposed of felony cases by way of felony waivers, I took as many as

fifty gun possession pleas. The majority of the sentences I imposed were non-custodial sentences. In a large majority of these cases, they were legitimate business merchants who had obtained a gun in order to protect themselves. So while it is true that they violated the new law and did have possession of an illegal gun, the possession was motivated not from a desire to commit with it or to represent a threat to the community, but rather to protect themselves from the violent aspects of the community.³²

B. The New York State Gun Control Law of 1980

New York State was the first state to enact gun control legislation. The law was to become a model for other states. The law, known as the Sullivan Law, was first enacted in 1911. It was named after State Senator Timothy "Big Tim" Sullivan, a Manhattan Democrat, who came out of the Irish slums of New York City to become boss of Tammany Hall.³³ Like the 1980 gun law, the Sullivan Law was enacted in response to public and political outcry against violent street crime with guns. What triggered the Sullivan Law was the slaying of David Graham Phillips, a nationally known novelist, by a mentally deranged gunman outside the former Princeton Club near Gramercy Park in Manhattan. This incident ignited a campaign for compulsory gun registration.³⁴ The law required a license to be issued by a magistrate or a justice of the peace before a gun could be obtained. Conviction for possession of an unlicensed gun was an "A" misdemeanor which carried a maximum sentence of up to one year incarceration.³⁵ There was no mandatory minimum sentence or restricted plea-bargaining.³⁶ The law remained unchanged until 1963, when the penalty for possession of a loaded unlicensed gun in a public place was raised to a "D" felony, with a possibility of incarceration of up to seven years. The lack of restrictions on plea-bargaining or charge reduction continued.³⁷

Although gun control legislation started as early as 1911, mandatory minimum sentences did not begin in New York State until 1974 with repeat drug related offenses and in 1978 when mandatory minimum sentences were enacted for violent and non-violent felony offenses. Sentences escalated for second offenses and again for the third offense. For the third offense, the label "persistent felony offender" was applied. Although plea-bargaining is widespread in New York State (about ninety percent of all adjudication of guilt are based on bargaining³⁸), plea bargaining is restricted in certain instances. Plea-bargaining for the above offenses has been restricted to the extent that if the indictment charges a Class "A", "B" or "C" violent felony offense, the charges on which a plea is accepted must include a violent felony offense. This has the effect of prohibiting a plea that would avoid a prison sentence. (For a detailed description of New York State mandatory sentencing scheme including gun possession charges, see the Appendix pages in this paper).

On June 13, 1980, at 1:10 A.M., after three hours of debate, the New York Senate voted to approve the 1980 Gun Control bill by a vote of 38 to 18. Although the debate lasted only three hours, some senators like Senator Johnson, voiced strong objection to the gun law. He stated that the bill was a demonstration that the senators had "abandoned any attempt to do anything about the serious aspects of the crime problem in this state"³⁹. Senator Johnson feared that the senators were being led by public misunderstanding about what would affect violent street crime with guns. The public, he felt, had been deceived by the press, particularly the Daily News and the New York Post, into believing and supporting the notion that the law would reduce violent street crime. He argued that now the senators were allowing that misunderstanding to continue.⁴⁰ Senator Johnson believed that judges and prosecutors had treated those charged with gun use and possession severely and that this legislation would not deter those who would use guns to commit crimes. The congested court system, he declared, was the cause of light sentences given to defendants charged with use or possession of guns. He felt that this congestion effectively undermined the efforts of judges and prosecutors. In addition to court congestion, he added, overcrowding in state prisons forced prosecutors to be selective of the cases they chose to prosecute and judges to review sentencing very carefully and drive both prosecutors and judges to rely on plea-bargaining.⁴¹

On the other hand, Senator Marino, blamed judges for what he felt was an unwillingness on their part to sentence defendants harshly who use guns. He stated, "once these cases get before a real judge and a real D.A. and a real jury that most of them are thrown away, dismissed, settled out of court, plea-bargained out."⁴² He argued that the mandates of the Senate had not been followed in the past and the judges handed out illegal sentences and that there was no reason to believe that judges would follow the mandates of Senate or the Assembly now.⁴³

The Assembly shortly after midnight passed the measure by a vote of 89 to 55. This vote was reached after four and a half months of debate on how stringent the law should be.⁴⁴ The Assembly heard testimony from Bob Young, President of the New York State Conservation Council. He testified that the bill was "directed at the wrong people. This type of proposal will only trap my fellow sportsmen and their families in its jaws. The sportsmen I represent are your average citizens throughout the state.

We do not commit crimes with guns. There are those who are all too willing to substitute gun control for crime control."⁴⁵

The new gun law provides that all charges for possession of an unlicensed loaded gun in a public place would be raised to an "armed violent felony offense" and any plea-bargaining or reduction of the charge would be prohibited until a grand jury had decided whether to indict the defendant or dismiss the charges. This would prevent gun charges from being dismissed in Criminal Court or from being reduced to a misdemeanor. All such cases must then go to the Supreme Court for final disposition by trial or guilty plea to a felony. Plea-bargaining negotiations for a lesser sentence in exchange for a guilty plea prior to trial would be allowed only after a defendant had been indicted for a felony, and the minimum sentence would be a year.⁴⁶

As with most gun laws in the United States, the gun control law also attempts to separate legitimate from illegitimate gun use and possession by regulating the place and manner in which firearms may be used. Generally, it prohibits the carrying of firearms within city limits or in a motor vehicle; the carrying of concealed weapons on one's person; or the discharging of a firearm in populated areas. The law attempts to reduce firearm violence by police intervention before violence or crime actually occurs. In addition, the law is intended to reduce gun crime by making it so much costlier than crime without a gun that potential criminals either will attempt crimes without guns or not commit crimes at all.

The law also provides for illegal sale of guns to be raised from a misdemeanor to a felony, and defendants convicted of selling or possessing twenty guns or more could receive up to twenty years of incarceration. Plea-bargaining here would also be restricted. However, none of these charges would affect a person accused of possessing an unlicensed, loaded gun in a home or place of business. This charge would remain a misdemeanor. A defendant may be able to by-pass the mandatory minimum sentence only if a Judge finds mitigation circumstances, after a mitigation hearing.

Because the gun law allows for defendants to by-pass the mandatory minimum sentence by a judge conducting a mitigation hearing, Assemblyman Wemple, Conservative-Republican from Schenectady, referred to the bill as a weak anti-gun bill. He felt that allowing

mitigation hearings weakened the bill to the point that it reduced the effectiveness of the bill. He stated:

You have the mitigation hearing; you have exceptions that are built into this law that are precisely the same thing, the identical thing that a judge can do today. He basically can sentence the same way he can fine, the same way he can dismiss, the same way he can, almost except you have mitigation hearings instead of perhaps pre-indictment plea-bargaining.⁴⁷

An amendment offered by Senator Franz Leichter, Liberal-Democrat from Manhattan, forbidding mitigation hearings for those arrested for possessing guns and requiring an automatic sentence of at least a year was defeated. Assemblyman Wemple described what he felt was wrong with the bill:

The problem with this bill . . . is the judges, if they don't want to make this work, they won't anymore than they have wanted to make the present law work and get tougher on these people. I think this is the basic problem with what we have here, there was a lot of work, a lot of time spent and I really don't know what we have come up with to be perfectly frank.⁴⁸

Although Assemblyman Wemple feared the response of judges to the new law, Assemblyman DiCarlo feared the response of the system to the new gun law; namely, he feared that cases that should have been disposed of in criminal court would be pushed on to Supreme Court because defendants were not allowed to plea to a lesser charge than a "D" felony until after they had been indicted by a grand jury. He estimated that this change would be a costly one. He stated:

The problem basically is that it throws many cases into the Supreme Court and county courts of our state, and from there it goes to the grand jury procedure. In some cases even after a grand jury procedure they can plea-bargain down to a misdemeanor, taking up the time of the grand jury, taking up the time of the stenographer, for printing and accomplishing virtually nothing. We are going through an exhaustive grand jury process accomplishing virtually nothing.⁴⁹

Assemblyman DiCarlo, although he had strong reservations concerning the effect of the bill, nonetheless voted for the bill and stated, "I am sure that for political reasons, many of us will vote for the bill in any event."⁵⁰

Under P.L. 70.02-5(c) minutes of a mitigation hearing are required to

be sent to the Division of Criminal Justice Services. Section 70.02 of the Penal Law specifies that, any person indicted for an armed felony who pleads guilty to a Class "D" Violent Felony, may be eligible for a sentence other than an indeterminate sentence of imprisonment if one or more of the following factors exist:

1. mitigating circumstances that bear directly upon the manner in which the crime was committed; or
2. where the defendant was not the sole participant in the crime and the defendant's participation was relatively minor; or
3. possible deficiencies in proof of the defendant's commission of an armed felony.

The law also provided up to \$625,000.00 for New York City to speed up its processing of applications for gun licenses. All requests for licenses must be acted upon within six months and the reasons for denial must be given to each applicant.⁵¹ The New York City Police Department reported that most of the applications in 1983 were made for licenses to keep a gun in a home or place of business and only 1386 out of 7096 were for permits to possess a weapon outside place of business or home. In reviewing an application for a gun license, the police examine the nature and location of an applicant's business and the likelihood that an applicant may be affected by violent crime. An applicant is required to document his/her need for the license with bank deposit slips, tax information and past crime reports. Having a criminal record or history of serious mental illness disqualifies an applicant for a license. There is a \$76.00 filing fee and the process may take up to six months for approval. Nonetheless, as of February 5, 1984, applications for gun licenses had decreased by almost 25%, bringing the number to its lowest level since the legislature passed the gun law.⁵² It is difficult to interpret what a decrease in filings represents. Sergeant Peter Sweeney, a public information officer of the New York City Police Department, and Sergeant Robert R. Recco, a supervisor in the Licensing Department of the New York City Police Department, conclude that the decrease may be due to a reduction in people's perception of crime. They cite 9.4% reduction of major crime offenses from January to November of 1983. One would have expected that the law's punitive provisions for unlicensed possession would have increased the application for licenses, yet they have dropped. Odie Stern, a director of Handgun Control, Inc., a

lobbying group, concludes that the decrease may be due to the less aggressive advertising by companies that specialize in obtaining gun licenses. These companies prepare applications for fees that vary from \$300.00 to \$1,000.00. Due to the economy, people may simply not be willing and able to pay such high fees. It is unlikely however that those who apply for such licenses are actually involved in violent street crime with guns; so that a decrease in filings cannot be associated with a desire to use guns in violent street crime. It would seem that those who possess guns illegally have not been motivated to and comply with licensing statutes in fear of the mandatory one year sentence.⁵³ It may be equally plausible to argue that a decrease in licensing application has to do with: (1) the greater availability of illegal guns on the street; and (2) the fear that the act of applying for a license itself enable the police to identify a gun possessor more easily.⁵⁴

It should be noted that the mandatory one year minimum only applies to adults — those 16 years old and older. However, the problem of juveniles carrying, using and possessing loaded guns is becoming more and more widespread, and perhaps one of the reasons many otherwise law-abiding citizens are arming themselves⁵⁵ is the fear of such youth using guns against them in violent street crime.

Under the law, according to Eric Warner, Chief of the Juvenile Offense Bureau of the Bronx District Attorney's Office, a youth under 16 can be tried as an adult for certain serious crimes, such as homicide, rape and armed robbery. But if a youngster is under 13, he/she can commit any of those crimes and he/she will still be sent to family court, where the maximum sentence for murder is five years. In the first six months of 1981, the police reported youngsters between the age of seven and fifteen accounted for eighteen homicide arrests, seven of them involving guns. They also accounted for 2,250 robbery arrests, 353 serious assaults and 90 rape arrests; however, the police did not have figures of what proportion of these arrests involved guns.⁵⁶

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Barbara Basler reported on youths and their use of guns in serious street crime. She told of one Harlem youth who was serving time for armed robbery, as remarking that he got his first gun at the age of eight years — a .45 automatic. He stated that he broke into a store, found the .45 gun and took it. He stated, "when I wasn't sticking up people, I liked to shoot it late at night near the polo grounds housing project — or out my window."⁵⁸

One of the chief advocates of a strong gun control law was Mayor Koch. On April 16, 1980, he appeared before a state legislative committee, responding to allegations that the law would force judges to imprison "innocent citizens" with no criminal intent to possess guns illegally. The Mayor responded that the typical person arrested for gun possession "in all probability, committed ten crimes before he was apprehended. He's not a nice guy."⁵⁹ Mayor Koch, who had proposed a more stringent bill, including felony charges for persons found to possess guns in their homes or businesses, described the enactment as "a significant first step in the fight to remove illegal handguns from the streets of our city."⁶⁰ Mayor Koch said his aides would carefully monitor prosecutions under the new law and that he might seek additional legislation if necessary.⁶¹

Governor Carey sent a "message of necessity" to both Chambers to by-pass the required three day wait before a bill can be voted on after it is introduced. Governor Carey signed the bill, which took effect sixty days thereafter, and the governor stated:

Let there be no error about it, this bill will be vigorously enforced . . . the state prison system would be expanded if the law resulted in huge numbers of convictions. If the choice is between finding places in jail for people who commit crimes or finding more room in cemeteries for innocent people who die, I prefer to find the jail space.⁶²

District Attorneys Robert M. Morgenthau of New York county, Eugene Gold of Kings County and John J. Santucci of Queens county generally praised the law and said that their offices were prepared to cope with any

increase in trials resulting from the restrictions on plea-bargaining. Aside from the possibilities of more crowded courts and jails, other law enforcement officials reported that they anticipated no problems with the new law and felt there were enough officers to handle any increase in arrests.⁶³

Assemblyman DiCarlo's statement that many assemblymen and women would vote in favor of the gun bill, despite serious reservations concerning its effectiveness, because of "political reasons" is unfortunately another example of how the legislature responds to public outcry and the headline cases without too much consideration as to whether or not the bill they enact makes any sense, whether the results they anticipate will in fact be the results that emerge.

A recent sentencing decision affirmed by the New York State Appellate Division New York vs. Suitte, 90AD 2d 80 (1982), illustrates the diverse positions of the judiciary concerning the new law. The case involved a defendant named James Suitte, who was arrested in January of 1982, for unauthorized use of a motor vehicle. At that time, he was found to possess a loaded Sterling .25 caliber automatic pistol. Although the defendant-appellant had registered the gun in North Carolina, when he acquired it there in 1975, he carried it unregistered in New York State for seven and a half years preceding his arrest. He had a college education, two children and had never been convicted of a crime. His defense to the charge of possession was that he needed the gun for protection because the tailor shop he operated was located in a high crime area in the Bronx.⁶⁴

Mr. Suitte, negotiated a plea of guilty to a Class "A" misdemeanor possession in the fourth degree: he had originally been charged with a Class "D" felony (PL 265.02). In exchange for the plea, the judge exercised his discretion and found that the mandatory sentence of one year of incarceration would be too severe and sentenced the defendant to 30 days incarceration and three years probation. The Judge stated "the legislature, the community and indeed this court are concerned with the proliferation of guns and the possession of guns by individuals, regardless of the reasons, and we have such a possession in this case."⁶⁵

The 30 day sentence became the subject of an appeal. The issue before the appellate court was whether the sentencing judge had abused his discretion by sentencing the defendant to a 30 day sentence of incarceration and using as a basis of that sentence the notion that general

deterrence permits such a sentence.⁶⁶

Justice Lazer, writing for the court, affirmed the 30 day sentence of the defendant. Judge Lazer argued that there was no abuse of discretion by the sentencing judge and no failure to observe sentencing principles nor a need to impose a different view of discretion than that of the sentencing judge. He wrote:

True, the defendant does not appear to be a danger to society or in apparent need of rehabilitation. It is plain, however, that the sentencing court viewed general deterrence as the overriding principle and we cannot say that the emphasis was erroneous or that the interests of justice call for a reduction. Deterrence is the primary and essential postulate of almost all criminal law systems. It is hardly debatable that prisons do deter even if the degree of deterrence and the types of persons deterred remain in dispute. Even when imposing an 'individualized' sentence, the judge may look beyond the offender to the presumed effect of the sentence on others. Indeed, the primary purpose behind mandatory sentence laws is to impose swift and certain punishment on the offender. In emphasizing the mandatory minimum sentence and the purpose of deterrence, the new gun legislation⁶⁷ intended to convey to the public a 'get tough' message on crime.

Judge Lazer went on to explain that although the law allows for a judge to find mitigating circumstances to sentence a defendant to less than the mandatory minimum sentence, the law did not contain a blatant exception for first offenders :

The statute provisions for mitigation are not carte blanche for the commission of an offense free of the threat of a sentence of custodial detention. The sense of the new law is to deter all unlicensed handgun possession, whether the offense is the first or a repeat. The special mitigation inquiry is not intended to provide automatic probation for those without prior criminal records. The penalty to be imposed is a matter for the trial court's broad discretion within the limits imposed by the legislature. In balancing the public and private interests represented in the criminal justice process, the sentencing court's decision in this case was neither inconsistent with sound sentencing principles, nor inappropriate.⁶⁸

Any reduction of the sentence, it was also argued, would send to the public a message that the gun law was not being taken seriously. However, Justice O'Conner dissented by asking the questions: "Is it just or proper

that we permit one sentencing judge to count general deterrence as the overriding factor in this gun possession case under the new anti-gun law, with the implication that another sentencing judge in a factually identical case may switch the emphasis in the formula to another factor, e.g. rehabilitation?"⁶⁹ He argued that it was totally inappropriate and completely counterproductive to impose a jail sentence for however short a period of time in light of the fact that the defendant had been cooperative with the arresting officer, readily admitted that he knew it was illegal to carry an unlicensed weapon and had received a very favorable probation report that showed him to be a devoted father and husband and a productive member of society.⁷⁰

Although Justice O'Connor felt a violation of the new gun law called for appropriate sanctions and penalties, he also felt that under clear and compelling circumstances any jail sentence for its violation would be inappropriate. He wrote:

It is beyond cavil that violent crime is ever on the increase and that it is, in all its terrifying aspects continuously creating conditions of unspeakable horror on the streets of our cities. Out of these jungle conditions in crescendo fashion the cry of an aroused and frightened public is heard demanding, with good reason, swift and effective measures to contain and to curtail the monstrous abominations which are daily visited upon them. The first is fueled by those who should and do know better but who, seizing upon a popular theme, pick up the cry and by some total distortion of reason, imply that the fault lies with the judiciary and suggests that tougher and longer prison sentences are the solution. The legislature responds by passing more and more mandatory sentencing laws and the press and other news media not infrequently give at least tacit approval to such measures. And all the time, judges sitting in the eye of the storm, know that the catastrophic rise in crime bespeaks a failure not alone of society, but of the family, the church, the schools, the home and the economic and political structure of the State itself. I have previously expressed my disapproval of mandatory sentences because of a firmly held opinion that mandatory sentences give to a worried and frightened public the illusion of protection, that they do not deter the criminal and worst of all that they incapacitate a major section of the criminal justice system in denying discretion to the courts . . . To the issue before us —to tack on an additional jail sentence for the possession and/or use of the gun, loaded or unloaded, in or about the commission of a crime, makes much sense and may even be effective. However, to send an otherwise law-abiding citizen to jail on his first offense under the facts of this case makes no sense, accomplishes no good and creates nothing but untoward hardship and bitterness.⁷¹

However, it is the position of the Bronx District Attorney office that the new gun law will deter defendants from possessing illegal guns and using them in violent street crime. The Major Offense Bureau chief stated:

The new gun law deters people from carrying or possessing illegal weapons. The knowledge that there is an absolute jail sentence, if found in possession of a gun has got to have some degree of deterrence on a lot of people who don't want to go to jail and are not willing to risk that by carrying or possessing a gun. It can deter people who are prone to commit violent crimes. We have seen an awful lot of people doing robberies with toy guns and knives. I think one of the reasons for this is because the penalties are lesser because the crime is lesser and therefore the jail sentences are lesser. I think the legislative intent is two-fold (1) to enact legislation that hopefully would act as a deterrent to those who would possess illegal guns and (2) to provide more severe sanctions for those who do.

The Suitte case is a clear illustration of the overcriminalization that may occur as a result of enforcement of the gun control law. It is debatable whether the 30 day sentence imposed on Mr. Suitte would deter anyone, not the individual who is, or may be, engaged in violent street crime, not the storekeeper who transports the day's receipts, and not those who carry guns for their own self-protection in high crime areas. Mr. Suitte had carried a loaded gun for seven years without incident. If an individual fears for his/her life and property, it is not difficult to weigh a thirty day sentence and three years of probation against the threat of becoming a victim of a violent street crime.

C. The Importance of the Role of the Prosecutor and the Relationship between Plea-bargaining, Mandatory Minimum Sentences and Prosecutorial and Judicial Discretion.

Although the prosecutor, defense counsel and the judge play an active role in the plea-bargaining process and therefore in the ultimate sentencing of the defendant, the role of the prosecutor deserves special attention. The prosecutor is the most important institutional determinant of a criminal sentence because of his/her almost unlimited prosecutorial discretion and because of this power he/she stands at the foreground of the criminal justice system, making key decisions concerning the severity of sentences.⁷³ The prosecutor will use this power to determine which defendants shall be subject to the full weight of the mandatory minimum sentence.

The prosecutor has first the legal authority to drop criminal charges, thus ending the possibility of punishment; secondly he has the legal authority to determine the specific offense for which a person is to be prosecuted and this ability to select a charge can also broaden or narrow the range of sentences that can be imposed upon conviction; and third, the prosecutor possesses the absolute power to reduce charges in exchange for guilty pleas and to recommend particular sentences to the Court as part of the plea-bargaining process. Rarely will the prosecutor's recommendations for a lenient sentence be refused in an adversary system in which he/she is supposed to represent the interest of the state.⁷⁴

The prosecutor's role is not limited to the prosecution of cases through the criminal justice system. He/she is not only an advocate, but also an investigator, an administrator, a legal scholar, an advisor to police agencies, a chief law enforcement officer, a community educator and an aid in improving criminal justice legislation. The prosecutor is also a political animal, elected in the five boroughs and as an elected official

participates actively in marshalling society's resources against the threat of crime. When a crisis in the enforcement of criminal law arises in the community, the public press and others clamor for a 'war against crime' and he may be drawn into the maelstrom of political controversy by the demand that he 'stamp out the criminals'. He is called upon to make public statement, to propose legislative reform, or to direct the

energies of the law enforcement machinery of the community. On the other hand the office demands and the public expects, that the prosecutor will respect the rights of persons accused of crime. Because of the power he wields, we impose on him a special duty to protect the innocent and safe-guard⁷⁵ the rights guarranteed to all, including those who may be guilty.

The responsibility of the prosecutor then differs from that of the typical attorney; his/her duty is to seek justice, not merely to convict. This special duty exists because (1), the prosecutor represents the State and therefore should use restraint as in the selection of cases to prosecute; (2), during the trial the prosecutor is not only an advocate but also may make decisions normally made by an individual client and those affecting the public interest that should be fair to all; and (3), in our system of criminal justice, the accused is to be given the benefit of all reasonable doubts⁷⁶ which the prosecutor is obligated to protect.

In furtherance his/her special role, the prosecutor has been given wide discretion in detemring whether to charge a defendant with a crime or violation once arrested. The Code of Professional Responsibility states:

In addressing himself to the decision whether to charge, the prosecutor should first determine whether there is evidence which would support a conviction. It is unprofessional conduct for a prosecutor to institute or cause to be instituted criminal charges when he knows that the charges are not supported by probable cause;

The prosecutor is not obligated to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that evidence may exist (exists) which would support a conviction.

Illustrative of the factors which the prosecutor may properly consider in exercising his discretion are:

- i. the prosecutor's reasonable doubt that the accused is in fact guilty;
- ii. the extent of the harm caused by the offense;
- iii. the disproportion of the authorized punishment in relation to the particular offense or offenders;
- iv. possible improper motives of a complaintant;
- v. prolonged non-enforcement of a statute with community acquiescence;
- vi. reluctance of the victim to testify;

- vii. cooperation of the accused in the apprehension or conviction of others and
- viii. availability and likelihood of prosecution by another jurisdiction.

In making the decision to prosecute, the prosecutor should give no weight to the personal or political advantages or disadvantages which might be involved or to a desire to enhance his record of convictions.

From the above it is clear that the prosecutor cannot be compelled legally to prosecute any particular defendant for committing any specific offense.

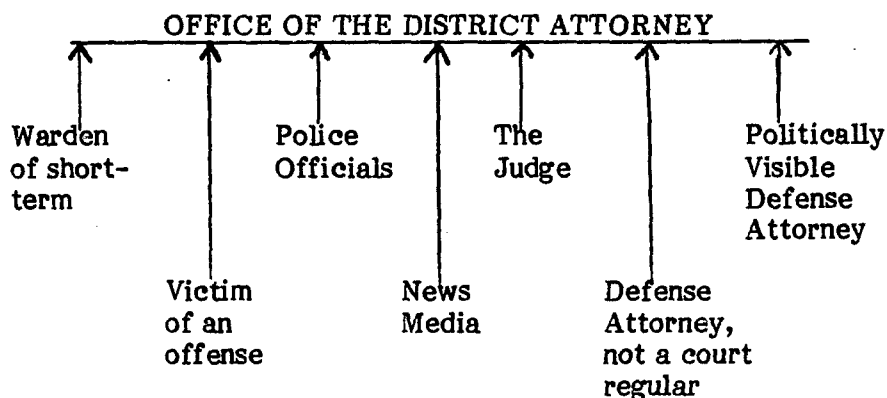
Because the prosecutor possesses the power to choose which arrests should be prosecuted and to what extent, his/her ability to influence the ultimate sentence the defendant receives is quite formidable and such power has become the focal point of interest and debate for those who would reform sentencing structures ranging from indeterminate to determinate sentencing schemes. Such prosecutorial power it is argued must be curtailed or even eliminated in order for a just sentencing scheme to emerge where sentencing is totally uninfluenced by the prosecutor's bargaining power and instead is in the control of the judges who follow legislative mandates in the form of mandatory minimum sentences. The gun law is therefore, not only an attempt to reduce violent gun and gun-related street crime, but also, an exercise in an attempt at reducing prosecutorial discretion.

It should be noted that mandatory minimum sentencing schemes only curtail prosecutorial discretion after the prosecutor has made the decision to charge the defendant with a particular offense. It is only after the prosecutor has decided to charge P.L. 265.02 that the charge reduction restrictions become effective and the mandatory minimum sentence applies. By categorizing gun possession felonies as Class "D" violent felonies the statute restricts pre-indictment charge reduction and therefore plea-bargaining by virtue of the fact that "street" possession of a loaded gun by all defendants is now an "armed felony" offense (C.P.L. 1.20-41), and any reduction of a pre-indictment "armed felony" complaint is prohibited (C.P.L. 180.50). The prosecutor is not compelled by law to charge P.L. 265.02, even when the facts upon arrest are that the defendant possessed a loaded gun outside place of business or home. Prosecutors may exercise their discretion and any of the reasons given above to charge lesser offense or even dismiss the charges against the defendant. However, once the prosecutor charges the defendant with

265.02, as a felony charge the Supreme Court has jurisdiction over the case and the prosecutor must proceed by grand jury process.⁷⁸

Although the prosecutor cannot be compelled to prosecute any particular offense, the prosecutor is subject to outside pressures and a duty imposed by law and the standards imposed by the Appellate Division of the Supreme Court through the adoption of the standards of the American Bar Association to pursue the prosecution of offenses vigorously and with justice and without bias or discrimination. The external pressures on the prosecutor have been depicted by Abraham S. Blumberg⁷⁹ in the following manner:

Proximate and More Remote Pressures on the Prosecutor



Source: Abraham S. Blumberg, "The Criminal Court as Organization and Communication System" in Richard Quinney, Crime and Justice in Society, (Boston: Little Brown & Co., 1969), p. 283.

The length of the arrows in the chart depicts the intensity and proximity of the pressures of the office of the district attorney. The greatest pressure is exerted by the warden of short-term prison population. Police officials and personnel who are motivated by pressures and demands from their own organization for production are the second important source of pressure on the district attorney for production results, as are the judges. Politically visible defense attorneys through formal and informal relationships at times exert pressure on the decision to prosecute and to what extent. Although Blumberg places the pressure exerted by the

news media as less intense than other pressures, it can be argued that he underestimates the power of the press, especially with the sensational case in which with outraged citizens demand to know what will happen to a particular offender. However, Blumberg is correct in that the news media is only interested in the newsworthy defendant — the average defendant's arrest goes unnoticed and hence the pressure placed upon the district attorney's office is minimal.⁸⁰

Evidence that New York prosecutors do not abuse their discretion in charging a defendant with an offense, to reduce or add charges, or to plea-bargain, and therefore in influencing sentencing, has been shown by a comparison made by B. Boland⁸¹ in a study of the prosecution of felony arrests. Boland compared three jurisdictions as to how their district attorneys' offices handled felony cases. The jurisdictions were: New Orleans, Louisiana; Washington, D.C.; and New York County in New York City. New York county showed the best results — out of 100 cases, only 4 cases were rejected at screening by the prosecutor as opposed to 45 rejected in New Orleans and 17 rejected in Washington.⁸²

Legislators that enacted mandatory gun sentencing schemes in order to reduce prosecutorial and judicial discretion have been criticized because it is argued that any move toward mandatory sentencing in the form of fixed sentences for specific offenses will be viewed as a move away from considering individual differences. Norval Morris, Dean of the School of Law at the University of Chicago who gave the keynote address at the Special Conference on Determinate Sentencing, spoke in opposition to mandatory minimum sentences as a legitimate alternative to indeterminate sentencing schemes stated:

Legislation of this type is, in my view, unprincipled and morally insensitive; it cannot encompass the factual and moral distinctions between crimes essential to a just and rational sentencing policy. Nevertheless, it is politically popular. Whenever mandatory minima are prescribed, the same results follow — they meet with nonenforcement and nullification. This is neither surprising nor deplorable. It is not surprising because the pervasive influence of charge bargaining for carrying severe mandatory penalties. It is not deplorable because persistent confusion about the goals of criminal law enforcement and indefiniteness regarding the purpose of punishment make sentencing discretion essential. The enforcement of arbitrary penal equations is both irrational and inequitable. And in the overcrowded court systems of the cities of America, as in the case of the New York experiment with

mandatory minimum sentences for certain drug offenses, nonenforcement and nullification will follow.⁸³

Allowing almost unlimited discretion on the part of the prosecutor to charge and plea-bargain and on the part of the judge to sentence the defendant, it was argued, leads to unequal treatment of similar cases. Whenever discretion is granted, it is argued, it will be abused.

Another prominent speaker at the Conference on Determinate Sentencing was Professor Albert W. Alschuler, who has written extensively about the role of the prosecutor and plea-bargaining. Professor Alschuler has been critical of the abuses of prosecutorial discretion in the sentencing process and he has also been critical of sentencing reformers, who advocate fixed sentences including mandatory minimum sentences, who refuse to address the problem of such purported unrestrained prosecutorial discretion. Professor Alschuler argued that the prosecutor's power undermines any attempt by sentencing reformers to introduce sentencing reforms that lead to a more just and equitable sentencing scheme. He stated:

Although prosecutor's offices have in practice probably had a greater influence on sentencing than any of the other agencies (not excluding state legislatures), the call for sentencing reform has largely ignored this extensive prosecutorial power. In my view, fixed and presumptive sentencing schemes of the sort commonly advocated today (and of the sort enacted in California), are unlikely to achieve their objectives so long as they leave the prosecutor's power to formulate charges and to bargain for guilty pleas unchecked.

Indeed, this sort of reform is unlikely to produce its antithesis — to yield a system every bit as lawless as the current sentencing regime but one in which discretion is concentrated in an inappropriate agency and in which the benefits of this discretion are made available⁸⁴ only to defendants who sacrifice their constitutional rights.

Although Professor Alschuler felt that unlimited judicial discretion and prosecutorial discretion were harmful to a fair and equitable sentencing scheme, he stated:

As much as judicial discretion, the discretion of American prosecutors lends itself to inequities and disparities based on disagreements concerning issues of sentencing policy; it permits at least the occasional dominance of illegitimate consideration such as race and personal or political influence; and it may lead to a general perception of arbitrariness and uncertainty, contribute to a sense of unfairness, and even undercut the deterrent force of the criminal law.⁸⁵

Restraining prosecutorial discretion seems to be a more important objective than restraining judicial discretion to Professor Alschuler. He explained:

There are additional objections to prosecutorial sentencing discretion that do not apply with nearly so much force to judicial discretion. The exercise of prosecutorial discretion is more frequently made contingent upon waiver of constitutional rights; it is generally exercised less openly; it is more to be influenced by considerations of friendship and by reciprocal favors of a dubious character; it is commonly exercised for the purpose of obtaining convictions in case in which guilt could not be proven at trial; it is usually exercised by people of less experience and less objectivity than judges; it is commonly exercised on the basis of less information than judges possess; and, indeed, its exercise may depend less on considerations of desert, deterrence and reformation than upon a desire to avoid the hard work of preparing and trying cases. The discretion of American prosecutors, in short, has the same faults as the discretion of American judges and more.⁸⁶

At the Conference, Alschuler also argued that sentencing reformers were well aware of the problems of the concentration of such governmental power in the hands of the prosecutor's office and its effect on any type of sentencing reform. He argued that reformers have simply made a decision not to attack the issue because it would be a "fruitless political battle"⁸⁷ and that "sentencing reforms will have a rough enough time in the political arena without a hopeless charge at the prosecutor's well-entrenched — and very comfortable — way of doing business."⁸⁸

Alschuler did not however feel that a just sentencing scheme could only be realized if prosecutorial discretion were restrained or eliminated. He felt that plea-bargaining can lead to just sentencing decisions, if the bargaining were in the hands of the legislature and the judge.

He concluded:

Plea-bargaining can be restrained in a system of fixed or presumptive sentencing without undercutting the reformers' objectives, but only if its form is substantially altered. In place of the prosecutor's sentencing power, the legislature must specify the reward that will follow the entry of a plea of guilty. Just as a sentencing statute can treat the carrying of a firearm as an aggravating factor leading to an additional year's imprisonment, it can treat the entry of a plea of guilty as a mitigating factor leading to a specific reduction in penalty. Under such a statute — coupled, of course, with the elimination of plea-bargaining by prosecutors — the 'break' that follows the entry of a guilty plea would not depend upon the prosecutor's feelings of friendship for particular defense attorneys, by his desire to go home early on an especially busy day, by his apparent inability to establish a defendant's guilt, by exercise of the right to trial, by the race, wealth or bail status of the defendant, by a defense attorney's success in threatening the court's or the prosecutor's time with dilatory motions, by the publicity that a case has generated, or by any number of other factors — irrelevant to the goals of the criminal process — that commonly influence plea-bargaining today.⁸⁹

Alschuler's fears concerning the almost unlimited power of the prosecutor to plea-bargain are not held by all and indeed the Supreme Court in Santobello vs. New York (1971)⁹⁰ declared that plea-bargaining should not be eliminated or curtailed, but "encouraged." The court stated in dictum:

The disposition of criminal charges by argument between the prosecutor and the accused, sometimes loosely called 'plea-bargaining' is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full scale trial, the State and Federal Government would need to multiply by many times the number of judges and court facilities.⁹¹

Mario Merola, the District Attorney of Bronx County has called plea-bargaining an "indispensable tool, the efficacy of which has been well established." Although he defends plea-bargaining as sound in theory, he also warns of its misuse when the bargain is struck for the wrong reasons. In an article describing modern prosecutorial techniques, including the establishment of a "Plea-bargaining Recommendation Board" to ensure that plea-bargaining is more standardized, he wrote:

While the plea-bargaining concept is sound in theory, in practice it has been subverted to reflect the weakness of the system, rather than its strengths. It has been all too often a symbol of failure rather than success.

Essentially, the difficulties with the practice occur because the plea-bargain is struck for the wrong reasons. Rather than being in accord with office-wide policies which reflect the district attorney's priorities, the plea-bargain is often motivated by desperation at the collapse of a case which has been unreasonably delayed, the existence of a backlog of cases, the inclination of a particular assistant or the philosophy of a particular judge, compounded by pressure from the court administration to dispose of cases as quickly as possible.⁹²

The American Bar Association's position on plea-bargaining is that properly conducted, plea-bargaining may well produce a result approximating closely, but informally and more swiftly, the result which ought to ensure from a trial, while avoiding most of the undesirable aspects of that ordeal.⁹³ They further stated:

Disposition without trial of course provides a substantial cost of living to the accused and to the public in terms of time of lawyers and all other participants. Although the cost of saving alone would not be appropriate justification for abridging the legal process if it were achieved at the expense of fairness or equal justice, from the standpoint of the objectives of the criminal law, a fair and just disposition of a case without trial is obviously preferable to its disposition by trial, as is true in civil litigation. The speed and certainty of a disposition by plea promotes deterrence, a basic goal of criminal justice. Rehabilitation of the delinquent is a primary goal of the system and this objective is more likely to be fostered by avoidance of the clash and controversy of trials and prolonged appeals. An accused who carries on litigation over a long period in the face of strong evidence of the guilt which is finally confirmed by a jury verdict and by appellate review will often develop deep hostilities toward society and its instruments of justice and correction. However, irrational these hostilities they become a barrier to rehabilitation. The defendant by 'settling his case', submits himself to the correctional forces of society and may therefore be more likely prepared to change his attitude and habits.⁹⁴

The question then is not whether prosecutorial discretion should be eliminated, but where it should be placed and how much should be allowed. Also if prosecutorial discretion is reduced at one point, what effect will it have on the whole system? The exercise of discretion in the criminal

justice system has been likened to a balloon. Attempts to squeeze out discretion at one point merely results in moving the discretion to another point. The balloon must be squeezed at all points at once if the inequalities of discretion, along with its benefits, are to be purged from the criminal justice system.⁹⁵

The New York gun law was passed to remove the inequalities of discretion and thereby allow prosecutors and judges to deal with gun arrests more rigorously. If the discretion "balloon" was squeezed at one end, one would expect a reaction at another part of the balloon. If prosecutors are restricted from reducing charges, the burden of sentencing is placed squarely on the judges' shoulders. Will prosecutors try to circumvent the law in some way? Will plea and charge bargaining be carried on outside and beyond the ears of the court? Will mitigation hearings be used by judges to bypass the one year mandatory sentence? Will prosecutors refuse to prosecute those cases where they feel that the one year minimum sentence is too harsh a sentence even though the facts warrant the charge?

The question is therefore what are the consequences of the legislative attempt to reduce violent street crime by reducing discretion of prosecutors in handling gun possession cases where the mandatory one year sentence would be imposed? Have prosecutors, through the use of their almost unlimited power to charge and plea-bargain, managed to circumvent the one year mandatory sentence? Is prosecution of gun possession cases being handled differently, if so, how and why? Also, if gun cases are not being handled differently, then the move to reduce discretion of prosecutors by legislating mandatory minimums, with restrictive plea-bargaining, having any effect on the way cases are prosecuted, and on the sentences defendant ultimately receive? How are the prosecutors reacting to such reduced discretion?

Attempts to reduce or eliminate prosecutorial discretion have occurred in a few American jurisdictions. One of the most extensive recent attempts occurred in Alaska, where in July of 1975, the Attorney General declared an official statewide prohibition of plea-bargaining.⁹⁶ Unlike other jurisdictions whose prohibitions were more limited in scope, Alaska's prohibition contained very few exceptions to the general rule and

was made applicable to all felonies and all misdemeanors throughout the state.⁹⁷

The Alaskan researchers believed that by eliminating plea-bargaining, one, prosecutors would find ways of replacing it by implicit or covert actions; secondly, the court process would become bogged down; third, defendants would all demand trials; fourth, there would be fewer guilty pleas and, fifth, defendants' sentences would become more severe. However, the researchers found quite the contrary — the court process was accelerated rather than inhibited and defendants continued to plead guilty at about the same rate. Although the trial rate increased substantially, the number of trials remained small; and although some sentences were more severe, this was true only for the relatively less serious offenses and relatively "clean" offenders. The conviction and sentencing of persons charged with serious crimes of violence such as murder, rape, robbery and felonious assault appeared completely unaffected by the change in policy; and conviction rates did not change significantly overall, although prosecutors were winning a larger proportion of those cases that actually went to trial.⁹⁸

It is my purpose to investigate whether the types of convictions and types of sentences imposed in gun possession cases were affected by the prohibition of plea-bargaining. As the Alaska study shows, it may simply be a case of serious crimes being treated seriously, whether plea-bargaining is allowed or not. In that case, one would expect to find gun possession arrests being handled the same way, whether the discretion of prosecutors is curtailed or not and, in fact, one may predict that gun possession arrests would be prosecuted even more rigorously than before the law because the legislature has given the district attorney yet another tool with which to support their arguments that gun possession cases should be handled seriously.

One significant result of the prohibition against plea-bargaining reported by Alaska researchers was that the policy led to "massive and unprecedented"⁹⁹ refusals to prosecute. It is my intent to investigate whether such practices were also occurring under the enforcement of the new gun law. In addition to the massive refusals to prosecute by the Alaskan prosecutor's office, the administrative practices and procedures of the prosecutor's office sometimes created opportunities which encouraged

plea-bargaining and charge-bargaining. One such practice was the pre-trial conference procedure at which lawyers and judges would meet to talk about the merits of cases.¹⁰⁰ There may be similar practices in New York courts to avoid the harsh one year mandatory minimum sentence. Mitigation hearings may be having the same effect on gun cases.

Another attempt to reduce or eliminate prosecutorial discretion occurred in New York State's Ulster County in the mid-1970's.¹⁰¹ To counteract a local judge's sentencing policy, which the district attorney believed to be too lenient, the district attorney's office forbade its assistant prosecutors from plea-bargaining with defendants charged with certain serious offenses. The policy affected primarily those defendants whose cases had been indicted by the grand jury. Although the ban was quite effective, it did not entirely eliminate bargaining. In some instances, the prosecutors evaded the ban by bargaining with defendants on the charges to be filed. If a defendant indicated a willingness to plead guilty to a charge lower than the one which the grand jury was to vote on (allowing the prosecutor to charge the lesser offense in a superior court information — an accusatory instrument allowed by the New York State Criminal Procedure law to be used in lieu of an indictment handed down by the grand jury), the defendant would then plead guilty to a lesser offense with the promise of a more lenient sentence than he/she would have received if indicted and convicted. This method of evasion was checked by the supervising district attorneys, because it ran against their office policy.¹⁰² However, if a plea-bargaining ban was forced upon the prosecutor's office by the legislature, the above type of charge-bargaining may occur, especially if the goals of the prosecutor's office were not being addressed by the restrictions in the new law.

There is some debate over whether mandatory minimum sentences are favorable or not to the prosecutor. On the one hand, mandatory sentences may force prosecutors to negotiate with defense counsel on what charges are to be filed against the defendant, a practice that usually occurs beyond the court. However, the practice is not likely to occur in Bronx county, as it did in Ulster county, New York, when plea-bargaining was restricted there by the district attorney's own initiative. The defense counsel in Bronx county is usually not privy to charges filed against the defendant by the prosecutor until the defendant is arraigned, and indeed

most defendants in Bronx county represented by legal aid attorneys do not even see their defendants in order to review their cases before the defendant is arraigned.

On the other hand, the prosecutor gains the power to select which sentence a defendant will, if convicted, ultimately face. If the prosecutor never charges the defendant with a violation of P. L. 265.02, he/she will never face the one year mandatory minimum attached to conviction of that offense. This puts the prosecutor in the sentencing business, an uncomfortable position, in that the prosecutor is charged by the State with the duty of prosecuting charges against the defendant but not of sentencing the defendant. The position of the prosecutor is not an unbiased one, the judge is in the best position of all three parties to sentence the defendant after hearing the State's position and the defendant's. One judge has described the contradictory position of the prosecutor in relation to the mandatory provision of the gun law as such:

Sometimes mandatory sentencing laws work a hardship upon prosecutors with respect to dispositions; he does have a degree of discretion in reducing charges. I have found that where prosecutors feel they have a very weak case, that they will bend the spirit, if not the very framework of the statute. The prosecutor is not necessarily assisted by mandatory sentences. They like them and they have been active in the legislature in getting them enacted for philosophical reasons. Its been the feeling of many prosecutors for years that judges tend to be too lenient. When the prosecutor has a good case and prosecutes that case and the judge sentences the defendant to probation, they whistle at that. Its no business of theirs, but by the same token they represent the community and as such are an arm in protecting the community. They feel they should have a voice in what sentence a defendant should receive , so they have been active and in the forefront of suggesting to the legislature mandatory sentences. They like them, but I don't think that they help them. Because of plea-bargaining, they are not necessarily assisted. They are assisted in this sense; they have better control over what kind of plea will entice an accused to plea. If the defendant knows that on a "D" felony he faces a mandatory sentence of a number of years, obviously the prosecutor has some degree of control over that. The prosecutor offers the lesser plea and reduces the defendant's exposure and he controls it, not the defendant. Without a mandatory sentence the defendant can strike his own bargain with the judge, the D.A. can be left out. So that although the D.A.'s power is strongly enhanced, the D.A. is now in the sentencing business.¹⁰³

It may be that prosecutors will only attempt to circumvent the gun law if the restrictions placed upon them have a detrimental effect upon the way they must now prosecute gun arrests. Prosecutors may impose restrictions upon themselves — that is, make policy decisions as to how to handle certain kinds of cases, including gun arrests and choose what to charge and by what method to prosecute depending upon the facts of the case, the absence of search and seizure problems, the availability of witnesses, etc. But these are restrictions that are self-imposed and designed by the district attorney's office to allow the office to function most efficiently, justly and make best use of a limited amount of resources and personnel. Such policies can always be adjusted to meet changing patterns of crime, public awareness, political sensitivity and changes in the resources and personnel available. If restrictions are however placed upon the prosecutor's office from the outside, problems of adjustment may arise leading prosecutors to attempt to circumvent the restrictions placed upon them.

Under the gun law, the only restriction placed upon the prosecutor (as far as the prosecution of 265.02 gun possession cases) is that if 265.02 is charged, plea-bargaining is restricted until after the defendant has been indicted. The district attorney is under no legal compulsion to charge 265.02, even where the facts bear out the elements of the charge. However, there is little if any compulsion not to charge 265.02 either. In large, jurisdictions like Bronx county, a prosecutor is extremely unlikely to be personally acquainted with defendants and to want to intervene for a particular defendant to obtain a lesser charge. The prosecutor in that case runs the almost certain risk of having the case reviewed by not only fellow assistants, but by supervising assistants. In addition, the assistant, who initially writes the charges against the defendant, is not likely to be the assistant who will prosecute the defendant at future court appearances. There is also the arresting officer, who is not likely to go along with any subterfuge. One supervising assistant explained the situation in the following manner:

It is possible for a D.A. at arraignment or at screening to on his own to charge less than a felony or reduce to a felony. I can't imagine an A.D.A. taking it upon himself the responsibility of doing so. There are so many follow-up and subsequent occasions upon which mitigating circumstances can

be brought up to a supervising A.D.A. It would be terribly arrogant and in fact putting his job in jeopardy. If a D.A. sees something in a case that is very significant that really warrants him reducing then and there, there is no reason why he can't go to his bureau chief and present to him, point out to him why this case should be reduced. D.A.'s around here are not automatons.¹⁰⁴

A supervising district attorney who had been in the office for eight years further stated:

The only way a district attorney could circumvent the law would be to encourage the judge to mitigate the sentence. It would have to be a mistake for a district attorney not to charge 265.02 if the facts warrant it.¹⁰⁵

When asked about checks and balances in the Bronx district attorney office he responded:

There are checks on the D.A.'s. The Early Case Assessment Unit evaluates every felony arrest as it comes in and screens cases to see how they should be prosecuted. Every folder that is written up is evaluated by a supervisor over there; plus there are supervisors assigned to check out what goes on in the court room everyday. So there is a supervisor checking every one of those cases. The plea board was established to deal with assistants handling similar cases to make D.A.'s position uniform, a few assistants present the day's cases to the board and establish plea offers. All gun cases that are indicted go before them and line D.A.'s cannot change plea offers unless a supervising D.A. OK's it.¹⁰⁶

As stated, the only restrictions on the prosecutor is that once 265.02 is charged, plea-bargaining is restricted until after the defendant has been indicted. A situation that might cause adjustments on the part of the prosecutor's office is: where the judge and defense counsel, after indictment, allow the defendant to plead to the entire docket thereby bypassing the prosecutor (because the prosecutor gains power in plea-bargaining through his/her ability to reduce, add or delete charges). The judge can decide to sentence the defendant without the need to consult the prosecutor for the reduction, addition or deletion of charges and hence the prosecutor doesn't have the opportunity to bargain for a particular sentence. This situation may occur in any case, but where mandatory minimums are involved, the effect of the prosecutor's diminished power to affect the sentence of the defendant is more acute. It is not the individual case that matters; it is a pattern as to a particular offense that would be

of concern to prosecutors. If a particular judge did decide to bypass the district attorney in this manner there is nothing the prosecutor can do.

Although it is the judge that ultimately sentences the defendant, the prosecutor has an interest in the sentence a defendant receives. It is good for the morale of the office to know that where cases are fully and effectively prosecuted, judges will sentence defendants in line with prosecutor recommendations and mandatory minimums set by the legislators. Also, blame may be laid at the prosecutor's door by observers of the criminal justice system for lenient sentences given defendants. Judges may point to the poorly prepared cases by the district attorney's office and a willingness of district attorney's office "to bargain away the courthouse." More importantly, the system is one of plea-bargaining and the district attorney must be part of the process if it is to be fair and just to both the defendant and the People.

A second situation that might cause the district attorney's office to make adjustments is the fact that the grand jury process may become overburdened if all defendants must be prosecuted by the indictment process, unless the defendant waives such formal indictments. The district attorney's office might need to assign more personnel to the grand jury. The same might occur if more mitigation hearing or trials occurred as a result of the defendant's reluctance to plead guilty.

Although the district attorney's office has a strict policy concerning charging PL 265.02 if a defendant is in possession of a loaded gun, outside place of business or home, negotiation with judges and defense counsel at the bench may lead the parties to agree to allow the defendant to waive formal indictment by the grand jury. In allowing the defendant to do this, all parties agree to a particular guilty plea and sentence.

In exchange for a sentence that is less than the mandatory minimum, the defendant waives formal indictments and pleads guilty; the prosecutor gets his/her conviction, possibly to an "E" felony, avoids a trial, a formal mitigation hearing and a suppression hearing; the defendant's case is resolved quickly and he/she avoids the mandatory minimum sentence; and the judge obtains a disposition that is favorable and just to the defendant.

The prosecutor is not likely to agree to such a proceeding unless the defendant has outstanding mitigating circumstances such as previous criminal convictions. He/She is also not likely to proceed in this manner unless

he/she has a strong case against the defendant, which is the reason the defense counsel agrees to such a proceeding. It should be made clear that the prosecutor is not engaging in anything that is illegal or inappropriate, the option for a defendant to waive formal indictment has always been available and there is no reason to believe that undue pressure is placed upon the defendant to waive indictment by the prosecutor, judge or defense counsel. The agreement to dispose of the case in this manner is, however, out of the earshot of the public and no public record is made of the bench conference. It is a formal proceeding in that the court is in session and all three parties and the defendant are before the court, but it is also informal in that the negotiations are off the record and hence the reasoning to support the charge at plea and the sentence are unavailable for public scrutiny.

D. Review of the Literature

The type of empirical research that has been conducted by social scientists on the relationship between guns and violent street crime falls into two categories — that research which seeks to investigate whether there is a relationship between violent street crime with guns and the availability or access to guns and that research which seeks to investigate whether there is a relationship between violent street crime with guns and the way such offenses are handled by the criminal justice system. Zimring, Fischer and Cook¹⁰⁷ have examined whether the availability or access to guns is directly or indirectly related to violent street crime with guns.

Zimring in 1968 conducted a study which consisted of 554 homicide cases from the Chicago police department records. He considered whether the elimination of guns would reduce the number of criminal homicides. He argued, if most homicides were spontaneous and tend to occur simply because the means of violence — the gun — is available, then reduction in gun availability should reduce criminal homicides. Zimring found support for his hypothesis. He found that:

1. more than 2/3 of the homicides involved persons known to each other before the attack;
2. 82% of the homicides were accomplished by altercations;
3. only 30% of the victims of fatal gunshot attacks were wounded by more than one shot;
4. in about 1/2 of the incidents either the victim or the offender had been drinking alcohol.¹⁰⁸

Zimring, along with George B. Newton in 1969, advanced his argument that the quantity of firearms, particularly of handguns, in general circulation was a causative factor in the number and proportion of firearm crimes, accidents and suicides. This was made available in a report

submitted to the National Commission on Causes and Prevention of Violence and in a policy paper submitted to the John F. Kennedy School of Government Task Force on Handgun Ownership, Handgun Control in Massachusetts.¹⁰⁹ However, in light of the sharp increase in crime, including handgun crime, in some of the northeastern cities that were the focus of his hypotheses of more firearms-more firearm crime, Zimring found current data more consistent with a "subcultural" focus on firearm circulation. He concluded that the problem lies not in the general circulation of firearms but in the availability of firearms to those who are likely to commit violent crime. Thus, Zimring's revised analysis is limited to policies that affect the level of handgun involvement in subcultural violence.¹¹⁰ To support his change of perspective, Zimring's attempted to illustrate that the increase in robbery killings in Detroit (from the period between 1962 to 1970 the number of robberies increased from 4,200 to 20,000 and the number of robbery killings increased from 15 to 155) was due to the availability and use of weapons rather than the increase in the number of robberies. Data again were supplied by the Detroit Police Department. Zimring argued that a fourfold increase in the former could not explain a ninefold increase in the latter, and that while the relationship between robbery and robbery killing trends were close through the period 1962 through 1970, the two trends diverge dramatically after 1971. After utilizing simple correlation coefficients between weapon choice and robbery deaths; using police data on deaths and estimating the relative frequency of gun versus other weapons use, Zimring concluded that evidence suggests that effective firearms control measures may affect both the frequency and lethality of robbery.¹¹¹

In 1976, Fischer¹¹² conducted a study in Detroit to test the relationship between availability and violent street crime with guns. He designed his study to investigate the extent to which the rising homicide rate in Detroit could be attributed to the increased availability of guns. Gun availability was measured by the guns registered and the number of licenses to purchase guns that were granted each year. During the period of 1963 to 1971, homicides by gun had increased seven times, while those

involving long guns increased thirteen times. Homicides by other weapons such as knives did not show an increase. Fischer focused attention upon three variables:

1. the willingness of local residents to use means other than handguns to settle disputes (violence factor);
2. the economic activity of the city (economic factor) and
3. firearm availability (availability factor).¹¹³

Both violence and firearm availability factors were found to be statistically significant. It was concluded that most of the increase in the homicide rate could be attributed to an increase in handgun murders. Furthermore, the data suggested a positive relationship between guns and the homicide rate. Firearm availability accounted for 1/4 of the rise in homicides.¹¹⁴

The United States Conference of Mayors have studied the size, distribution and usage of the stock of weapons held by American households. They have used this information to influence legislators to draft and pass legislation to control access to guns that may be used in violent street crime.¹¹⁵

In an attempt to present the Mayors' position on gun control and violent street crime, Matthew Yeager,¹¹⁶ writing for the Conference's Handgun Control Committee, questioned the basic assumptions of those who advocate mandatory minimum sentences for gun possession instead of laws restricting access to guns. Yeager questions the assumptions that have led to a belief that prison sentences will deter illegal handgun possession and therefore reduce violent street crime with guns.

In theory mandatory minimum sentences are supposed to (1) deter crime and (2) counteract the abuses of judicial and prosecutorial discretion, but Yeager attacks this theory with the following arguments:

1. Mandatory sentences prevent judges from basing sentences on important individual factors;¹¹⁷
2. Avoidance of mandatory sentences may be a practical necessity, particularly for the prosecutor, who relies on the possibility of leniency to obtain guilty pleas;¹¹⁸
3. Judges and prosecutors fearing a loss of power may resort to subrose methods to get around the rigid requirements set by mandatory sentencing legislation; prosecutors, for example, engage in preindictment plea-bargaining;¹¹⁹
4. Where prosecutors have sought the imposition of long mandatory sentences, the courts have often refused to enforce the statutes or have narrowed their application. Under former New York Penal Law for example, the court construed the term "convicted" in the law requiring long mandatory sentences as not including offenders who had previously been found guilty of a felony which had resulted in a suspended sentence;¹²⁰
5. By sharply curtailing judicial discretion in sentencing, the legislature unintentionally transfers discretion to the prosecutor, to the extent that it entrusts a prosecutor with undue advantage in plea-negotiations;¹²¹
6. Legislators should not impose mandatory sentences. They are counterproductive to public safety and they hinder correctional programming without any corresponding benefit. To the extent that the mandatory provision requires an individual offender to be incarcerated longer than necessary, it is wasteful of public resources to the

extent that it denies correctional programming such as probation or parole to a particular offender, it lessens the chance for successful reintegration into the community. To the extent that mandatory sentences are in fact enforced they have a detrimental effect on corrections.¹²²

7. In some cases, when a marginal offender has committed an offense, the judge feels the mandatory penalty is inappropriate and dismisses the case or acquits the offender; similarly, a jury may decide not to convict merely because it does not believe that the mandatory penalty is warranted;¹²³
8. Mandatory prison terms are ineffective and perhaps counterproductive because incarceration is ineffective and perhaps counterproductive. Long prison terms may be self-defeating. The threat of punishment has different results depending upon the nature of the offense and the individual offender's incarceration is not an effective answer;¹²⁴ and
9. A requirement that the least drastic alternative be imposed is consistent with public safety. Long mandatory prison terms are actually the most drastic alternative. Mandatory sentences are undesirable for this reason.¹²⁵

Yeager's arguments are compelling and raise serious doubts about the benefits of mandatory prison sentences to reduce judicial and prosecutorial discretion and thus reduce violent street crime with guns. Yeager's arguments are compelling in that there is little evidence to support the notion that mandatory prison sentences deter persons from committing violent street crime. The assumption is that a person contemplating possessing a gun or contemplating committing any crime will weigh the cost and benefits of committing the crime in a rational way. He/she will decide whether the gain to be made from possessing the gun - whether monetary, emotional or

for self-protection is worth risking the punishment - the mandatory prison sentence - he/she will receive if he/she is caught.¹²⁶

It can be argued that the threat of mandatory sentences may not deter persons from committing violent street crime with guns because:

1. A large proportion of violent street crime with guns is irrational. They are committed in the heat of passion or by impulse. It is the availability of the gun at hand that leads to the violent crimes;¹²⁷
2. A large proportion of violent street crime is committed by persons under the influence or seeking to obtain drugs or alcohol. In these cases deterring them is irrelevant — the individual is succumbing to physical, medical, psychological, and physiological needs which outweighs the cost of their actions,¹²⁸ and
3. Only 2% of all crimes committed ultimately result in a jail sentence. The odds are in the perpetrator's favor.¹²⁹

By focusing upon mandatory minimum sentences, Yeager concludes attention is diverted away from the failure of communities to deal with the problem of access to guns.¹³⁰

It would seem that the New York State legislators ignored studies that directly dealt with whether gun control laws have any effect upon gun violence. Studies such as the one conducted by Douglas R. Murray in 1975¹³¹ examined three major sets of hypotheses derived from the literature concerning the relationship between guns, gun control legislation and rates of violence.¹³² His first hypothesis was to test whether various types and severity of gun control laws have a significant effect on lowering rates of violence associated with firearms.¹³³ There was no relationship found. His second hypothesis tested the relationship between gun laws and differentiated rates of possession of guns throughout the country. Murray found no significant effect on access to guns in relation to gun laws, once he had controlled for basic social factors, such as income, age, education, race, etc.¹³⁴

In the third hypothesis, Murray attempted to determine whether the basic proposition upon which gun laws are based is valid, that is, whether differing rates of access to guns have any significant effect on violent crimes. Murray found no evidence that the above was true and hence he concluded that "these findings are in direct contradiction of the widely held opinion concerning the relationship of firearms, gun control laws and crime rates."¹³⁵

Rand researchers¹³⁶ analyzed the projected effects of mandatory minimum prison sentences in both crime and prison populations. They concluded that only if every person convicted of a felony received a mandatory prison sentence of five years would society receive the maximum crime control benefit. This would apply whether the felony conviction was for a violent crime or a non-violent crime and would apply whether the offender was a first-offender or a multiple offender.¹³⁷ They further concluded:

If every convicted offender were sentenced to prison for five years, the crime rate could be reduced by 15%, while prisons would grow by 50% . . . The effect of incarceration on crime can be substantially improved only at a staggering cost in greatly increased prison populations. The tax dollars required for such a crime control scheme are prohibitive.¹³⁸

This is not to say that mandatory minimum sentences coupled with restricted plea-bargaining, if properly framed by the legislators and enforced against certain defendants at particular times in their crime careers, with the support and guidance of the police, judges and prosecutors, would have no effect upon violent street crime with guns. I am only stating here and agreeing with Yeager's and Murray's argument that mandatory minimum sentences, the way they have been enacted, enforced and greeted by various members of the criminal justice system may have little effect on reducing violent street crime with guns. This will become more evident as other studies are discussed.

Although Yeager did not do any empirical research on his own to support his conclusions (but based his conclusions upon the research of others), he does bring to the surface a number of points that others approaching the question of mandatory minimum sentences have overlooked or paid little attention to. Yeager's study focuses attention on the effect and consequences of imposing mandatory prison sentences coupled with restricted plea-bargaining on the criminal justice system, and upon

the role of the prosecutor and the prosecutor's unlimited prosecutorial discretion, his/her need to plea-bargain, and the injustice that may result if this power is curtailed by restriction of his/her power by mandatory sentencing.

Yeager supports his arguments by analyzing the effect of the New York Second Felony Offender Law and the 1973 Rockefeller Drug Act. Both laws required mandatory minimum sentences coupled with restricted plea-bargaining. The legislators in enacting both statutes failed to identify the needs of the prosecutor, the consequences of such restrictions on his/her prosecutorial discretion, the effect upon dispositions and jail sentences and the effect on violent street crimes.

I shall discuss the laws in some detail as they reflect the empirical research done on this topic and New York's limited experience with mandatory minimum sentences coupled with restricted plea-bargaining.

In response to a national "war on drugs", the New York State Legislature in 1973 enacted the New York Drug Law.¹³⁹ Prior to the law, the general policy of the State had been "to divert low-level users of illegal drugs into drug treatment programs, and to invoke criminal penalties mostly against higher-level traffickers."¹⁴⁰ However, due to the increase in drug-related deaths (they were six times as great as they were in 1960), the legislature concluded that this approach was a failure. Thus in 1973, the Legislature enacted a drug law, which carried a mandatory prison sentence for the sale and possession of various amounts and types of illegal drugs. For example, an offender convicted for the sale or possession with intent to sell any amount of illegal narcotic drug must be sentenced to prison for a term of one year to life, with life-time parole under the law. Plea-bargaining was not permitted to lesser offenses.¹⁴¹ The above stipulations of the 1973 Law remained virtually intact until July 1976, when the restrictions on plea-bargaining of those charged with Class "A-III" felonies were abolished. That change significantly altered the 1973 Law, despite the severe mandatory penalties that remained for most severe drug offenses.¹⁴²

The objectives of the drug law were two-fold: "it sought to frighten drug users out of their habit and drug dealers out of their trade and thus to reduce illegal drug use, or at least contain its spread. It aimed to reduce crimes commonly associated with addiction, particularly robberies, burglaries and theft."¹⁴³

Despite the harshness of the drug law, narcotic-related deaths in New York City increased 14%, from 745 in 1973 to approximately 848 in 1974. Narcotic-related deaths are generally considered a good heroin use indicator, and it is frequently assumed that heroine addicts accounts for a sizeable proportion of property crime. The predicted sharp rise in admissions for drug addiction treatment failed to materialize. Thus, narcotic and other dangerous drugs remain as available in New York City as before the law took effect.

To evaluate the effects of the drug law, the Association of the Bar of the City of New York created the Drug Law Evaluation Project. The Project analyzed data from September, 1973 to June, 1976 when the law was in full force, before the 1976 amendments.¹⁴⁴ The objectives of the Project were:

1. to ascertain what happened as a result of the 1973 drug law revision;
2. to analyze to a degree if possible, why it happened and
3. to identify any general principles or specific lessons that can be helpful to New York or to other states as they wrestle with the problem of illegal drug use and related crime.¹⁴⁵

The Project Team found that: (1) heroin use was as widespread in mid-1976 as it had been when the 1973 revision took effect, and ample supplies of the drug were available;(2) the pattern of stable heroin use between 1973 and mid-1976 was not appreciably different from the average pattern in other East Coast cities;(3) in N.Y.C. and other N.Y.S. jurisdictions, the new law may have temporarily deterred heroin use, until 1979 when heroin use again increased; admission to treatment programs increased immediately after the new law took effect; (4) most evidence suggested that the illegal

use of drugs was more widespread in 1976 than in 1973, and that in this respect, New York was not unique among East Coast cities; (5) serious property crime of the sort often associated with heroin users increased sharply between 1973 and 1975; the rise in New York was similar to increases in nearby states; (6) there was a sharp rise in non-drug felony crimes between 1973 and 1975, however, the rise was apparently unconnected with illegal narcotics use: non-drug felony crimes known to have been committed by narcotics users remained stable during that period; (7) the available evidence suggests that the recidivist sentencing (predicate felony) provision of the 1973 law did not significantly deter prior felony offenders from committing additional crimes; (8) measured in dollars the experiment of the 1973 law was expensive; approximately \$32 million was spent in the effort to enforce and implement the 1973 drug law; thirty-one new judges were allocated to NYC alone to deal with the increased workload; the \$32 million included increased support staff as well as prosecutors, and defense counsel; and finally, sentences under the 1973 law did not constitute a significantly larger fraction of annual new commitments to state prisons than in the past; they accounted for 13 percent of all commitments in 1972 and 1973 and for 16 percent in the first nine months of 1976.¹⁴⁶

The objectives of the 1973 drug law and the 1980 gun law were similar in that both laws sought to reduce crime by imposing mandatory minimum sentences and restricting plea-bargaining, both resulted from the legislators' attempt to reduce prosecutorial and judicial discretion. What accounts for the disappointing results of the drug law can serve as an indication of the problems that might be encountered with the gun law.

The Project team argued that for such a law to be an effective deterrent, the law would have to be "effectively enforced and the threat of the laws' sanction had to be clearly perceived by drug users and traffickers as an ever-present reality."¹⁴⁷ This end was never accomplished. The drug law failed to deter drug use or drug-related crime because very few cases made it through the criminal justice system.

The Project team pointed out that drug offenders had always had low odds of being arrested for any single offense. The risk of being arrested did not increase under the 1973 law. Bail practices did not change under the new law, with release upon paying bail, the deterrent effect is reduced. The number of indictments reported by the Project team did not increase; they remained virtually the same, despite the fact that prosecutors by and large did not change-bargain with arrestees before indictment to avoid the mandatory minimum provisions that arise after indictment. By the first half of 1976, only 25% of arrests for drugs resulted in an indictment. In 1973, the figure was 39%. There was a slight decline (86% in 1972 and 80% in 1976) under the 1973 law in the frequency with which convictions were obtained after an indictment thus, only 1/5 of those originally arrested in 1976 for drug felonies were ultimately convicted (80% of the 25% indicted) a decline from roughly 1/3 under the old law.¹⁴⁸ The total number of convictions for drug offenses in felony courts in the period 1974 to mid-1976, was lower than would have been expected during the same period under the old law disposition patterns. Nine hundred fewer cases were disposed of. However, the team also reported that for those ultimately convicted, incarceration became more likely. Thirty-three percent of those convicted of drug offenses received jail or prison sentences. From 1974 to June 1976, the incarceration rate had grown to 44%, a direct result, the team concluded, of the plea-bargaining restrictions and mandatory minimum sentencing provisions. There was an 11% increase (637 defendants) in the number incarcerated; however, this increase, they also concluded did not offset the decline from 1974 to mid-1976 in the likelihood of ever being convicted.¹⁴⁹

The Project team concluded that a defendant under the old law faced an 11% chance of receiving a prison or jail sentence in superior court, under the law of 1973, the chance remained virtually the same - 11%

(because of the new law's reduced indictment and conviction rates). Even if there was not a reduction in indictment and conviction rate, the maximum effect of the law would have been only 7% higher, that is the chances of being incarcerated would have risen from 11% to 18%. Whether this increase would have had any deterrent effect upon drug users engaged in violent street crime and those that traffic in drugs is unknown. It would seem unlikely that it would have.

Those who were "caught in the net" of the new law and faced its consequences received harsher sentences. Drug law offenders sentenced to prison under the 1973 law would spend more time there than they would have under the old law. Between 1972 and 1974, under the old law, only 3% of those convicted and sentenced to prison for drug felonies received a minimum sentence of more than three years. During 1974 and 1975, when the new law took effect, 22% received minimum sentences of more than three years. Life time sentences for drug offenders were rare before the new law, but after the law took effect, 1,777 defendants received such sentences between September 1973 and June 1976.¹⁵⁰

It might be reasonably concluded that under the new law, only a small number of drug offenders actually felt the full weight of the new law — "a more likely and longer prison sentence"¹⁵¹ and since the Project Team did not look at recidivism rates for those that did get "caught" by the new law, nothing is known of the deterrent effect of such prison sentences upon future drug and drug related crimes.

An important aspect of the Project research was that the team attempted to assess the effect of the law on the criminal justice system. They observed that in New York City the time required to process drug law cases lengthened dramatically. The time they reported nearly doubled and a backlog was created that numbered at 2,600 pending cases, in spite of the 31 additional courts created to deal with the new law. The team reported that two factors contributed to the backlog: the tremendous increase in the number of trials demanded by defendants who now faced mandatory prison sentences (trials rose from 6% before the law to 16% after the law took effect) and the law's restricted plea-bargaining. The gain in pleading guilty was removed. A defendant risked little in asking for a trial. In fact, he/she may have gained in that the longer the time it takes to adjudicate a

case, the more of a chance a defendant has to receive a sentence that is non-jail. In the criminal justice system, trials impede the flow of the system — witnesses are required, police officers, a court part must be made available —the expense to the system is great. Fewer drug cases were disposed of after the new law, 700 fewer cases —this due to the court delays and restrictions on plea-bargaining.¹⁵²

Although the Project team did not reveal any overt actions among prosecutors, judges or the police to circumvent the law, and indeed they found them enforcing the law, they concluded that there was little enthusiasm for the drug law. Many judges and prosecutors, they reported "felt that the mandatory sentencing provisions reduced the possibilities of individual treatment of offenders, and therefore the quality of justice."¹⁵³ They continued that some prosecutors were troubled by the harshness of the penalties one could receive for low-level drug trafficking compared to those who had committed other crimes which would seem more "heinous"¹⁵⁴ by most citizens. The prosecutors also felt that the drug law forced them to scatter their limited resources on what they considered relatively minor offenses. As for judges, they found that some were reluctant to send some drug offenders to jail for such long sentences, when they felt drug rehabilitation would have been the proper disposition but for the law. What they did then was to adjourn cases for long periods of time "slowing down the process of judicial disposition."¹⁵⁵ The police felt that "all-out street level enforcement would be only marginally productive and would hopelessly inundate the courts."¹⁵⁶

In 1974, Justice Dickens, late of the N.Y.S. Supreme Court, criticized New York's tough drug law and stated that he had been forced "to give a life sentence to a 19-year old woman who had no previous record, but who had now been found guilty of selling a small amount of heroin to an undercover policeman."¹⁵⁷ A judge presently sitting in Bronx Supreme Court also criticized the mandatory provisions of the drug law because of the consequences he felt the law had on individual defendants and on his discretion to consider their differences. He stated:

From my point of view, any kind of mandatory proscription is going to work a hardship in an individual case. When the Rockefeller Drug Law went into effect and mandated life sentences for anybody involved in drugs; you then found yourself in a situation where a youngster who was attending

college, who had fallen into the drug culture (which is rather easy to do in our society), could now be facing the disaster of a life sentence, when this youngster might be a very brilliant student with a promising career in science or some other field he chose, is now stigmatized by a jail sentence of a mandatory nature, because he gave or aided in the transfer of one glassine envelope containing heroin or cocaine. The mandatory kind of sentence restricts the Judge in certain situations where if you had discretion, justice would be better served.¹⁵⁸

An important lesson comes from the conclusion of the Project team:

The key lesson to be drawn from the experience with the 1973 drug law is that passing a new law is not enough. What criminal statutes say matters a great deal, but the efficiency, morale, and capacity of the criminal justice system is even more of a factor in determining whether the law is effectively implemented.

Whatever hope there is that statutes like the 1973 revision can deter anti-social behavior must rest upon swift and sure enforcement and a dramatic increase in the odds that violators will, in fact, be punished. Until New York's criminal justice process is reformed so that it can do its work with reasonable speed and reasonable certainty, the Legislature does not in reality have serious policy options to choose from. Without implementation, there is no policy; there are only words.¹⁵⁹

John Kaplan, in his study entitled, "The Wisdom of Gun Prohibition," drew upon law enforcement experiences with liquor and drug prohibition and attempted to draw up a balance sheet of costs and benefits that would result from an outright prohibition of the sale of guns. He concluded that although such a prohibition might be manageable from an enforcement point of view, the rise of a black market in guns outweighs the benefit of such a prohibition. He further stated that all that might be accomplished is the rise in the cost of guns to criminals. "The widespread availability of drugs in open view is a testament to the ease of which illicit merchandise can be obtained."¹⁶⁰

The legislature that enacted the 1973 drug law had as their target two groups of offenders, those who commit drug-related crimes such as robbery, burglary, and theft, and those who were heavy drug abusers. The enforcement of the drug law by police officers, prosecutors and judges, lead to the overcriminalization of a group of offenders, namely, the low

level drug abuser, who prior to enactment of the law might have been able to negotiate a plea to a lesser charge and sentenced to probation and/or a fine, or ordered to participate in a drug rehabilitation program. Likewise gun possessors who have no criminal records and have not used their guns to commit violent street crimes, beforee the 1980 gun Control Law, could have avoided being indicted if charged with illegal possession of a loaded gun outside their place of business or home. In the case with drugs and guns, a group that the legislature had not targeted as being the basis of the enactment of the law are being subjected to the restraints built in the law by the legislature which may lead to injustice.

1. Studies that deal with Legislation
Aimed at Reducing Violent Street
Crime with Guns

Most studies that deal with the issued of prosecution and disposition of firearm possession cases in the criminal justice system include information on guns usually as an additional control measure of the seriousness of the case, or as an indication of the quality of evidence (e.g., whether the gun involved was recovered as evidence), with little attention paid to gun effect.¹⁶¹ However, there are notable exceptions:

In 1974, the Massachusetssts legislature passed the Bartley-Fox Amendment to its gun control law, which expanded Massachusetts licensing procedures and made unlicensed carrying of a weapon an offense with a mandatory sentence of one year, forbidding the suspension of sentence, nonfiling of cases, plea-bargaining and other devices used by judges and prosecutors to avoid felony convictions. The amendment became effective in April of 1975.¹⁶²

In an attempt to evaluate the effects of the Massachusetts Amendment, James Beha¹⁶³ and his associates analyzed every arrest charge involving weapons.

Beha's objectives were to evaluate the impact of a firearm charge on securing conviction and imprisonment for not only those who use a gun but also, those for whom simply possess or carry weapons while committing another crime. The objectives of the Beha study were to analyze the way the criminal justice system has responded to the Bartley-Fox mandate and the attendant limitations on the discretion of the police, prosecutor and judges.¹⁶⁴

A substantial portion of Beha's research dealt with how the prosecutor, judge and police adopted to such weapons cases and one of his initial concerns was whether judges would resent the loss of discretion imposed by the legislators and find ways to circumvent the law his main purpose was to assess the effect of the Bartley-Fox Amendment in lowering firearms related offenses.¹⁶⁵

Beha concluded that there was widespread compliance with that provision of the Amendment by judges, prosecutors, and the police, that dealt directly with possession of carrying of a firearm. Judges sentenced defendants charged with possession of a gun in accordance with the statutory mandatory minimum.

Prior to the law a fairly large number of such cases involved suspended sentences or individuals so charged had their files on record kept without being sentenced. There were cases, Beha reports, in which judges appeared to acquit the defendants rather than to sentence him to the mandatory minimum, but these instances, he states, were few.¹⁶⁶

Beha reported that in 1974, 28% of defendants charged with carrying a weapon, as the most serious charge against them, received a prison sentence from the lower court or were indicted, while 34% received suspended sentences or lesser penalties upon conviction. In 1975, almost half were sentenced to at least one year or indicted. Of the twenty prison sentences imposed on defendants charged with weapons in their possession in 1974, 13 were appealed and very few received a prison sentence thereafter, if their convictions were upheld. Beha concluded then that the chances were five times as great for a defendant charged with illegal possession to receive a jail sentence under the amendment.¹⁶⁷

Beha also found that the "mix of persons prosecuted did not change significantly; about half the prosecutions continued to be unrelated to other criminal activity and the age, sex and marital characteristics of the 1975 sample of defendants were the same as the 1974 sample of defendants."¹⁶⁸ More importantly, the 1975 sample of defendants were somewhat less likely to have any criminal records.¹⁶⁹

In fact, a large proportion of those arrested had no criminal records. A third of Beha's 1975 sample of defendants had no prior criminal histories, while 12% of the remaining two-thirds had only minor records. Beha reported further that based upon the limited amount of background information that he had available to him identifying race, sex and occupation "there was no significant difference between the Bartley-Fox defendants and those prosecuted in 1974, laying to rest fears by some who felt blacks would be disproportionately represented in gun possession arrests after the law took effect."¹⁷⁰

Beha did argue that because the police were not dropping charges on their merits, prior to a hearing many defendants' attorneys were prepared to argue and judges were more prepared to consider legitimate procedural defenses. He further added that most defendants who would have benefitted from judicial discretion probably would not have been convicted even before Bartley-Fox and that therefore, the bulk of the drop in conviction rates for those charged only with possession or carrying, must be traced not to judicial discretion, but to zealous defense counsel.¹⁷¹

Prosecutors, he found, did not attempt to use their added discretion to charge offenses to avoid the mandatory minimum; nor did he find that prosecutors used their additional power to plea-bargain away the effects of the mandatory minimum sentence. He also found that the police did not use their discretion to enter a possession charge against the defendant to circumvent the penalties of the mandatory minimum.

Beha also found that the Bartley-Fox amendment had little effect on other weapons-related charges and hence little effect upon gun-related crimes. He reported that if a person was charged with armed robbery, in which an unlicensed gun was used, a weapons carrying charge was ordinarily not filed as an additional charge, since the latter carried a much smaller mandatory sentence than ordinarily given out for armed robber, so the defendant risked no additional jail time for carrying a gun under the

Bartley-Fox amendment — the prosecution gained no more bargaining power in the prosecution of more serious gun-related crimes. It also should be noted that defendants arrested for carrying a gun are not generally "violent street crime prone" and hence arresting, convicting and sentencing these defendants will not reduce violent street crime. So that even if all members of the criminal justice system followed the amendment to the "letter of the law", this would not be likely to reduce violent street crime with guns.¹⁷²

In 1979, David Rossman¹⁷³ and his Associates extended the Beha study by analyzing a period beyond six months after the Bartley-Fox law went into effect, looking at more jurisdictions and most importantly including systematic interviews with prosecutors, defense attorneys, judges and court clerks. Rossman concluded that there were differences in the "accommodation" of the criminal justice system to the Bartley-Fox amendment over time. He showed:

1. In the year immediately following the enactment, enforcement appeared to be pursued more vigorously than two years later;
2. Arrests for carrying charges increased after enactment but then declined in the following year;
3. Interviews with police revealed a clear misunderstanding concerning the meaning of the law and its applicability. They therefore resolved their misunderstanding by enforcement of the law the first year, but not in the second;
4. Prosecutors and judges systematically downgraded charges of carrying to weapons possession leading to the restoration of judicial discretion.

5. After the law, convictions for carrying charges declined for those charged, indicating that judges and juries were less willing to convict on such charges;
6. The Bartley-Fox amendment in Boston only lead to 40 more prison sentences over a one year period for carrying charges than would have been expected.¹⁷⁴

Unlike the New York legislators, the Massachusetts legislators did not prohibit prosecutors from plea-bargaining with gun-carrying defendants at any time. A prosecutor who does not want a defendant to be subject to the mandatory minimum one year jail term may agree to dismiss the Bartley-Fox charge in return for a guilty plea to some other crime. The prosecutor may also reduce the carrying charge to possession in return for a guilty plea. Finally the defendant may plead guilt to a Bartley-Fox charge in return for the prosecutor's recommendation, the Bartley-Fox jail sentence be served concurrently with a longer sentence and thus be of no practical significance to the defendant.¹⁷⁵

As in all of the above plea-bargaining situations, the defendant receives some advantage for not going to trial on carrying charges. Rossman found that plea-bargaining continued after the Bartley-Fox law went into effect and played a significant role in the disposition of those cases. Before the law 31% of the dispositions were plea-bargained, after the law the number rose to 36% in 1975 and fell to 15% in 1976. In the two years that followed the Bartley-Fox law, in some cases, the charges were reduced or dismissed so that the defendant could receive a suspended sentence.

Rossman finally concluded, based upon the above data, that the "Bartley-Fox law removed discretion in one area-sentencing; but discretion remained to accomplish the same ends in another area-plea-bargaining."¹⁷⁶

When Rossman asked judges and prosecutors whether they were satisfied with the law, the response from the majority of judges and prosecutors was that they thought that Bartley-Fox did not persuade those in the criminal justice system to get tough with violent crime. About half of them felt that the law interfered with their ability to obtain a fair and effective sentence in an individual case.¹⁷⁷ Rossman found that even judges with tough reputations noted that in some cases they would have suspended the defendant's sentence if the law allowed them to do so.¹⁷⁸

The importance of the Rossman study is that it shows (1) that long term effects may be quite different from short term effects; (2) long term effects may reveal that some judges and prosecutors attempt to circumvent the law; (3) the criminal justice system takes time to adjust and react to mandatory minimum sentences; and (4) the law did not have any noticeable effect on violent street crime with guns.¹⁷⁹

Another attempt to assess the effects of Bartley-Fox amendment was the study done by Pierce and Bowers.¹⁸² They used an enlarged data-base, which included a longer period of time after the law was implemented, and compared the trends in Massachusetts and Boston with other states and communities. Pierce and Bowers found that: (1) the incidence of gun assaults was deflected downward by the introduction of Bartley-Fox, with a compensatory increase in assaults in which guns were not used. They concluded therefore, that Bartley-Fox had both a deterrant effect and a displacement effect; (2) as for armed robberies, a moderate deterrant effect was detected with a possibility that guns were again beginning to be used two years after Bartley-Fox went into effect, particularly against victims in certain types of robberies; and (3) gun homicides showed a slight decline, as a consequence of Bartley-Fox.¹⁸¹ But it is not at all clear how the Bartley-Fox amendment achieved these effects on major crimes.

The Bartley-Fox amendment spoke directly to only one offense, carrying of an unlicensed firearm. Penalties for gun-related crime or crimes where guns are used were not changed. Pierce and Bowers did not show why or how reductions in gun-related crimes must be attributed to Bartley-Fox amendment. They did not show that those who are charged with carrying guns alone were responsible for gun-related crime. They did not show that by prosecuting these defendants, other defendants, who use guns in gun-related crimes are deterred from such crime. There is the possibility that the public, misunderstanding the penalties of the Bartley-Fox amendment, thought that gun-related crimes as well as gun carrying charges now carried more severe penalties and in that way deterred persons from using guns in gun-related crimes.¹⁸²

Pierce, Bowers, Rossman and Beha, did not look at recidivism rates of those charged with gun carrying charges alone. If these defendants were re-arrested for violent gun related crimes, then they might have been a possible connection between simply carrying guns and gun-related crime. If they were not re-arrested, then perhaps these are not the persons who would have used their weapons in gun-related crime, the target of the

legislators. If the law did not deter those directly affected by the law and those who were made to feel the severe penalties of the law — it is difficult to understand why other defendants charged with more severe gun-related charges would be deterred from such behavior because of the law.

The Loftin, McDowall study¹⁸³ of the Detroit gun enhancement law illustrates how one jurisdiction in order to reduce violent street crime with guns used an add-on, non-concurrent sentence. The thrust of the law was to provide a mandatory two year add-on sentence for felonies committed while in possession of a gun. Therefore, a defendant who is charged with a felony committed with a gun not only faces a jail sentence for that charge, but in addition a mandatory add-on penalty for having possessed a gun in the process. The two additional years were to run non-concurrently. Although the law did not restrict charge-bargaining by the prosecutor, the Detroit prosecuting attorney declared that he would not plea-bargain away the charges resulting from the new law.¹⁸⁴

The Loftin and McDowall's evaluation of the effect of the law focused upon two questions (1) how the mandatory add-on was implemented in the courts and (2) whether the add-on sentence provisions had detectable crime-reduction effect. To analyze these questions they used sentencing data for three years (1976 through 1978) spanning the enactment of the new law. The researchers found no observable change in the sentencing practices for firearm homicides or armed robberies, but some increase in the sentences for firearm assaults.¹⁸⁵ They concluded that the courts seemed to be applying the new law selectively. Assault arrests were relatively low before the new law and not given a high priority by prosecutors and judges. If convicted many defendants were sentenced to suspended sentences or probation. Since the new law was a sentence that was non-concurrent, the failure to sentence a defendant the additional two years would be very conspicuous in an assault case. However, prosecutors and judges usually treated armed robberies and firearm homicides severely. The researchers observed that "the sentencing judge could simply shave a couple of years off the already severe sentence for murder or robbery, making the net sentence the same as it had always been."¹⁸⁶ Judges were

hard pressed not to sentence a defendant the additional two years in assault cases, but could easily circumvent the additional sentence in robbery or homicide cases.

Loftin and McDowall concluded that.

The law did have a slight effect on the assault cases, however, the overall sentencing pattern given to 232 guilty carrying concealed weapons defendants was as follows: only a total of 18% of those convicted were sentenced to some form of confinement, while the remainder either received probation and/or fine or a suspended sentence. Only 7.2% of those convicted defendants were sentenced to a prison term exceeding one year; 4.7% of the defendants received sentences between three months and a year; and 5.5% of the defendants received less than 90 days of incarceration.¹⁸⁷

The Loftin-McDowall study is of particular interest in that the Legislators did not seem to associated simple gun possession or carrying with use of a gun in violent street crime; they seemed to believe that mandatory sentences to reduce violent gun-related street crime, only works if the target of the add-on sentences are those who actually use or possess guns while committing violent street crime. However, since the add-on law was so rarely used by judges to affect the sentence of the defendant, we can only wonder if such an approach would serve to deter violent street crime. However, we do see how the system reacts to the implementation of such an approach and the ways, judges and prosecutors can circumvent it.

Although not stated by Loftin and McDowall, one can speculate that judges sought to circumvent the add-on sentence because they felt that there was sufficient latitude in the scope of possible lengths of sentences that they could mete out, the would be sufficiently severe, without the use of the add-on sentence. Also, they may have felt that to add two years to a defendant's sentence may have placed sentences for crimes committed when the defendant was in possession of a gun inconsistent with sentences for other crimes of equal severity.

It is of interest here to address the Florida Glisson Amendment. Florida's judges were required to impose on defendants to mandatory prison sentences for use of a firearm in specific felony offenses, with the mandatory sentence set at between three years to life, depending upon the judge's discretion. The Florida Amendment is another add-on sentence,

similar to the Michigan law. D.E.S. Burr¹⁸⁸ studies the deterrent effect of this law by interviewing several hundred felony offenders who had used firearms in the commission of their convicted crimes for which they were convicted. When asked, by Burr, whether they knew of the amendment and its consequences when they committed these offenses, 83% of the felons stated that they did know and 73% stated that they would continue to carry weapons once released from prison, despite the amendment. This finding raised the question as to whether under any circumstances mandatory sentencing for possessing or carrying weapons will even deter those who use or possess such weapons to commit violent crime. If the group that the law affected most — the convicted felon, who received more jail time because of an add-on mandatory sentence is not deterred (or at least states that they will not be deterred) — then it is difficult to predict what type of violent prone person would be deterred by mandatory minimum sentences or add on mandate sentence for gun possession.¹⁸⁹

Burr also reported, after observing the court system over a year, that about 525 felons were convicted in Florida that were prosecutable under the Glisson amendment, but only slightly more than half were given mandatory add-on sentences.¹⁹⁰

Although all the laws studied increased the penalties for possession or carrying of a gun as a means of reducing violent gun-related street crime, the researchers did not investigate whether the defendants who were arrested, charged, convicted and sentenced solely for possessing or carrying a gun recidivate. Are these defendants being rearrested for possessing guns or rearrested for violent street crime? The researchers tend to draw conclusions concerning the effect of the law on reducing violent street crime by analyzing rates of gun-related crimes, when in fact, these crimes may be committed by two different groups of people — those that possess guns for non-violent purposes, such as protection from burglary or robbery and those that possess and use guns to committ violent street crime.

Phillip Cook and Daniel Nagin¹⁹¹ writing under the auspices of the Institute for Law and Social Research analyzed what they referred to as "the increasingly widespread policy of giving priority to defendants accused of gun crimes, relative to those accused of similar violent crimes

committed with other weapons, and on the more traditional policy of giving priority to defendants accused of armed violent offenses relative to those accused of unarmed violent crimes in the District of Columbia."¹⁹⁶

Cook and Nagin argued that:

Whether most illegal possession cases in fact tend to involve dangerous criminals depends partly on the circumstances under which the police are inclined to make an arrest. The police will inevitably have many opportunities to make weapons arrests involving people who are unlikely to be active criminals: Shopkeepers and others who carry a gun for self-protection but failed to obtain the necessary license, drunks celebrating by shooting into the air, and so on. If the police tend to handle such cases with a formal arrest procedure, then the typical weapons-possession case will be quite different than if police reserve the arrest option for those they suspect of being criminals.¹⁹⁷

The prosecutor's office in the District of Columbia had adopted a gun-emphasis policy to counteract increased violent crime with guns. The Prosecutor instructed assistants to treat weapons-possession cases seriously. An assistant district attorney was not permitted to refuse to prosecute an illegal gun possession case at the intake hearing (arraignment) on their own authority — a more senior prosecutor would be the only one who could reject a gun possession case at the initial screening. The D. C. criminal code has substantial jail penalties prior to the gun-emphasis policy, for defendants who possessed a gun without a license or a deadly weapon outside their place of business or home could be sentenced to up to a year in jail. If the defendant had a prior felony conviction, he/she could be sentenced to up to ten years.

The researchers traced the criminal careers of 6,000 adult males arrested in 1973 in D.C., and collected rearrest data on each defendant in 1976. They found that of approximately 6,000 defendants, 957 were arrested for gun possession charges only. The 6,000 were divided up into "type of crime" groups depending upon their 1973 conviction, for instance, robbery, homicide, assault, etc.¹⁹⁸

Cook and Nagin analyzed rearrest data in order to determine the appropriate criminal justice policy in processing defendants arrested for gun possession, based upon the assumption that one reason why courts may want to treat these cases seriously in that "weapons possession defendants" are active robbers or highly inclined to violence.¹⁹⁹

They concluded:

1. Recidivism patterns for 798 gun possession defendants in the 1973 sample suggests that the typical weapons possession defendant is less actively involved in violent crime than the typical member of their violence prone sample;
2. 61% of the gun possession sample were age 21 or older and had no prior record of arrests for violent crime, and this group had a very low re-arrest rate even when compared with the corresponding group in the violence-prone sample. Youths and defendants with prior records had re-arrest rates that were considerably closer to those of the 'violence-prone' sample;

Therefore, illegal gun possession, per se, is not a very accurate indicator of violent criminal propensity in the District of Columbia, but that illegal weapons possession cases for youths and/or those with prior records involve defendants who are almost as active in violent crime, on the average, as violent crime defendants in these groups. 200

It appears from the above data that in jurisdictions like District of Columbia where the criminal code makes a distinction between those that possess guns (who have prior records and those who do not have such records), the distinction is warranted, in that the former are likely to be rearrested for violent crimes with guns. These defendants were not deterred by the prosecutor's gun-emphasis policy, and the threat of harsher, longer sentences seems not to be a deterrent, but for the non-violent record defendant the gun-emphasis policy may have in fact deterred them.

Cook and Nagin also looked at disposition data of approximately 1,100 weapon possession offenders in 1974. Ninety-one percent of these cases involved guns. Two-thirds of the gun cases were charged as misdemeanors, one-third were charged with felonies. Felony charges were reserved for those cases in which the defendant had a prior felony conviction or a prior weapon offense. Incarceration was reserved for convicted offenders who were initially charged with felony offenses. Twenty-five percent of the felony arrestees and five percent of the misdemeanor arrestees were imprisoned. The major basis of discrimination in case disposition then was not the type of weapon, but rather the seriousness of the initial charge. I would argue that since the only difference between felony and misdemeanor gun charges is the

defendant's record, that the real basis of discrimination lies there. They further concluded that the overall conviction rate for gun possession offenses is substantially higher than the conviction rate for any of the violent crime cases. The incarceration rate (i.e., the fraction of arrests that result in conviction and incarceration) is as high for felony weapons cases as for robbery cases. The incarceration rate for misdemeanor weapons cases is similar to that of assault cases. Although the average length of sentence for weapons cases is less than that for violent crime cases, it is nevertheless clear from the above results that the average weapons case, in the District of Columbia's lower courts is taken quite seriously by the prosecutor and judges who were involved with those cases.²⁰¹

The disposition pattern for weapon possession cases suggests that these crimes are viewed as quite serious by the judges and prosecutors of the Court of the District of Columbia as well. The conviction rate is higher in felony gun-possession cases than for any of the violent crimes. Moreover, the likelihood that a felony weapons-possession arrest will result in a prison term is about the same as for gun robbery cases. Conviction rates for misdemeanor weapons possession are also relatively high, but incarceration rates are much lower than for felony cases (but as high as for assault cases). Average sentence length is relatively low in all weapons possession categories. Their recidivism results for weapons possession cases indicate that youthful arrestees or those who have a prior record of arrests for violent crimes are almost as violence prone and likely to recidivate as the members of the violence sample, so those categories of defendants are properly viewed as serious threats to the community.²⁰²

The New York State Division of Criminal Justices (D.C.J.S.) together with the Major Violent Offense Trial Program, in order to assess the impact of the mandatory minimum sentence for possession of a gun outside place of business or home, designed and conducted a comparative analysis of the court processing of all arrests in New York City in the last quarter in 1979 (pre-law) and the last quarter of 1980 (post-law) where 265.02 was the most severe reported arrest charge. By their definition, gun possession cases in their study therefore may have included defendants who were charged with other charges, which may or may not have influenced the disposition of their cases.

The purpose of their research was "to determine whether or not any statistically significant differences exist in the probability of certain court outcomes."²⁰³ D.C.J.S. based their analysis upon 632 pre-law gun cases, any statistical differences that emerged between the two groups was then subjected to the standard two-sample test at the .05 confidence level to determine whether or not such difference could be accounted for by sampling error alone.²⁰⁴

D.C.J.S. found:

- (1) After the gun law, defendants charged with 265.02-04 were significantly more likely to be indicted (63.5%) than prior to the gun law (40.7%), an increase in the indictment rate of 22.8%.

However, the non-conviction rate in Criminal Court dismissals, dismissed at the Grand Jury or acquitted remained virtually unchanged (29% pre-law versus 28.6% post-law). One might have expected the dismissal rate to increase because defense counsel would become more rigorous in the legitimate defense of defendants faced with mandatory jail sentences.

From the above data, D.C.J.S. staff concluded that the criminal court is "essentially being used to screen cases completely from the system that are not acceptable for felony prosecution in the Supreme Court and the Supreme Court is no longer being used for the acceptance of pleas to reduce charges."²⁰⁶ It is also possible that prosecutors are simply allowing a number of cases to proceed to indictment and complying with the stipulation of the law that no defendant be allowed to plea to reduced charges or have a mitigating circumstance considered until after the defendant has been indicted. It should be remembered that the grand jury process is a pro-prosecution process. The district attorney presents the witnesses and elicits the testimony, questions and cross-examines the witnesses and carries out grand jury requests for additional evidence or witnesses to be subpoenaed before it.²⁰⁷ The defendant is not present in the grand jury room²⁰⁸ and defense counsel are not allowed to test the validity of the evidence offered against the defendant. Because there is no judge present to safeguard the defendant's rights and the fact of indictment is a serious and perhaps calamitous event in the individual's life, the district attorney stands in a position of vouching for the truth of the evidence he/she presents.²⁰⁹ The standard for determining whether to

hold the defendant over for trial after indictment is the preponderance of evidence, not beyond a reasonable doubt. Prosecutors have little to lose by proceeding against the defendant by indictment and in fact they have everything to gain — a stronger position to recommend jail sentences.

- (2) Of the 359 pre-law convictions only 44.5% were to felonies. Of the 233 post-law convictions 81.1% were to felonies. Thus a defendant arrested for possession of a weapon after the new law took effect was almost twice as likely to be convicted of a felony.

D.C.J.S. argues that the above figures are significant because even if these felony convictions did not lead to longer jail sentences, the defendants would now face more severe predicate felony sentencing statutes if they became re-arrested and pled to a felony. However, the D.C.J.S. team may be exaggerating the effect of a felony conviction on a defendant. Whether or not the felony conviction will lead the defendant to stop possessing guns illegally, or from engaging in violent street crime, is questionable. It may well be that the defendant is more concerned about how much time he or she receives rather than what charge to pled to. We do not know how many defendants in the post-law sample faced predicate felony sentences before the 265.02 convictions. Some of these defendants may have faced predicate felony sentences before the 265.02 conviction, and therefore the prior felony conviction did not deter them from possessing weapons. The D.C.J.S. study did not supply with data on the prior records of defendants. Nor do they supply data concerning recidivism. One would expect that defendants who face predicate felony status as a result of the gun possession conviction would be less likely to be rearrested on felony charges than those defendants who do not face predicate felony status if the felony gun possession conviction is a deterrent to future felony arrests.

The assumption that predicate felony status deters future criminal activity has been studied by the joint committee on New York Drug Law Evaluation by Matthew Yeager under the auspices of the Association of the Bar of the City of New York.

In order to test the relationship between prior felony convictions and deterrence, he compared the criminal activity of convicted felony offenders before and after the 1973 predicate felony provision of the New

York Penal Code took effect. He examined the records of two parallel groups of convicted offenders. One group consisted of 223 offenders who had been convicted of a felony during 1970 and 1971. Yeager traced the criminals records of these offenders for a two-year period ending August, 1973 just prior to the effective date of the predicate felony rule. The second group was made up of 220 offenders who had been convicted of a felony during 1972 and 1973, and their records were traced for a two-year period through August 1975. Those in the second group faced the mandatory prison sentences under the 1973 revision if they were again convicted. Yeager then compared the two groups and found that the predicate felony "statute had no effect of deterrence by threat of imprisonment."²¹¹ He stated:

The percentage of prior convicted felons who were arrested for a second felony during a two-year period after their earlier felony conviction proved to be exactly the same for the two groups studies, 20%. Arrest alone does not establish guilt of course, and this data may mainly attest to the consistency of the arrest practices of the police before and after the 1973 statute. But there is no reason to suppose that the quality of police arrests declined after the 1973 law went into effect and therefore, the likelihood is that these data reflect an underlying reality. Namely that the rate of recidivism was the same before and ²¹² after the effective date of the 1973 predicate felony provision.

D.C.J.S. found no significant change in the overall likelihood of conviction to any crime from their data. The pre-law overall conviction rate was 61.4% on 585 total dispositions versus a post-law rate of 55.9% on 418 total dispositions.²¹³ With this result, it would seem that there is little need for all defendants arrested for illegal possession of a loaded gun outside place of business or home be indicted. Since defendants can face a year's imprisonment in criminal court, the minimum sentence for gun possession could have been meted out (very few defendants serve more than one year of incarceration for gun possession). Raising the level of conviction charge to a felony did not increase convictions. There were more felony convictions, but not more defendants in the post-law sample who were convicted and sentenced on any charge were significantly more likely to receive some type of incarceration sentence — 47.9% or 102 of the 214 sentenced — than defendants in the pre-law sample — 34% or 121 of 351 sentenced.²¹⁴

From the above D.C.J.S. concluded that the findings cited "concretely demonstrate a significant change in the manner in which top charge criminal possession of a loaded firearm arraignments are being handled in New York City courts after implementation of the 1980 law."²¹⁵ However, by using top charge gun cases, defendants may be receiving jail sentences for other charges against them as well as for the gun charge. It is true, however, that after the law, it became extremely more likely that a defendant will be forced to plead to a felony charge - from 44.5% to 81.1%. Nonetheless, it appears that the system selectively treated defendants - say those with prior records, held in pre-trial detention, little or no family ties, unemployed, etc. as demanding the full weight of the law, while others were allowed to circumvent it, either by the prosecutor allowing the defendant to plea-bargain after he/she had been indicted or the judge finding mitigating circumstances or simply refusing to sentence the defendant to jail time. D.C.J.S. did not supply information that would allow for such an analysis. Nor did they supply recidivism data on defendants in their study. D.C.J.S. does include some data on mitigating circumstances. The data, however, is extremely deficient, in the D.C.J.S. only reports the total number of mitigation hearings performed - that is only where they received supporting documentation, the minutes of such hearings and the reasons given for each determination by the setting of mitigation. They reported that in 1981, statewide, they received only 443 minutes, of those 45.6% or 255 were for 265.02 gun possession case. Reasons for the decision of the judge to grant mitigating circumstances are as follows:

<u>Number</u>	<u>Reason for Setting Aside Mandatory Minimum One Year Sentence</u>
47	Manner of Commission
0	Minor Participation
5	Deficiency of Proof
65	No Priors
82	Unduly Harsh
8	Favorable Probation Report
0	D.A. Favorable Recommendation
<u>48</u>	No Reason Cited
255	

Source: Division of Criminal Justice Services, 1981.

One sitting Bronx Supreme court justice gave his reason for not using mitigation hearings as follows:

The problem with mitigation hearings is that the minutes of the hearing have to be preserved; they must be sent down to D.C.J.S. and I think that that has an intimidating effect upon the judiciary, they know a record of these proceedings are going to some place to be reviewed and I must confess I never use them. ²¹⁶

When the reason reported is "unduly harsh", we do not know from the data D.C.J.S. supplied what factors a judge may have taken into account when subjecting a defendant to the mandatory minimum sentence. One cannot draw conclusions from the data reported because in 48 cases no reason was given for bypassing the mandatory minimum and in general very few minutes were sent to D.C.J.S. However, in 65 cases, the reason given was that the defendant had no prior convictions. Although there were no cases where the district attorney's favorable recommendation was given as the reason for finding mitigating circumstances, the Chief of the Major Offenses Bureau of the Bronx District Attorney's Office stated:

The law does not restrain prosecutors from being fair and just because the options in the law allow for any party, including the prosecutor to state mitigating circumstances. In an appropriate case, a prosecutor will bring such mitigating circumstances to the attention of the judge. One point people don't have a good grip on is the prosecutor's role. The prosecutor's role is to bring about a fair result and if that calls for mitigation then it calls for mitigation and sometimes it may call for a dismissal.²¹⁷

In general, research has shown that there are considerable problems with supporting the contention that gun control laws in the form of mandatory minimum sentences for gun possession have any effect upon violent street crime with guns and a significant, but perhaps politically unpopular insight made by the Vera Institute of Justice during their study of felony arrests to convictions in New York City:

A good deal of research on criminal courts is motivated by a zeal for due process, and focuses upon the lack of trials, the infrequency of formal motions, charge reductions and the like as a means of exploring the gap between theory and practice. Filing few formal motions, fewer trials, frequent charge reductions and a rapid pace in the courtroom, it is easy for researchers to conclude that concern for due process has all but been abandoned in favor of self-serving interests.

Although my research will seek to identify and analyze the variables that may have been affected the handling of gun possession cases by prosecutors, I feel caution must be exercised not to overstate the kinds of conclusions to be drawn from the results of the data collection.

It is very difficult, if not impossible to adequately study the effects of any gun law on the rate of violent street crime: that is, whether the enactment of a mandatory gun control law will have an effect on individuals who would use guns illegally, and, therefore, affect the amount of violent street crime. Douglas R. Murray²¹⁹ explored the relationship between access to handguns, gun control laws and the evidence of violence associated with firearms. Utilizing F.B.I. data, census materials, vital statistics and Harris and Gallup surveys in a multiple regression statistical framework, Murray concluded that gun control laws have no significant effect on rates of violence beyond what can be attributed to background social conditions such as high levels of crime in general, high levels of poverty, lack of education, low occupational status, high density and

overcrowding, substandard rental housing, large number of migrants, need of various forms of public assistance, high urbanization and population. He further concludes that this lack of effect may be due to the laws not effectively controlling access to firearms.²²⁰ An expert on gun control legislation, Franklin Zimring, Director of the Center for Studies in Criminal Justice at the University of Chicago, has also questioned the effectiveness of such gun control laws on the rate of violent street crime. Zimring doubts the effectiveness of the Bartley-Fox law. He states that although gun-related crime decreased after the law was put into effect, gun related crime had decreased in all major northeastern cities during the period when the research was conducted, 1975-1976.

Zimring concluded:

The whole notion of cause and effect is suspect. Criminologists are very much like forecasting economists and gypsy fortunetellers. We can't explain gun-related behavior, so how can we say what has affected it, whether up or down.²²¹

Supporters of the law concluded that the study showed that the law may have significantly reduced the number of murders and assaults with guns committed in Boston. However, it can be argued that the perceived reduction, in the amount of crimes where guns were utilized, may have resulted from other factors such as the increase or decrease of illegal weapons into the Boston area.

The above studies demonstrate the quality of literature dealing directly with mandatory minimum sentences for gun possession and restricted plea-bargaining in major urban cities. The studies reviewed attempt to single-out illegal gun possession or carrying as the target of mandatory sentencing. Their findings are useful for comparison with the data presented for Bronx County, New York.

Although the Beha (1977) study and the D.C.J.S. (1979) study showed an increase in the percentage of prison sentences defendants charged with gun possession received, the other studies such as Rossman's (1979) showed that after the law was in effect for two years prosecutors and judges sought to circumvent the law. Although Pierce and Bowers (1979) concluded that Bartley-Fox had a possible deterrent effect, they could not explain why and Cook and Nagin's (1979) research lends credibility to the

notion that those arrested, prosecuted and sentenced for gun possession are not at all likely to commit violent street crimes with guns.

There still remains a basic misunderstanding about how members of the criminal justice system are affected by the imposition of mandatory minimum sentences. There is a lack of empirical research that focuses directly upon this question. James Wright summarized research on gun control legislation:

Research (on the effectiveness of gun control legislation) leads to no strong or certain conclusions concerning the quality of gun control legislation to affect changes in the criminal justice system or in rates of crime associated with the use of guns.

The basic defects in gun control legislation stem from a lack of understanding about how the legislation is expected to impact upon persons who might commit crimes. Licensing of gun dealers, and regulating imports (as in the 1968 Gun Control Act) without too much thought given to how to implement the law effectively, simply leads to adjustments in the gun distribution system that restore the status quo ante. Gun control that reduces judicial discretion may increase the use of discretion at other points in the criminal justice system.²²²

Notes

Chapter I Introduction and Statement of Problem

1. James Wright, et. al., Weapons, Crime, and Violence in America: A Literature Review and Research Agenda, (Washington, D.C.: U.S Dept. of Justice, 1981) p 429-467.
2. "Towns Jail Mandatory Guns," New York Times, (May 10, 1984), p B22; "Mayor in Georgia Likes New Law Requiring Guns," New York Times (March 17, 1982), p A18; Michael Norman, "The American Dual Over Guns," New York Times, (May 3, 1981), p 34, 104.
3. Ibid. p 106.
4. Op. Cit. Wright, p 429-467.
5. Op. Cit. Norman, p 102.
6. Ibid.
7. Op. Cit. Wright.
8. Ibid.
9. Fox Butterfield, "Controls On Guns Suggested by Polls," New York Times, (June 20, 1983), p A16.
10. Franklin E. Zimring, "Is Gun Control to Reduce Violent Killings?" University Of Chicago Law Review 35 (1968), p 721-737.
11. Op. Cit. Wright.
12. Philip Cook, "The Affect of Gun Availability in Robbery and Robbery Murder: A Cross Section Study of 50 Cities," in James Wright, Weapons, Crime and Violence in America: An Annotolled Bibliography (Washington, D.C.: National Institute of Justice, (1981), p 033.
13. Op. Cit. Zimring.
14. Op. Cit. Cook; George D. Newton and Franklin E. Zimring. Firearms and Violence in American Life. Task Force Report on Firearms. National Commission on Causes and Prevention of Violence (Washington, D.C.; Government Printing Office, 1969).
15. Op. Cit. Newton and Zimring.
16. Barbara Basler, "State's Gun Law: Impact and Intent Uncertain," New York Times (April 11, 1982). p 1.
17. Ibid.
18. Ibid.

19. I will use the word "gun to mean all firearms as defined by the Penal Laws of the State of New York, Chapter 265.00 entitled, "Firearms and Other Dangerous Weapons." "Firearm" means any pistol, revolver, sawed-off shotgun or other firearm of a size which may be concealed upon the person, except an antique firearm. The important word in the definition is "concealed". What is, therefore, commonly known as a handgun will be included in my use of the word "gun", unless specifically noted. Where this definition coincides with its use by others, I will continue to use the term "gun". If others make a distinction between "guns", "handguns", or "firearms", which is meaningful to the understanding of the text, I shall note it for the reader.
20. "Mandatory minimum sentence" is defined for purposes of this paper as a statutory requirement that persons found guilty (of any number of specific offenses) must serve an amount of time in prison or jail - the exact amount of time served being determined by a combination of the mandatory minimum sentence and any allowable early release for good behavior or parole. Sentencing in New York is generally indeterminate with specific ranges specified by statute for the minimum and maximum for Class "A" and B-II" felonies,. For other Class "B" and Class "C" felonies, the minimum is one year to 1/3 of the maximum; and for Class "D" and Class "E" felonies, the mimimum is one year. For a summary and description of mandatory sentencing practices in the U.S., see the appendix, this paper.
21. P.L. 265.00 (for complete law see appendix page 24).
22. Ari Goldman, "10 Arrested in City Under New Gun Law," New York Times, (August 13, 1980), p B10.
23. Ibid.
24. New York State, Division of Criminal Justice Services, Semi-Annual Report on Violent Felony and Juvenile Offenses in New York State, (unpublished draft, 1984).
25. New York State, New York State Assembly Proceedings (Thursday, June 12, 1980) p 9503.
26. Ibid.
27. Op. Cit. Goldman, p B10.
28. Matthew Yeager, Do Mandatory Prison Sentences for Handgun Offenders Curb Violent Crime? (Washington, D.C.: U.S. Conference of Mayors, Inc., 1976), p 1; New York Times, (April 17, 1980), p A3.
29. Ibid.
30. Ibid.
31. Gelwyn Raab, Carey Signs a Bill Controlling Guns; Calls it Toughest, New York Times, (June 14, 1980), p A1.

32. Interview conducted in Bronx Supreme Court, Bronx County between March, 1984 and August, 1984.
33. "History of the State's Handgun Law," New York Times, (June 14, 1980), p A27.
34. Ibid.
35. Ibid.
36. W. Boyd Littrell reports in his work, Bureaucratic Justice, (London: Sage Publications, 1979), p 216-217, that in the year 1925, of the 4,004 dispositions obtained in N.Y.C., 3,508 were by guilty plea (88%) and only 12% (496) were by guilty verdicts indicating that plea-bargaining in N.Y.C. was not a recent development caused by administrative necessity.
37. Op. Cit., History of the State's Gun Law.
38. Diane Steelman, Sentencing of Convicted Offender, (New York: Public Affairs Committee, Inc. 1984), p 1.
39. New York State, New York State Senate Proceedings (Thursday, June 12, 1980), p 5,692.
40. Ibid., p 5693.
41. Ibid., p 5697.
42. Ibid., p 5702.
43. Ibid., p 5703.
44. Op. Cit., N.Y.S. Assembly, p 9497.
45. Ibid., p 9519.
46. New York State, New York Penal Law, Title P, Offenses Against Public Safety: Article 265.00, "Firearms and Other Dangerous Weapons;" Irving Schwartz, New York Sentencing Charts, 1983, (Minnesota: West Publishing Co., 1982), p 35-51.
47. Ibid., p 9520. Op. Cit. N.Y. Assembly.
48. Ibid., p 9521.
49. Ibid., p 9521.
50. Ibid., p 9540.

51. Gelwyn Raab, "Albany Passes Gun-Control Bill with Mandatory Prison Terms," New York Times, (June 13, 1980), p B16.
52. "Pistol License Requests Drop Sharply in City," New York Times, (February 5, 1984), p 40.
53. Ibid.
54. Ibid.
55. Barbara Basler, "Children Bearing Guns: A Growing Peril in the City," New York Times, (September 27, 1981), p C7.
56. Ibid.
57. Ibid.
58. Ibid.
59. Robin Herman, "Koch in Albany, Meets Skepticism on Stiffer Gun Control," New York Times, (April 17, 1980), p B17.
60. Ibid.
61. Ibid.
62. Op. Cit., Raab, "Carey Signs a Bill..", p 27.
63. Ibid.
64. People of the State of New York V. James Suitte, 90 AD2d. 80, 81,(1982).
65. Ibid.
66. Ibid.
67. Ibid.
68. Ibid.
69. Ibid.
70. Ibid.
71. Ibid.
72. Interview Conducted in the Bronx Supreme Court, Bronx County, March 1984 to August 1984.
73. Op. Ci, Steelman, p 1.
74. Albert Alschuler, "Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for Fixed and Presumptive Sentencing," in Determinate Sentencing: Reform or Regression, Summary Report, (Washington, D.C. National Institute of Law Enforcement and Criminal Justice, L.E.A.A., 1978), p 59.

75. "The Prosecution Function," in Op. cit., Rogers (see 66), p 77.
76. American Bar Association, Code of Professional Responsibility, Ethical Considerations, 7-13 as approved by the A.B.A., House of Delegates, February 1971, reprinted in Op. cit., Rogers, p 43-68, 69-72.
77. American Bar Association, Project and Standards for Criminal Justice, Standard Relating to Prosecution and Defense Functions, (Chicago: American Bar Association, Inc. 1971), p 25-33.
78. C.P.L., 180.50
79. Abraham Blumber, "The Criminal Court as Organization and Communication System" in Richard Quinney. Crime and Justice in Society, Boston: Little Brown and Company, 1969), p 283.
80. Ibid.
81. B. Boland, "The Prosecution of Felony Arrests," in Report to the Nation in Crime and Justice: The Data, (Washington: Bureau of Justice Statistics, 1983), p 55.
82. Ibid.
83. Noval Morris, Conceptual Overview and Commentary on the Movement Toward Determinacy," Op. Cit., National Institute of Laws Enforcement, p 8.
84. Op. Cit., Alschuler, p 59.
85. Ibid., p 69.
86. Ibid.
87. Ibid., p 70.
88. Ibid.
89. Ibid., p 76-77.
90. Santabello v. New York, 404 U.S. 257,262. (1971).
91. Ibid., p 260.
92. Mario Merola, "Modern Prosecutorial Techniques," Criminal Justice Bulletin (1976), p 256.
93. Op. Cit., Rogers, p 39.
94. Ibid.
95. Lawrence Sherman, "The Police and the Mandatory Gun Law", Criminal Justice Bulletin, 16 (March, 1980), p 164-165.
96. Michael Rubenstein, The Effect of the Official Prohibition of Plea-Bargaining on the Disposition of Felony Cases in Alaska Criminal Courts: Final Report, (Anchorage, Alaska, Judicial Council, 1979), p 1.

97. Ibid.
98. Ibid., p ii-iii, 219-243.
99. Ibid.
100. Ibid.
101. Douglas McDonald, On Blaming Judges: Criminal Sentencing Decisions in New York Courts, (New York: Citizens Inquiry on Parole and Criminal Justice, Inc. 1983), p 135.
102. Ibid.
103. Interview conducted in Bronx Supreme Court, Bronx County between March 1984 and August 1984.
104. Ibid.
105. Ibid.
106. Ibid.
107. Franklin Zimring, "Determinants of the Death Rate from Robbery: A Detroit Study," Journal of Legal Studies 6 (June 1977), p 317-332; Joseph Fischer, "Homicides in Detroit: The Role of Firearms," Criminology 14 (November 1976), p 387-400; Phillip Cook, "The Effects of Gun Availability in Robbery and Robbery Murder: A Cross Section Study of 50 Cities" in James Wright, Weapons, Crime and Violence in America: An Annotated Bibliography, (Washington, D.C.: National Institute of Justice, 1981), p 033.
108. Ibid., Zimring.
109. James Beha, "And Nobody Can Get Out: The Impact of the Mandatory Prison Sentence for Illegal Carrying of a Firearm...", Boston University Law Review 57 (1977), p 96, 106.
110. Op. Cit., Zimring.
111. Op. Cit.
112. Op. Cit., Fischer.
113. Ibid.
114. Ibid.
115. Op. Cit., Yeager.
116. Ibid.
117. Presidential Commission on Law Enforcement and Criminal Justice, Task Force Report: The Courts, (Washington, D.C.: U.S. Government Printing Office, 1967), p 16.

118. Ibid.
119. Presidential Commission on Law Enforcement and Criminal Justice: The Challenge of Crime in A Free Society, (Washington, D.C.: U.S. Government Printing House, 1967), p 142.
120. Ibid.
121. Ibid.
122. National Advisory Commission in Criminal Justice Standards and Goals, Corrections, (Washington, D.C.: U.S. Government Printing Office, 1973), p 545.
123. Op. Cit., Presidents Commission on Law Enforcement: The Challenge of Crime, p 142.
124. Op. Cit., National Advisory, p 145, 544-545.
125. Ibid., p 150.
126. Ibid.
127. Ibid., p 7.
128. Ibid.
129. Ibid.
130. Op. Cit., Yeager, p 26.
131. Douglas R. Murray, "Handguns, Gun Control Laws and Firearm Violence", Local Problems, 81 (1979), p 81.
132. Ibid., p 91.
133. Ibid.
134. Ibid.
135. Ibid.
136. Op. Cit., Steelman, p 11.
137. Ibid., p 12.
138. Ibid.
139. The 1973 Drug Law was enacted as Chapters 276, 278, 676 and 1,051 of the 1973 Laws of New York State. Significant subsequent amendments are contained in Chapters 785 and 832 of the 1975 Laws and Chapters 480 of the 1976 Laws.
140. Association of the Bar of the City of New York, "The Nations Toughest Drug Law: Evaluation of the New Drug Law: Evaluation of the New York Experience," (Washington, D.C.: Drug Abuse Council, Inc., 1977), p 3.

141. Ibid., p 4, Op. Cit., Yeager, p 11.
142. Op. Cit., Association of the Bar, p 5.
143. Ibid., p 3.
144. Ibid., p 5.
145. Ibid.
146. Ibid., p 7-12.
147. Ibid., p 13.
148. Ibid., p 15.
149. Ibid., p 5.
150. Ibid., p 16.
151. Ibid.
152. Ibid.
153. Ibid., p 19.
154. Ibid.
155. Ibid.
156. Ibid.
157. Ronald Sullivan, "Thomas Dickens, Ex-Justice, Dead," New York Times, (May 10, 1984), p B22.
158. An interview conducted between March and August of 1984, in Bronx Supreme Court.
159. Op. Cit., Association of the Bar, p 25.
160. John Kaplan, "The Wisdom of Gun Prohibition," The Annals of the American Academy of Political and Social Sciences 455 (May 1981), p 11.
161. Op. Cit., Wright.

162. Op. Cit., Behan, p 101-104 Mass. regulates firearms activity by means of three separate networks of law; laws concerning transfers of firearms, including requirements for filing weapon-specific information; laws concerning authority to own, possess or carry firearms; and laws punishing improper use of firearms, including additional penalties for their use in committing a crime. Behan's study dealt only with the middle group - those laws controlling the ownership, possession and carrying of firearms. "Firearms: in Massachusetts statutory scheme means a pistol, revolver, or other weapon of any description loaded or unloaded from which shots or bullets can be discharged and from which the barrel is less than 16 inches or 18 inches in the case of a shotgun. Because the Bartley-Fox law did not alter the penalties for ownership or possession, those cases were not analyzed. "Carrying" means taking a firearm outside place of business or home carrying, therefore, is equivalent to the "possession" charge, 265.02 in N.Y.S. since most firearm cases are handgun cases, not long guns, the Behan conclusions are generally applicable to what I refer to as "guns".
163. Op. Cit., Behan, p 98-99.
164. Ibid., p 119, 134, 137; Op. Cit., Wright, A Literature Review, p 528.
165. Op. Cit., Behan, p 315-317.
166. Ibid., p 317.
167. Ibid.
168. Although the above was not statistically significant, it was inconsistent with what opponents of the Bartley-Fox amendment had predicted.
169. Ibid.
170. Op. Cit., Behan, p 317.
171. Op. Cit., Behan, p 145, 314-316; Op. Cit., Wright, A Literature Review, p 528.
172. Ibid.
173. David Rossman, et. al., "Massachusetts' Mandatory Minimum Sentence Gun Law: Enforcement, Prosecution, & Defense Impact, Criminal Law Bulletin 16 (March, 1980), p 150.
174. Ibid.,, 152-153, 155, 158.
175. Ibid., p 162-163.
176. Ibid., 163.
177. Ibid.
178. Ibid.

179. Ibid., p 162--163.
180. Glenn Pierce and William Bowers, "The Impact of the Bartley-Fox Gun Law on Crime in Massachusetts, (Mass: Center for Applied Social Research, Northwestern University), 1979, James Wright, Weapons, Crime & Violence in America (Washington, D.C.: National Institute of Justice, 1981) p 143.
181. Op. Cit., Wright, A Literature Review & Research Agenda, p 533, 534.
182. Ibid.
183. Colin Loftin and David McDowall, "One With a Gun Gets You Two. Mandatory Sentencing and Violent Firearms Violence in Detroit," Annals of the Academy of Political & Social Sciences, 455 (May, 1989), p 150-167.
184. Ibid., p 159.
185. Ibid., p 162.
186. Ibid.
187. Ibid.
188. Op. Cit., Wright, A Literature Review, p 424.
189. Ibid.
190. Ibid.
191. Phillip Cook and Daniel Nagin, Does The Weapon Matter? (Washington, D.C.: Institute for Law & Social Research, 1979).
196. Ibid., p 1.
197. Ibid., p 26.
198. Ibid.
199. Ibid., p 3.
200. Ibid. p. 26
201. Ibid. p. 50 - 52
202. Ibid. p. 60
203. New York State, Division of Criminal Justice Services Semi-Annual Report on Violent Offenses in New York State, (August 1, 1982). 119.
204. Ibid. p. 120
205. Ibid. p. 121
206. Ibid.
207. C.P.L. 190.55

208. If the defendant serves written notice to the District Attorney at the time of or prior to grand jury presentation of a case against the defendant, he/she must be accorded an opportunity to testify on the matter after waiving immunity pursuant to section 190.45 of the C.P.L. The defendant also has a right to counsel pursuant to C.P.L. 190.52. The attorney may advise his/her client, but may not otherwise take part in the proceedings.
209. Op. cit. Rogers, p. 87.
210. Op. cit. D.C.J.S., p. 122
211. Ibid. p. 13
212. Op. cit. Association of the Bar, p. 10.
213. Op. cit. D.C.J.S., p. 122.
214. Ibid.
215. Ibid.
216. Interview conducted in Bronx Supreme Court, Bronx County between March, 1984 and August, 1984.
217. Interview conducted in Bronx District Attorney's Office between March, 1984 and August, 1984.
218. Vera Institute of Justice, Felony Arrests: Their Prosecution and Disposition in New York City Courts, (New York: Longman, Inc., 1981, p. XVI.
219. Douglas R. Murray, "Handguns, Gun Control Laws and Firearm Violence, "Social Problems, 81 (1979).
220. Ibid. p. 81, 91, 92
221. Michael Knight, "Studies of Gun Law Divided on Impact," New York Times, (January 21, 1981), p. A17.
222. Op. cit. Wright, Literature Review, p. 540.

II. THE DETERIORATION OF GUN POSSESSION ARRESTS

The criminal justice system has been likened to a great funnel with 100 percent of crimes committed forming the large end and sometimes as little as two percent of offenders imprisoned at the small end. In general, for every 100 felonies committed — 50 are reported, 12 suspects are arrested, 6 are convicted and 2 go to prison.¹ Sociologists and criminologists refer to this pattern as a "funnel of justice."²

Looking at the "funnel of justice" for felony and felony gun possession arrests permits a better understanding of the importance of the role of the prosecutor in determining the final disposition of felony and felony gun possession arrests and will help us better understand the effect of a mandatory minimum sentence and restricted plea-bargaining imposed upon such a system. To the casual observer, the existence of a "funnel of justice" system implies that there must be thousands of poor arrests made by police officers; hundreds of prosecutors mishandling, ignoring and not fully prosecuting felony arrests; and hundreds of judges imposing lenient sentences on what were "obviously" strong cases involving defendants that "need" to be locked up. However, this reasoning comes from an extremely simplistic grasp of the system and its "funnel of justice."

I shall begin by discussing the "deterioration" of felony arrests as described by the Vera Institutes study, Felony Arrests³ which traced the processing of felony arrests through New York City criminal courts from arrest to disposition. The Vera Institute began its study in response to comments made by the former Police Commissioner, Patrick V. Murphy in 1972, while addressing the Association of the Bar of the City of New York. Commissioner Murphy stated that a great share of the blame for the rise in crime in the city could be laid at the court's door. To support this contention, he cited the final disposition of 136 felony arrests for felonious possession of guns. He stated:

Not one retained its felony status through conviction, only 53 of the defendants received jail sentences or prison terms and the average sentence was one month. No wonder so many people of criminal intent carry handguns in New York City.⁴

The Vera Institute based its study upon an examination of New York City court records. To provide both a description of the dispositional process, and an understanding of it, the Institute researchers organized their data between two samples, a wide sample that would include enough

cases to give a valid statistical picture of the dispositional process and a deep sample small enough to allow extensive interviewing about each case. Intensive interviews were then conducted with district attorneys, defense counsel, victims and other court personnel involved in each case.⁵

The main objective of the study was to determine how and why attrition occurs with felony arrests. The researchers believed that although such attrition in the past has been explained by others as errors or mistakes on the part of the police, namely the arresting officer or that the blame has been laid at the door of court personnel, who have been forced to take short cuts owing to congestion, incompetence or carelessness. The Vera researchers argue that the truth lies more with the nature of the cases themselves — with the relationship between the victim and the perpetrator.⁶ They conclude that serious cases, where evidence is legally sound and complainants ready to cooperate are treated seriously by the system.⁶

In 1971, 100,739 felony arrests were made in New York City. Chart 1.0 shows the deterioration of felony arrests found by the Vera researchers — the reduction or dismissal of charges, or the imposition of non-felony sentences on those found guilty occurred in 3/4 of the arrests that proceeded through disposition. Twenty-five percent of the wide sample felony arrests were not disposed of.⁷

From an analysis of the wide sample, the Vera researchers found that:

- 43% of the cases commenced by felony arrest and disposed of in the criminal court were dismissed;
- 98% of the cases that ended in conviction were disposed of by guilty pleas rather than trial;
- 74% of the guilty pleas were to misdemeanors or lesser offenses;
- 50% of the guilty pleas were followed by "walks", and 41% by sentences to less than a year in prison;
- 9% of the guilty pleas were followed by felony time sentences;
- 2.6% of cases were disposed of by trial
- only 56% of felony cases entering the criminal

- justice system resulted in conviction for some offense;
- 44% were dismissed or acquitted;
 - 15% of all cases resulted in conviction for a felony;
 - 27% of all defendants received sentences to jail or prison, but only 5% were given prison sentences more than one year prescribed for felonies.

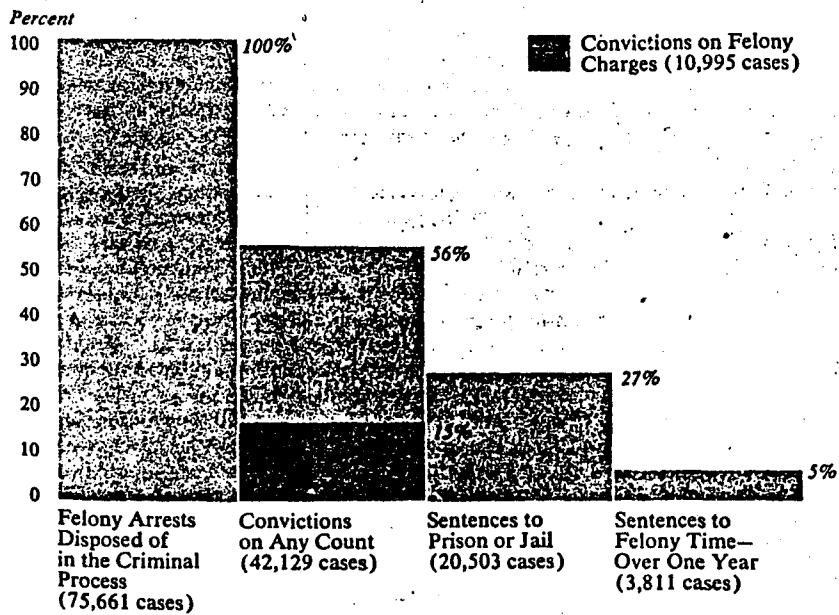
Chart 1.0 through 1.10 were supplied by the Vera researchers to show the deterioration of felony arrests and the dispositional pattern of such arrests.

The Vera Institute researchers found that the above figures were similar to those found in other cities and small towns.⁹ They also conclude that when the prior relationship¹⁰ between the victim and the offender are taken into consideration, one could detect a rough sense of proportionate justice that prevades the system. Prosecutors and judges are forced to dismiss or at least seek lenient sentences against defendants who are involved in crimes where there is a close relationship between the defendant and the victim because in many instances the complainants/victims do not support the judge or the prosecutor in their efforts to fully prosecute such cases by refusing to cooperate with the judge or the prosecutor's office. This lack of cooperation leads to cases being dismissed, reduced charges or light sentences. Serious stranger-to-stranger felonies (real felonies) are treated seriously and conviction results in stiffer sentences, in contrast to (technical felonies) among family, friends and lovers are usually downgraded, at times leading to dismissals and often resulting in reduced charges and light sentences.

The Vera researchers found dispositions were effected by one, the seriousness of the offense; two, the length of the defendant's criminal record and three, the closeness of the defendant's relationship to the victim. Thus, they conclude "the system was proportional in its outcome, although not in its process."¹¹ This conclusion by the Vera researchers indicates that there is a selective criminalization process at work and that judges, prosecutors and the police use certain indicators such as prior relationship, seriousness of the offense, and prior criminal record of the defendant to assess the blameworthiness of the defendant and then

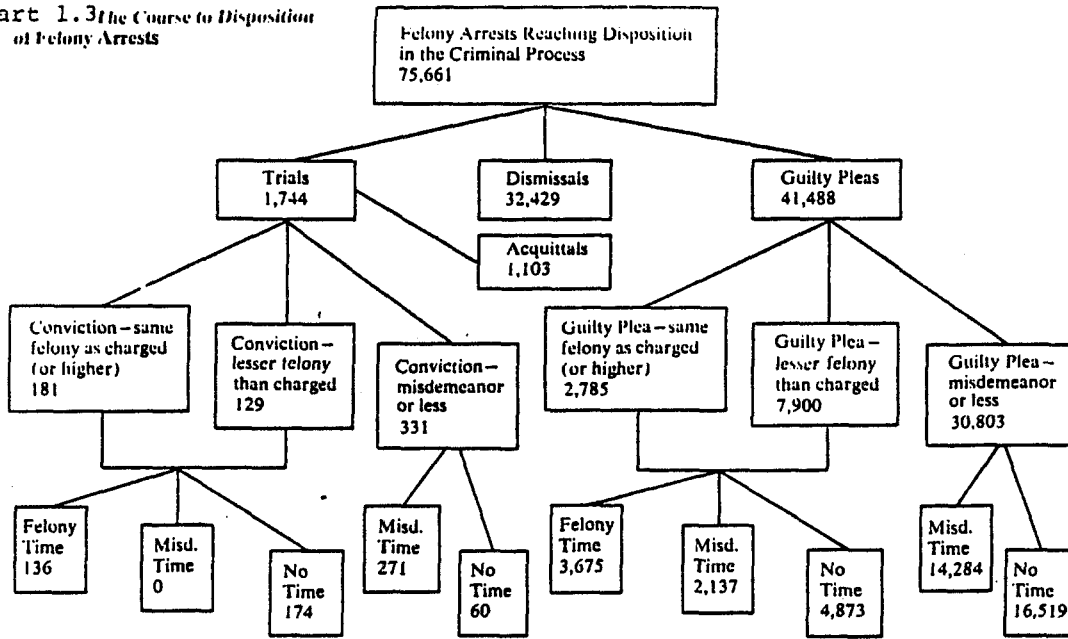
**Chart 1.0 . Disposition of 1971 Felony Arrests
in the Criminal Process**

**Disposition of 1971 Felony Arrests
in the Criminal Process**



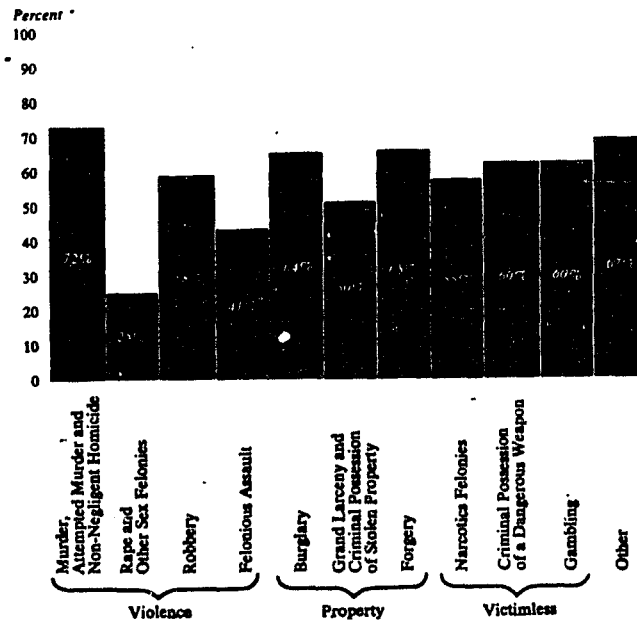
Source: Wide Sample Data (1971); Vera Institute Felony Disposition Study.

Chart 1.3 The Course to Disposition of Felony Arrests



Source: Wide Sample Data (1971); Vera Institute Felony Disposition Study.

Chart 1.4



Source: Wide Sample Data (1971); Vera Institute Felony Disposition Study.

determine how to dispose of the case. This selection process is acceptable until certain factors such as priors or prior relationships trigger automatic responses on the part of the prosecutor or judge which will then be used to trigger certain dispositions of cases. This study will attempt to determine if such a selection process is taking place with the prosecution of gun possession arrests and the nature and consequences of that selection.

Although data on gun possession will be analyzed separately, there are some observations to be made when comparing the deterioration of all felony arrests and gun possession arrests:

1. In Charts 1.3 and 1.4, it is shown that there is a high (when compared to other felonies), disposition rate by criminal possession of a dangerous weapon cases. This is also due to the fact that evidentiary problems put aside, gun possession cases are usually simple and the arresting officer's observations and testimony carry much weight within the criminal justice system — other victims or witnesses are not needed nor are lineups, further identification, etc. because the arrest and observation are usually simultaneous. Once again, this also holds true for gambling and narcotics felony arrests. However, the disposition rate of criminal possession of a dangerous weapon is not as high as murder which can and usually involves witnesses, identifications, etc. The seriousness with which the system and the public view murder warrants a high disposition rate — more time is expended on these cases in terms of investigation.
2. Chart 1.2 shows that criminal possession of a dangerous weapon has a very high "clearance rate" compared to "arrest rate." Since most arrests are made by police observation of a weapon and the arrest is made immediately, this high rate, when compared to other felonies is understandable. In a similar situation, gambling and narcotics felonies, arrests are made at the site of possession in most cases with little need for investigation or for a victim to come forward and cooperate. It is difficult to come to any clear conclusions concerning Chart 1.5. Criminal possession of a dangerous weapon cases show no pattern compared to other felonies, even other "victimless" felonies do not fall into the same pattern. Most felonies are disposed of as misdemeanors, except murder, rape and robbery cases. This includes criminal possession of dangerous weapons cases, where more than 50% plead to misdemeanor charges. This includes cases where there are victims, such as felonious assault cases, and cases where there are no victims, such as gambling, and cases where there are full investigations,

such as burglaries, and cases where little investigative work is necessary, such as criminal possession of a weapon.

3. Chart 1.6 shows us that criminal possession of a weapon is the only felony category where there are only sentences to misdemeanor time. No one received a felony prison sentence in Vera's wide sample, and 25% received misdemeanor time sentences. This is, however, better than gambling, in which no defendant received any jail or prison sentences. Although observation and arrest are simultaneous leading to a high disposition and clearance rate, evidentiary problems may be forcing district attorneys and judges to forgo felony conviction charges and allow defendants to plead guilty to misdemeanor charges. I will discuss evidentiary problems of gun possession cases, its effect upon dispositions and handling of gun possession cases later in this paper.

The data collected by the Vera Institute has withstood the test of time. The basic patterns they revealed in 1971 were found to be, for the most part, the same in 1978. In 1971, the number of felony arrests was 20% of the number of felony complaints; in 1978, felony arrests were 19% of complaints. Although the total number of felony arrests increased over three years from 100,739 in 1971 to 107,135 in 1978, the distribution of arrests across difference types of crime has remained relatively constant. Most importantly, "these arrests reach dispositions in a pattern that has shifted hardly at all from the pattern revealed by Vera's 1971 wide sample."¹² Chart 1.8 compares the dispositional pattern defined by the 1971 wide sample of arrests with the pattern of dispositions defined by official aggregate data for the year 1977.¹³

Vera does not claim that no changes had occurred during this period. They state that there were changes in the way the dispositional process was managed, which increased the efficiency of the criminal justice system. They report that by the mid-1970s:

the District Attorneys in each of the five boroughs had established procedures for more selective screening of felony arrests to identify, early on, cases that should be indicted. Increased efficiency resulted in part from the establishment of the Early Case Assessment Bureaus (E.C.A.B.) in 1975, which placed experienced prosecutors in complaint rooms in the Bronx, Manhattan and Brooklyn. Assistant district attorneys in the bureaus were assigned to 'track' felony arrest cases for dismissal, misdemeanor prosecution or felony prosecution by

Chart 1.5. Type of Plea of Those Convicted by Plea, for Each Type of Felony Charge

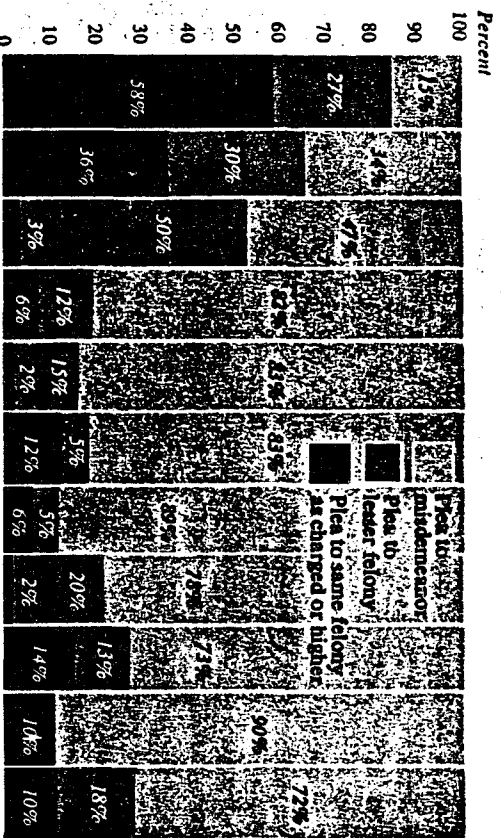
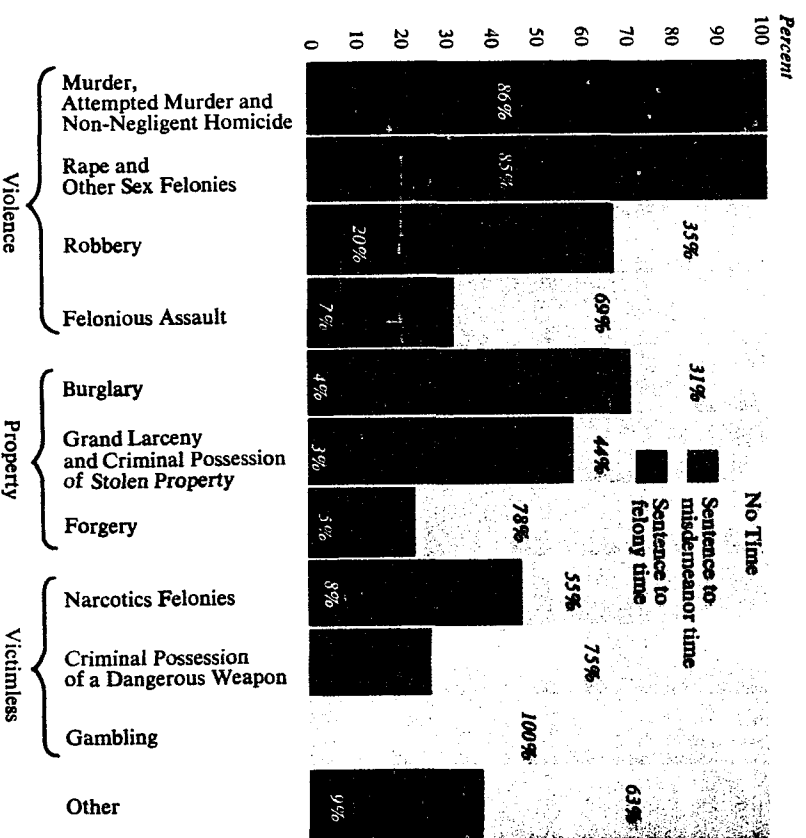
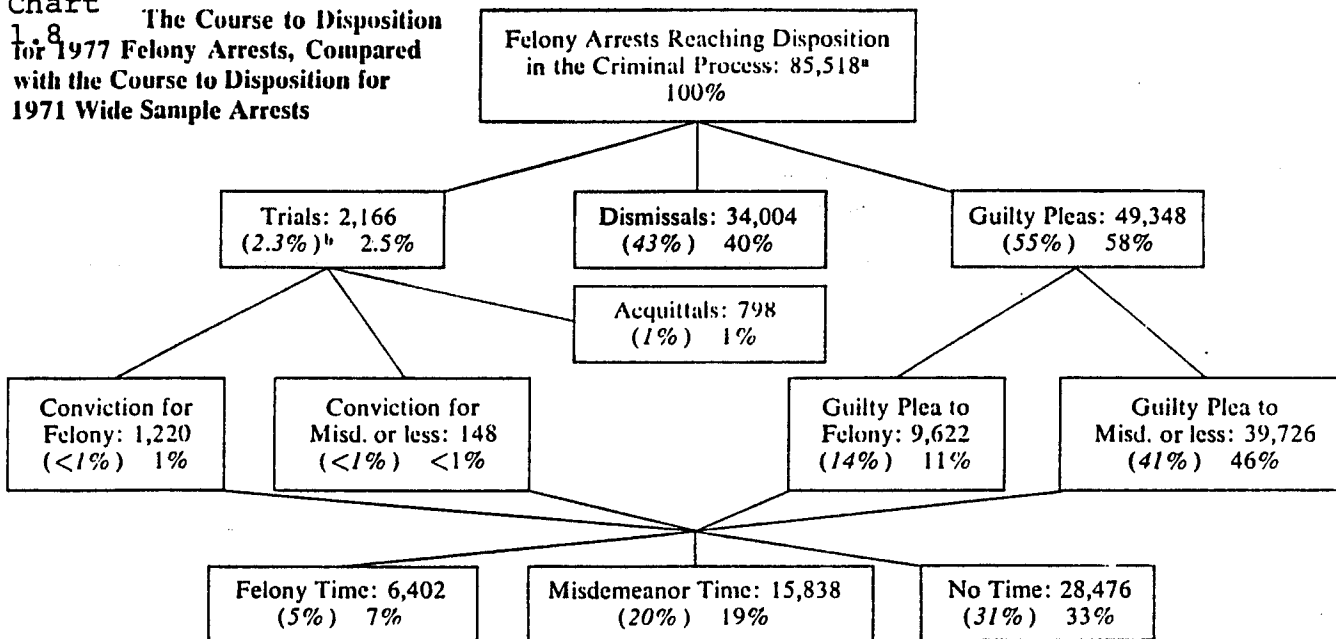


Chart 1.6. Sentence Following Conviction, by Type of Felony Charged at Arrest: Percent Given Each Sentence



Source: Wide Sample Data (1971); Vera Institute Felony Disposition Study.

Chart 1.8 The Course to Disposition for 1977 Felony Arrests, Compared with the Course to Disposition for 1971 Wide Sample Arrests



Sources: Criminal Court of the City of New York, *Filings, Dispositions and Sentences by Charge: January-June 1977 and July-December 1977*; New York State Division of Criminal Justice Services, *Crime and Justice: Annual Report 1977* and *New York State Felony Processing Quarterly Report: January-December 1977*.

- a. This number does not include cases transferred to other jurisdictions or to Family Court, nor does it include dispositions listed as "other" in the reports of the New York State Division of Criminal Justice Services.
- b. The italicized percentages express the patterns found in the 1971 wide sample data.

identifying evidentiary and other problems early in the process. In addition, E.C.A.B. helped focus assistant district attorneys on the early identification of¹⁴ particular subgroups of cases deserving priority prosecution.

As would be expected, due to the screening out of weak cases, the number of indictments decreased from a high of 27,185 in 1972, to a fairly constant 16,000 in 1976*, however, the conviction rate and felony conviction rate increased.¹⁵ Other major prosecutorial programs such as the Major Offenses Bureaus were launched in 1973. In addition, Mario Merola, the Bronx County District Attorney was instrumental in developing eight innovative programs:

- (1) the career criminal project to better focus prosecution of recidivists;
- (2) use of video-taped confessions and witnesses' statements;
- (3) standardized plea-bargaining;
- (4) centralized case screening and evaluation;
- (5) routinized disclosure to defense counsel;
- (6) focused prosecution of welfare fraud;
- (7) early prosecutor involvement in arson investigation; and
- (8) use of a special unit to prosecute cases involving violent juvenile offenders.¹⁶

*Felony indictments in the period January-September 1983 totalled 19,272. Source: NYS Felony Processing Quarterly Report: January-September 1983, NYS Division of Criminal Justice Services, October 1983.

Most of these innovations do not affect the prosecution of gun possession cases. These innovations affect the prosecution of more serious offenses involved in violent street crime. Although much of such crime involves the use and possession of guns defendants charged solely with simple possession of a gun do not play an important role in these programs. However, the introduction of standardized plea-bargaining does allow for the prosecutor's office to prevent assistant district attorneys from offering pleas that would be inconsistent with legislatively mandated minimum sentences, since the experienced A.D.A. will know of the offices policy and the legal restraints of plea-bargaining and would instruct other assistants as to how gun cases should be disposed of. This does not mean that all defendants charged with felony gun possession will face a recommendation by the assistant that the defendant receive a year in jail, but it will allow an experienced assistant to make distinctions between cases that face insurmountable evidentiary problems and those that do not. It will insure that more felony gun cases are indicted and not disposed of inadvertently in criminal court.

As stated, despite these changes in the management of felony arrests, the dispositional pattern of arrests coming into the system remained virtually unchanged and even so during the period when the Legislature enacted the Second Felony Offender provision, as well as the Rockefeller Drug Law. I have already stated the limited effect of such legislation. The Vera researchers conclude that the overall dispositional pattern did not change despite these changes. They stated:

Changes in legislation in policy and in practice had little affect on the dispositional pattern for felony arrests because they affected the administration of justice, not the pattern of police arrest activity . . . perhaps the lesson is that we must look principally to the streets of New York — to ways police patrol and investigate crime — rather than to our court process, if we wish to change the basic pattern of disposition.

From an analysis of Vera's deep sample of gun possession arrests, it was evident that the "arrest rate" and "clearance rate" for criminal possession of weapons was high — because most reports are simultaneous with a police officer's discovery of the weapon and arrest of a suspect for the crime.¹⁸ Vera researchers chose to only consider "D" felony arrests

for gun possession in their "deep" sample of gun cases. After checking to see if each case involved a loaded, operable gun, the Vera team were left with 28 cases for analysis. Only eight felony convictions were obtained and only two were to the "D" felony originally charged. The remaining felony convictions were by pleas to the purely hypothetical "E" felony "attempted" criminal possession of a gun (see chart) but the sample was riddled with evidentiary problems peculiar to the crime of possession.¹⁹

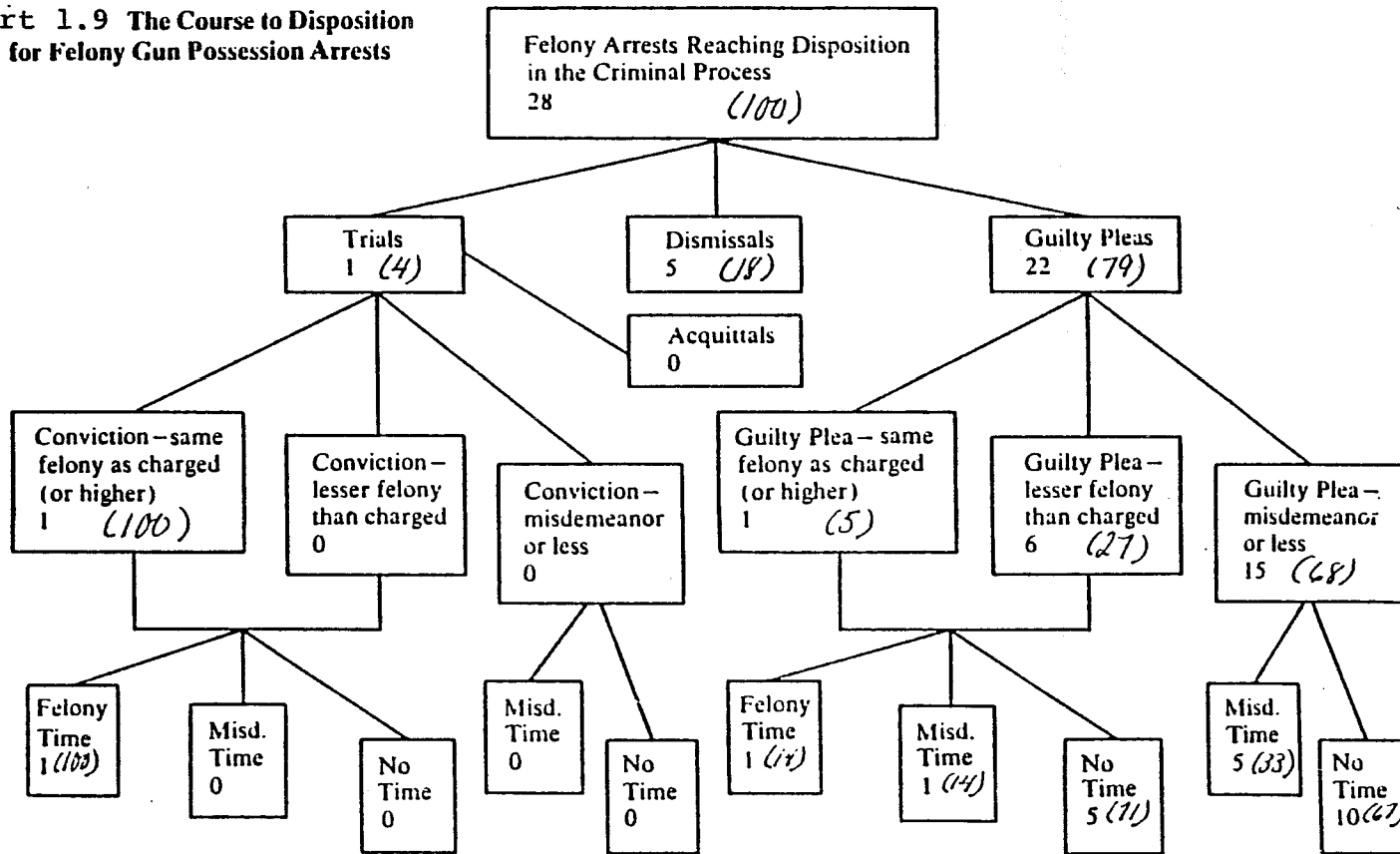
Vera generally found the pattern of deterioration of arrests for possession of guns as shown in Chart 1.9.²⁰ to be similar to that of a felony arrest.

What is most revealing in Chart 1.10 is that the conviction rate and felony conviction rate for gun possession is higher than for all felonies. There is an eighty-two percent conviction rate for defendants charged with gun possession for conviction on any charge versus sixty-four percent for all felonies and twenty-nine percent conviction rate for defendants charged with gun possession on felony charges and a five percent conviction rate for all felonies on felony charges. However, the sentencing figures are almost identical, with 29% of those defendants charged with gun possession being sentenced to jail or prison versus 28% for defendants charged with any felony and 7% of those defendants charged with gun possession receiving sentences to felony time — more than one year versus 7% for defendants charged with any felony and 7% of those defendants charged with any felony. This again is due to the nature of the observation/arrest, but for evidentiary problems, gun possession cases are simple to prosecute. These figures also show that gun possession cases were being handled as seriously as all felony arrests, many of which could have involved violence, injury and great loss of property.

As with felony arrests, the road to trial is rarely used. Only one of the twenty-eight cases resulted in a trial. In that case, the defendant had a gun arrest seven months prior to this arrest and had prior convictions for assault, maiming and disorderly conduct, placing the defendant in a very poor bargaining position. The judge gave the defendant what the probation report recommended — three years of incarceration.²¹

Few cases were dismissed — 5 out of 28. The typical gun possession arrest resulted in a misdemeanor plea and a "walk" (a "walk" is any sentence that has the immediate effect of releasing the defendant:

Chart 1.9 The Course to Disposition
for Felony Gun Possession Arrests

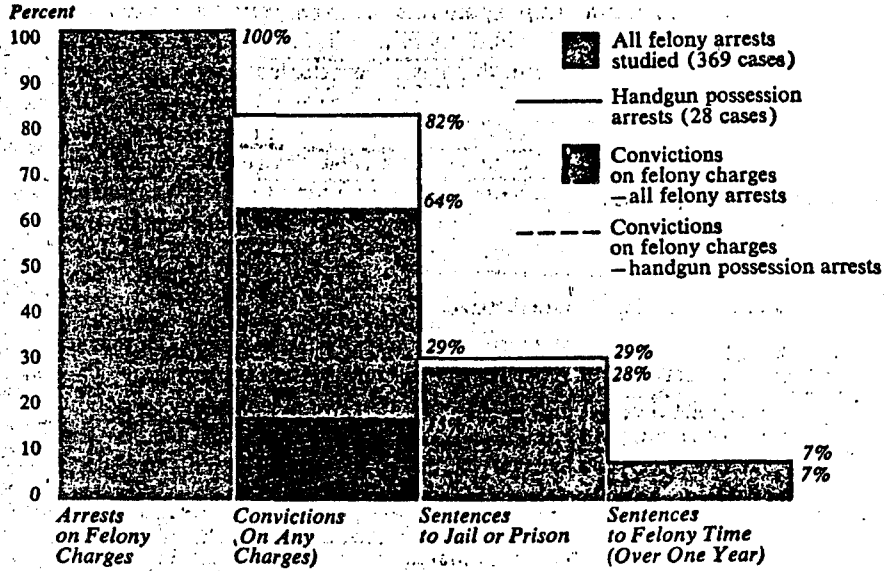


Source: Deep Sample Data (1973); Vera Institute Felony Disposition Study.

Chart

1.10 Dispositional Pattern for Handgun Possession Arrests
Compared to All Felony Arrests

(Handgun possession arrests are 8% of all felony arrests studied.)



Source: Deep Sample Data (1973); Vera Institute Felony Disposition Study.

probation, conditional and unconditional discharge or fine).²² Of the felony guilty pleas accepted by the court, five of the seven resulted in walks for the defendant.²³

Four factors were found, by the Vera researchers as bearing upon the disposition of felony gun possession arrests. They are:

1. prior relationships;
2. evidentiary possession problems;
3. evidentiary search problems; and
4. prior criminal record of defendant.²⁴

Two of the above factors, one and four, were cited as contributing to the deterioration of all felony arrests. Table 1 below shows relationship between victim and defendant by felony charge,

TABLE 1.
Relationship between Victim and Defendant, by Felony Charged

	<u>Prior Relationship</u>	<u>Stranger</u>
Violent Crime (N=148)	56%	44%
Attempted Homicide, Manslaughter (N=16)	50	50
Rape (N=12)	83	17
Robbery (N=53)	36	64
Assault (N=67)	69	31
Property Crimes (N=107)	35%	65%
Burglary (N=44)	39	61
Grand Larceny (N=63)	32	68
Grand Larceny-Auto (N=43)	21	79
Grand Larceny-Other (N=20)	55	45
Total Victim Felonies (N=255)	47%	53%

Source: Deep Sample Data (1973); Vera Institute Felony Disposition Study.

Table 1 shows prior relationships were found in over half of all felonies involving victims. Prior relationships were also mentioned by prosecutors and judges during interviews as their reason for offering reduced charges and light sentences in return for a plea of guilty and prior relationships were the most cited reason for dismissal of cases against

defendants. Prior relationships and non-cooperating complaining witnesses are scarce amongst gun possession arrests but when they do occur, they will affect the dispositional pattern of gun possession cases as prior relationships affect the disposition of felony arrests in general. The following case illustrates this:

A women reported to the police that her husband had an unregistered gun. When the police searched him and his closets and drawers, however, they found nothing. They did find a loaded gun in the trunk of a car registered in the wife's name, which was opened with her keys. Because the car was unoccupied at the time the gun was found, the ADA's case rested upon the wife's testimony that the gun belonged to her husband.* She never appeared in court to testify against her husband, and although the case was not dismissed outright, it was adjourned in comtemplation of dismissal (ACD).²⁵

The ADA said: "An ACD, from our point of view, is better in some ways than a dismissal — though it will be the same in the end — because we are holding something over his head. He knows he won't get leniency next time." This statement is surprising in view of another remark by the same ADA: "The case should have been dismissed in the Complaint Room. If I'd heard the story there, that's what I would have done. I think it was a bad case. There was no evidence of that gun being anyplace near the defendant."²⁶

Evidentiary possession problems arise from the difficulty of proving possession when the contraband is not discovered by searching the defendant or his/her premises. The typical evidentiary possession question is "if the gun was not discovered by search of the defendant, is there sufficient evidence linking the defendant to the gun to show that he/she possessed it?"²⁷ Four of the five cases that were dismissed were caused by possession problems. The following case illustrates the problem in gun possession cases and its effect upon the disposition of gun cases:

*Section 265.15(3) of the Penal Law creates a presumption of possession "by all persons occupying (an) automobile at the time" when a gun is found in it. In this case, neither the husband nor wife was in the car.

The two policemen said they heard a 'metallic sound' in the darkness as they approached the defendants and another man on a street at midnight. Allegedly, one cop flashed a light on the gutter several feet from the men and located the gun. I decided to dismiss at the preliminary hearing. As far as I could see, there was more than reasonable doubt as to whether either of these defendants actually possessed the gun. I did not believe there were any chances of conviction. I probed the officer carefully: the area was rubbish-strewn—there were lots of cans and bottles lying around. The sound might have been caused by a can in the street or any number of things. And it was pitch dark at the time. I did not believe that the officer, hearing a metallic sound some fifteen or twenty feet away, could immediately find the object with his flashlight. If the officer had testified that he saw one of the defendants drop the gun, or even that he saw the gun in flight, I would probably have accepted it. But this gun was just as likely lying in the gutter when the cops reached the scene. That is, if the gun was there at all — I thought the police version was a bit fabricated.

The ADA was furious: 'This defendant had a long record and had done time at least once — that's why I was pushing for the felony. And there was no point to a lesser charge here — possession was the essence of either the felony or a misdemeanor.

But this judge went far beyond the bounds of discretion; the sufficiency and credibility of the evidence should have been left to the jury. It would have been okay for him to dismiss a case where the cop finds a gun on the street and then arrests someone standing fifteen feet away — then there's no real link. But here the officer could testify to the metallic sound and the gun was close to the defendants.

"I don't blame the ADA," said the judge. "He should have been angry. If he wasn't, he should not be in the DA's office. But I was within my power to dismiss this case; the evidentiary weakness justified it, and a judge has to play jury sometimes. That's what these hearings are for."²⁸

One case where the defendant was allowed to plead guilty to a misdemeanor charge, which presented possession problems involving a defendant with no prior record, the loaded gun was found in a paper bag on a toilet seat in a public bathroom in the presence of others. The ADA settled for a plea to loitering and a conditional discharge. In the other case, the defendant and another man were the only two passengers in a subway car where a paper bag containing a loaded gun was found. This case might have ended in dismissal, except that the defendant, who had numerous previous convictions was made unable to make bail and

eventually plead to a misdemeanor weapon charge for time served (about 10 months).²⁹

Of the fifteen cases disposed of by the defendant pleading to a misdemeanor charge, seven presented evidentiary problems. Two of the seven had possession evidentiary problems and five had search evidentiary problems. The typical evidentiary search question involved is: if the gun was not in plain view of the police officer and was discovered without the defendant's consent by a search of his/her person, car or premises, did the officer have sufficient cause under Fourth Amendment standards to make his/her search reasonable?" In all five search cases, the defendant was allowed to plead to a misdemeanor. Two defendants received conditional discharges, one received probation and two received misdemeanor jail sentences.³⁰ A defendant who was arrested following a search triggered by an unidentified passerby, received a six month sentence. In that case, "the defendant was standing on the street with a group and had a gun."³¹ Because the ADA doubted the legality of the search, the defendant was offered an "A" misdemeanor and the judge promised the defendant, he would sentence him to six months if the probation report recommended it. Although the probation report revealed that the defendant had an extensive out-of-state record, the judge sentenced the defendant to the six months.³² In another case where the ADA felt there were search problems, he/she offered the defendant three months probation if he would plead to a misdemeanor. According to the ADA:

The search was weak. They first arrested him because they thought he matched a description of a man wanted for a shooting. But the shooting had been in the Bronx and the defendant was driving in Manhattan, the defendant's clothing didn't match the description, and I thought it was very questionable whether we could survive a motion to suppress. And the "A" misdemeanor seemed sufficient — the defendant had only one prior arrest six years before.³³

After analyzing the cases with evidentiary problems, the Vera researchers concluded, based upon their interviews and their deep sample that the exclusionary rule³⁴ (by which evidence may be suppressed if constitutional protections against unreasonable search and seizure are violated) works rather differently than many may assume. Whether or not the rule deters the police from making questionable searches, it does not seem to produce dismissals in cases brought into the criminal process in which the searches are probably illegal and the evidence could be suppressed. Not one of the gun possession cases was dismissed following a

successful motion to suppress illegally seized evidence; in a few cases in which such a motion was made, it was denied. Instead, the risk of losing a suppression hearing seemed in several cases to have so weakened the prosecutor's chances of conviction that he settled for a misdemeanor conviction and a walk. The guns of course were removed from circulation by the police at the time of arrest — and that after all may be the main objective.³⁵

The following case further illustrates the search problem:

A man on a motorcycle said there was a guy around the corner in a car who pointed a gun at him. "They'd had an argument," said the arresting officer. The complainant rode off, never to be seen again, and the office drove around the corner to find the defendant pulling out from the curb. We stopped him and arrested him for having a court officer's shield on the dashboard." He said he'd borrowed the car. The defendant was taken to the station on the charge of impersonating a court officer, but it was dropped when it became clear he had not done so. After the car was brought to the station house it was searched — the gun was then found in it.

As there had been no lawful arrest, there had been no reasonable ground for searching the car. "This was an exceptionally weak case," said the ADA. "There was a definite search and seizure problem, but it was never cleared up. Ordinarily, I would not go below an E felony on a gun case, but a motion to suppress at trial here might well have meant outright dismissal. So I waited for them to offer a plea. The defense attorney believed it was better to take a plea instead of risking having a motion to suppress denied and having to go to trial. It was unlikely that this motion would have been denied, but there's always a risk involved, and the defendant would have had no defense at a trial."

"He asked for an A misdemeanor," said the ADA, "and under the circumstances of the arrest — there were no witnesses — I accepted. There was no discussion of sentence, but this guy had only an old A misdemeanor conviction on his record, and a conditional discharge was the best all around solution — at least we have something on him for the next six months.

The judge agreed to the disposition, saying, "In a trial, it might have been dismissed; there was no defense, but the ADA was having search and seizure problems." With the conditional discharge, we have some control over him if he gets into any kind of trouble. But there was no need for more, or for special conditions. He was a working family man, no real record, and his family depended on his income.³⁶

Vera Research revealed that those defendants with heavier past criminal records were more likely to be convicted and when convicted more likely to receive heavier sentences than those with lighter records or no records at all.³⁷

Table 2 shows the relationship between dispositions of current felony charges, by defendant's prior record found by the Vera researchers:

TABLE 2.

Disposition of Current Felony Charge, by Defendant's Prior Record

(N=1382)

<u>Disposition on Current Charge</u>	<u>No Prior Rec.</u>	<u>Arrest (No Convic- tions Known)</u>	<u>Conviction</u>		<u>Incidence of This Type of Dis. in Sample</u>
			<u>No Prison</u>	<u>Prison</u>	
Dismissal/Acquittal	54%	45%	36%	29%	44%
Conviction Sentence:	46	55	64	71	56
Walk	77	61	42	16	50
Misdemeanor Time	22	37	56	56	41
Felony Time	1	2	2	28	9
Incidence of this type of record in sample	39	27	14	20	

Source: Wide Sample Data (1981); Vera Institute Felony Disposition Study.

In the remaining eight of the fifteen cases where the defendant was allowed to plead to a misdemeanor, the prior records of the defendant play a significant role in determining the final disposition of the defendant's case.

In one of these, the loaded gun was found among the 62-year-old defendant's possessions, after he was arrested for violation — propositioning a plainclothes policewoman posing as a prostitute in Times Square. The ADA offered this explanation for accepting a misdemeanor plea and promising a \$500 fine, despite his office's policy against reduction from felony charges in gun cases:

First, he had a very old record (serious charges, but all

between 1933 and 1950) which involved mostly acquittals and dismissals, so we consider that he really doesn't have any record at all. Secondly, he's an older man and has been steadily employed for 15 years. It didn't seem proper to give him a felony conviction on this. His being arrested and the compromising situation would serve as embarrassment and punishment enough. And it would have been difficult at trial, with the defendant probably gaining a good deal of jury sympathy.³⁸

In another case, where the defendant was allowed to plead to a reduced charge and received a conditional discharge, although technically the ADA had a very strong case, the defendant had no prior arrests or convictions. He was a "family man and a city employee." The ADA considered the fact that the defendant would lose his job if he were forced to plead to a felony when he decided to offer the "A" misdemeanor.³⁹

Although Vera reported that seven cases were strong enough for the ADA to offer a felony plea, five of the seven pleas resulted in walks for the defendants, none who walked, however, had substantial criminal records. The following case illustrates the process:

An off-duty police officer buying gasoline noticed that the attendant was carrying a gun and arrested him. The defendant had been arrested only once — 20 years before — and that charge had been dismissed. He had been steadily employed for 20 years, supporting a family. He pled guilty to attempted possession of the gun (an E felony) and was given five years' probation. neither the judge nor the prosecutor saw a point in putting him in jail.⁴⁰

However, two defendants with serious records, who pled guilty to felonies did receive prison sentences, one a three year sentence, the other a one year sentence; both had prior felony convictions. On the question of the relationship between gun possession arrests and defendant's prior record the Vera researchers concluded:

The overall importance of the defendant's criminal record in shaping the disposition of gun possession felony arrests is apparent even if evidentiary problems are ignored. Table P displays the sentences of all the gun case defendants who were convicted of something, by the nature of their prior records.

The numbers are small, but the association between prior convictions and time sentences on the current charge is strong. Twelve of the 14 walks went to defendants who had never

before been convicted; 8 of the 10 with prior convictions got time. Four of the five who walked with arrest records had only very old or only misdemeanor arrests. The one defendant who got time despite a clean record was the cab driver who pled to two misdemeanor drug offenses.

It is not surprising that prior convictions — or their absence — are so powerfully associated with disposition. The assumption built into the statutory scheme for classifying and setting maximum sentences in weapon offenses is that possession is a serious matter because it is potentially dangerous.

The potential danger is likely to be even greater when the possessor has, by previous convictions, already demonstrated criminal propensities.

TABLE 3.

Sentences in Gun Possession Cases, by Prior Criminal Record

	<u>Walk</u>	<u>Time</u> ^a
No Prior Record	7	1
Record of Arrests	5	—
Record of Convictions	2	8

Source: Deep Sample Data (1973); Vera Institute Felony Disposition Study

a. For the purposes of this table, the defendant who was conditionally discharged because he was known by the judge to face a year in jail for parole violation on the gun possession and because he had already done 154 days in pretrial custody, is considered to have been sentenced to time. Similarly, the defendant who was sentenced to probation after ten months in pretrial custody is considered to have been sentenced to time.

The "deterioration" of gun possession cases seems to be a matter of dealing seriously with those cases that warrant serious attention. The four factors (prior relationship, evidentiary search problems, evidentiary possession problems, prior criminal record of defendant) that the Vera researchers found to contribute to the disposition of gun possession cases allowed judges and especially prosecutors to decide which cases warrant felony disposition and felony time. The prosecutors and judges that the Vera researchers interviewed stated that gun possession cases were taken seriously because they viewed "violent crime associated with guns seriously and because of office policy and public pressure to resist charge reductions in cases involving guns."⁴² The researchers conclude:

Deterioration of these arrests, which fits the pattern of deterioration in felony arrests generally, does not appear to represent callousness towards the public interest. There are few deep sample cases in which — when the facts of the situations and the evidentiary obstacles to felony conviction are explored — it could be said that the disposition was clearly too lenient or that the courthouse was bargained away." The cases in which conviction was possible and in which there was also a suggestion of the potential for more serious harm seem to have been singled out for more severe dispositions. The defendant who fired his gun into the air in a vacant lot was evidencing a potential for causing harm, despite his lack of malice or criminal intent. He did 154 days in detention before being conditionally discharged on his misdemeanor plea, and he will do felony time because of the parole revocation triggered by his conviction for possessing the gun. The drunk with a record of assaults who was waving his loaded gun about in the street got felony time on a felony conviction. And the defendant with a juvenile record, whom the ADA believed was about to commit an armed robbery with a gun found in the car he and his friends were using to "case" the street, was convicted of a felony at trial and drew felony time.

Even in an uncongested system, in which every case could be taken to trial as originally charged, many of the remaining cases would have deteriorated because:

- The defendant's lack of prior record or his possession of the gun in his own premises warranted only a misdemeanor charge under the terms of the

Penal Law;

- The sympathy of the jury could easily have been won by the defendant's obvious lack of criminal intent in arming himself in a city where so many go forth armed, and by his otherwise responsible behavior towards family or community;
- The prosecutor would have had difficulty persuading a jury that the defendant actually possessed the gun if it was not discovered by searching him;
- If the gun was discovered by search, the prosecutor would have lost a defense motion to suppress the evidence (or the conviction would have been reversed on appeal) because the search did not meet constitutional requirements;
- Even in the face of serious evidentiary problems in gun possession cases, the police and courts seem to perform efficiently what may, after all, be their primary mission — removing illegal weapons from circulation.

The Vera study of the deterioration of gun possession arrests illustrates clearly that it is not the leniency by judges or the callousness of prosecutor's plea-bargaining that explains the deterioration of such arrests in the criminal justice system and the large number of people who possess guns and who may or may not use their guns in violent street crime.

There is a wide disparity among the type of sentences judges feel appropriate for those defendants accused of gun possession. One sitting Supreme Court Justice who rarely sentences defendants charged with gun possession to jail sentences gives his reasons for such actions as follows:

The gun law was a reaction on the part of the legislature to the extreme violence in our community and society, the problem I have with the gun law as I do with all kinds of mandatory sentences, it restricts the discretion of the judge in an area where discretion is needed. They are not all the same. We speak in terms of a person who is carrying an unlicensed weapon as a threat to the community. Yet I have found that a large number of people who possess guns are not threat to the community whatsoever, on the contrary very law-abiding citizens have now sought out a gun as a protection against the violence. It is almost a circular pattern here. We devise the gun law because there's too much violence in our community, we say we don't want people to carry guns unless they have a license you find many legitimate law-abiding people carrying weapons.

Even though the judge sentenced defendants so charged to probation and/or fines, he also believes that mandatory minimum sentences has resulted in defendants receiving more jail and prison sentences. He stated:

Defendants do more time because the district attorney must reduce mandatory minimum sentences and the cost to defendants of the district attorney⁴⁵ doing that is reflected in the more time the defendant receives.

Another sitting justice explained how he sentences defendants charged with gun possession as follows:

Let's take the man who owns a Bodega, you give him a year in jail, he may lose his business and his family may be put on welfare. He'll be in maybe nine months. It will cost us \$20,000.00 to support his family. What have we accomplished. The punishment that was inflicted seems in excess attended by the statute, but he lost his business. What may have been a cohesive family is now broken. What have we accomplished.

Let's assume he is the type committing burglaries or robberies; let's assume he's not employed and I conclude that his purpose in having the gun is not for protection but to commit crimes, then I have no problem with putting him in jail whatsoever. Yet we have to do something with the man who owns the Bodega. What do I do? I fine them \$1,000.00 and place them on probation for five years and I advise them that they now have a prior record. If the district attorney wants to take me up on it let him do so, I don't think⁴⁶ anyone up on it let him do so, I don't think anyone is going to.

This judge was also known to give split sentences and community service for certain defendants charged and convicted of gun possession. He stated:

If a guy has any sort of record: larceny, burglary, driving while intoxicated, I have sometimes given a split sentence rather than a year in jail. I would be inclined to give them three, four or six months in jail and the rest of the year on probation. I would give community service in lieu of jail time and probation, where I had a young fellow, sixteen or seventeen years of age. I would have considered it and I have given community service in lieu of that jail time.⁴⁷

Although this judge would be willing to sentence defendants to jail,

fine and/or probation, he admits that the law was a response to those judges who always gave defendants probation and/or fines. He stated:

Unfortunately, there were too judges who never sentenced anyone to jail; there were too many judges⁴⁸ always giving fines and probation. I don't think that was right.

Chapter II Deterioration of PL 265.02 Gun Possession Arrest

1. Op. cit. Steelman, p. 8, 9.
2. Op. cit. Vera Institute, p. XI
3. Ibid.
4. Ibid. p. XXI; Record of the Association of the Bar of the City of New York, volume 27, number 1, January 1972, p. 26.
- 5.
6. Ibid. p. 135
7. Ibid. p. 1.
8. Ibid.
9. Ibid. p. Xii
10. By prior relationship, the Vera Institute researchers included husbands, wives, children, lovers, and other family members, prostitutes and their pimps or customers, neighbors, in-laws, junkies and dealers, landlords and tenants. Ibid. p. 20
11. Ibid. p. 133
12. Ibid. p. Xiii
13. Vera supplied only an estimate of the dispositional pattern of felony arrest for 1977 due to the fact that N.Y. has no single source of offender-base tracking system that links felony arrests to dispositions reported in that year—some of the dispositions will have accrued in cases commenced in an earlier annual reporting period and some of the arrest will have not reached disposition. Approximations were also forced to be made because police data, criminal court data and supreme court data actually count different things. N.Y.C. Police Department reports "arrests", the criminal court reports "dockets" and the Division of Criminal Justice reports defendant-indictments. The link between police "arrest" data and D.C.J.S. "defendant-indictment data are not direct. Vera researchers assumed for purposed of their comparisons that the differences were marginal. Ibid. p. 142.
14. Ibid. p. 144
15. Ibid.
16. Mario Merola, "Modern Prosecution Techniques, "Criminal Justice Bulletin, (), p. 232
17. Op. cit. Vera Institute, p. 146.
18. Ibid. p. 115

19. Ibid.

20. Ibid. p. 118-119

21. Ibid.

22. Ibid. p. 2.

23. Ibid. p. 118 - 119

24. Ibid. p. 120 - 132

25. Ibid. p. 120

A case of disposed of by an adjournment in contemplation of dismissal (ACD) is considered a dismissal. Under New York Criminal Procedure Law 170.55, a non-felony prosecution in the criminal court may be adjourned in contemplation of dismissal of the accusatory instrument in furtherance of justice. After a felony charge has been reduced to a misdemeanor, a motion for an ACD may be made by the defendant, the prosecutor or the court. Usually an ACD is conditioned on the defendant's not being re-arrested within a six month period, but theoretically the judge could impose other conditions as a prerequisite to ultimate dismissal. The court may not order an ACD if the defendant has previously been granted a ACD; has previously been convicted of a crime and the district attorney does not consent to an ACD on the current charge; or has previously been adjudicated a youthful offender on the basis of any act involving dangerous drugs and the district attorney does not consent. (N.Y. Criminal Procedure 17.56 (1).

26. Ibid.

27. Ibid.

28. Ibid. p. 121

29. Ibid. p. 123

30. Ibid. p. 124

31. Ibid.

32. Ibid. p. 124

33. Ibid. p. 125

34. the "exclusionary rule," designed by the Supreme Court to give substance to the Fourth Amendment's prohibition of unreasonable searches and seizures, provides that when a search does not satisfy the constitutional standards of reasonableness, the "fruits" of the search must be suppressed and not used in evidence. As exclusion of the unlawfully seized evidence would mean acquittal at trial for many defendants accused of crimes of possession, when there is no complaining witness's testimony for the prosecutor or fall back upon, it was thought that the "exclusionary rule" would deter police officers from making unlawful searches. (see MAPP v. Ohio, 367 U.S. 643 (1961).) This rationale assumes, of course, that the law enforcement interest is the securing of convictions rather than the discovery and confiscation of dangerous contraband. The deep sample data suggest that this assumption may be mistaken.

35. Ibid. p. 125 - 126
36. Ibid. p. 126 - 127
37. Ibid. p. 120 - 121
38. Ibid. p. 127
39. Ibid. p. 128
40. Ibid. p. 130
41. Ibid.
42. Ibid.
43. Ibid. p. 131 - 132
44. Interview conducted in the Bronx Supreme Court, Bronx County between March 1984 and August 1984.
45. Ibid
46. Ibid
47. Ibid
48. Ibid

III. RESEARCH DESIGN

In order to meet the requirements data needs of my research in a relatively short time frame for design, collecting and analysis, I decided that a statistically significant post law simple random sample of the period August 12, 1980, to August 11, 1981, and a pre-law simple random sample of the period August 12, 1979, to August 11, 1980, would be used.

I chose to limit my research to one jurisdiction - Bronx County, New York City, because it would allow me to focus my attention on more sources of data and to analyze more kinds of data than I would have been able to do if I attempted to analyze data from all five boroughs. Data collected by D.C.J.S. after the first year the law took effect indicate that the pattern of gun arrests to conviction is relatively the same amongst the three largest boroughs, New York County; Kings County, and Bronx County.¹ In the period from August 12, 1980, to December 31, 1981, 36.9% (n = 4,049) of 265.02 gun possession arrests occurred in New York County; 39.0% (n = 3,164) occurred in Bronx County and 30.2% (n = 5,105) occurred in Kings County. For the same period, Bronx County accounted for 26.3% of all firearm indictments; New York County 22% of all firearm indictments and Kings County accounted for 35.7% of all firearm indictments in New York City.

The district attorneys charge one of three possession charges where weapons are involved: PL. 265.01; PL. 265.02; and PL. 265.03. The distinctions between the possession charges, broadly speaking, when used in connection with guns, are as follows: 265.01 is appropriate to unloaded guns, 265.02 is applied to loaded guns, and 265.03 is invoked when the gun is loaded and there is apparent intent to use it and there is another charge such as assault is charged also. Fourth degree weapon possession (265.01) is frequently used for weapons other than guns. Almost three-fourths of the cases charged with 265.01 were for non-firearms weapons.

I shall limit myself to 265.02 gun possession arrests because it is this charge that has become the focus of attention by the legislators, the Mayor, criminal justice specialists and the public at large, as encompassing the most radical change in the new gun law — 265.02 was elevated to a "D" felony with a one year mandatory minimum sentence coupled with restricted plea-bargaining. Also prior to this change, the criminal behavior that would lead a person to be charged with PL 265.02 remained the same

after the law as before the law, and the district attorney's office charged 265.02 when a loaded gun was possessed outside place of business or home, before and after the new law, so that the only change was the added mandatory minimum sentence and restricted plea-bargaining. By looking at 265.02 gun possession arrests only, I eliminated the problem of arrests with guns, where the possession of the gun is not the top charge or where the gun is incidental to the charges against the defendant, such as in armed robberies or assaults with guns. The arrest, disposition and sentencing of these arrests will be affected by the more serious charge of robbery or assault with a deadly weapon, making it difficult to determine what effect the possession of the gun had on the disposition and sentencing of the defendant and, therefore, difficult to analyze the consequences of the gun law upon the prosecution of possession cases.

In order to measure the consequences of the gun law on the prosecution of gun possession cases, I will make use of official crime statistics. In order to obtain such statistics, I have been given access by the New York City Criminal Justice Agency (C.J.A.)² to their computer system in which is collected specific information on gun cases. I also have access to the raw data from which data is fed into the computer. C.J.A. personnel are responsible for collecting data on each gun case and segregating out each gun case and placing it into a gun file. The procedure for the collection of data on gun cases within New York City is as follows:

1. Gun cases are brought to the attention of C.J.A. personnel through the police arrest report filed by the police officer in central booking;
2. Upon determining that a weapons charge may be involved in the complaint, C.J.A. personnel make a determination of the specific type of weapon involved. The specific weapon (i.e., gun) is stamped on the interview; hereinafter referred to as the "C.J.A. yellow."
3. Next to all defendants' information is the label, "gun." If the weapon is not a gun, "N" is designated to indicate a non-gun case. The statutory charge is entered in the central booking log as well as on the C.J.A. yellow.
4. The Criminal Justice Agency in the Bronx maintains additionally a source of documentation designated as the "C.J.A. gun log." This document is

exclusively used for the documentation of weapons cases. The specific weapon alleged is entered in the appropriate section of the CJAX gun log. This particular piece of information also documents the shift at which the case entered the system, the defendant's name, the specific weapons charge, other charges and the arrest number. The C.H.A. weapons log is then forwarded to a C.J.A. staff supervisor at the end of each shift. Upon the return of yellows to C.J.A., each case can be accounted for by making a match between information on the C.J.A. yellow and the gun log.

5. All cases, including weapons cases, are initiated into U.D.I.I.S. when the interview has been completed. In the event that there are more charges than the alleged weapons charge, the weapons charge takes priority within the hierarchy of charges entered into U.D.I.I.S.
6. C.J.A. personnel, through this process, have attempted to track each and every gun case from October 12, 1980, through October 4, 1981, through the process from Criminal Court arraignment to Grand Jury indictment to final disposition in Supreme Court.
7. The first indication C.J.A. personnel received that an indictment has been handed down is when the District Attorney forwards a list of indictment numbers to the Department of Corrections.
8. In order to continue tracking the particular case, C.J.A. personnel must consult the Supreme Court case worksheet available through the District Attorney's Office. All gun cases are extracted and isolated from this list for treatment.

The information taken by C.J.A. Personnel and placed into the gun file includes the following variables:

1. Defendant's name;
2. Defendant's date of birth;
3. Defendant's sex
4. Defendant's ethnicity;
5. Arrest date;
6. Precinct arrest number;

7. Arrest charges;
8. Docket number;
9. NYSID number;
10. An assessment of the defendant's community ties (depending upon the information supplied by each defendant and the ability of C.J.A. personnel to verify such information), which may include current address, length of residence at current address, alternate address, phone number, employment status, school status, if available, and C.J.A. personnel's attempt to verify this information to make recommendations to the court as to whether the defendant should be released on his/her own recognizance without bail; and
11. Criminal record of defendant, including any warrants, number of prior convictions and the number of open cases.

Statistical analysis will follow a before and after plan in which the new plea-bargaining policy will be treated as a factor in the study. That is, the new law will be considered a factor that could be either absent (if a case was filed before the prohibition), or present (if the case was filed after the prohibition). Since the policy was associated with the time a case was filed, controlling for other factors that might change over time will help to isolate possible effects of the policy.

Factors that would influence the processing and prosecution of gun possession cases are: the type of offense charge, the strength of the evidence against the defendant, aggravating and mitigating aspects of the crime, social-economic facts about the defendant including employment status, pre-trial detention status, relationship to victim, defendant's community ties, prior criminal record or lack thereof, etc. Official records may not be a reliable source for the collection of all of the above data.

The first problem encountered is that there was no separate collection of gun cases prior to the new law. C.J.A. collected certain data on each defendant both prior to and after the new law and that data can be used to fill some information that was being collected in the gun file. However, this information would not include Supreme Court information. One possible source for such information is the Division of Criminal Justice

Services and the District Attorney's office files. I was given access to the district attorney's files for supreme court cases and from this data I was able to compare data from C.J.A. with records kept by the district attorney's office.

The list of gun possession arrests I used to make a random simple sample included arrests where the arrest charge and the indictment charge were the same — no reductions, additions or deletions were made to the charge against the defendant from arrest to indictment. My list did not include cases that were dismissed before the defendant could be arraigned nor did the list include cases where the defendant's case was dismissed prior to indictment or cases where dispositions had not been reached by 1982. Also eliminated were cases that were sealed once disposition had occurred; these cases showed up on the computer as no public record.

From the list of 265.02 cases, a random sample was drawn of 120 cases before the gun law and 120 cases after the law took effect. Of the 240 cases, 37 cases were eliminated due to conflicting data from different sources, for example, disposition reported by C.J.A. and district attorney records did not match and could not be reconciled; or incomplete data. Data for the 203 cases (109 cases before the law and 97 cases after the law) were recorded by hand from N60's — arrest/indictment/disposition data sent to the district attorney's office from D.C.J.S. The information was then categorized and coded to be fed into the Wylbur computer to be analyzed. The language which was used to analyze the data is SPSS (Statistical Package for the Social Sciences). Once all the data has been fed into the computer a series of statistical programs was run to evaluate relationships between variables and their effects on the imposition of the mandatory one year sentence.

The dependant variables used in the gun study were waiver of grand jury process, mitigation hearing, nature and extent of rearrest, nature and extent of disposition and sentence. Independent variables used were time of arrest (before and after the gun law took affect), indictment date, indictment charge, prior convictions, bail status and complainant. The only demographic characteristic used was ethnicity, because it had the potential of affecting the defendant variables.

In order to get the impressions of professionals in the criminal justice system, I conducted structured interviews of judges and prosecutors and

sent out questionnaires to the Legal Aid Society in Bronx county. Information for each case was collected on data sheets for each defendant (see Appendix, Page 203).

In order to analyze the data collected three statistical procedures were used:

1. Crosstabulation and chi square. Several crosstabulations were done on variables. Chi squares were used to measure the frequencies of defendants and how they related to variables (significant chi squares are noted on charts and in the text). The chi-square will be used with the two samples, the pre and post law gun possession arrests, samples, to determine if there are any significant differences in the relative frequency of cases in each of the variable categories; and then the actual number of cases in each category for each sample is compared with the number that would be expected on the basis of the marginal totals (i.e., the sums for each variable and each sample) alone—that is, if there were no real differences among the samples.
2. Standard Error of Proportions procedures were used to make inferences pertaining to differences in percentages found in the data with regard to variables (significant Z noted in the text).

In order to further analyze the results of crosstabulations and chi squares, variables of interest from different tables were compared using a standard error. The proportion test was performed on percentage of guilty pleas who received various convictions, percentage who had prior convictions and were detained and percentage of defendants with priors who were rearrested before and after the enactment of the law.

3. Pearson correlation procedure was used to measure direction and strength of related variables (significant R is noted in the text).

Correlations were utilized to test the directional hypotheses of the researchers on all variables.

My research will be limited to analyzing concrete information about a particular law in one jurisdiction, the Bronx. However, my research may have significance on future sentencing policies. First, by increasing the rate at which prison sentences are imposed, a provision for mandatory sentencing taxes the resources of both courts and prisons. Accommodating any change in the arrest/conviction jail sentence rate demands additional resources not only for prosecutors and judges, but also for police, civilian employees, specialized ballistics services and legal services as well. This factor becomes even more important in light of the failure of the New York State prison bond issue to pass. Mayor Koch may parade in front of empty prison cells on television stating that if you have the gun, we have the space, but, in fact, we do not have the space. Prison and jail space in New York State is being taxed to the limit. If, indeed, one purpose of mandatory sentences is to increase the amount of jail sentences imposed against the serious offender, then if defendants are indeed, getting longer, more severe sentences, attention and solutions must be found to deal with the higher number of incarcerated defendants. If more prisons and jails are not to be built then perhaps alternatives to incarceration must be found.

Second, in light of the fact that New York State is in the process of going from an indeterminate sentencing scheme to a determinate one, it would be of particular interest to understand the ramifications of prosecuting and sentencing defendants under one small provision in the law that calls for a mandatory minimum sentence. If enforcement of that provision by prosecutors and judges leads to injustice, and can not even be said to have approached the legislators' expectations, New York State legislators may be forced to exercise caution before redesigning New York State's sentencing scheme. Third, the debate over the future of gun control is a volatile subject, the many studies that have been conducted, the many polls that have been taken and the many laws that have been placed on the books have not reduced the lingering debate, but have fueled it; nor has the above reduced crime allegedly associated with the proliferation of firearms in America. One more gun study is not likely to end the debate or find a solution to the problem if gun control, however, it may help lawmakers, social scientists, and groups that aggressively seek answers to question of gun control, to not make some of the assumptions that are associated with poor lawmaking. This research may help them

identify what limits the further criminalization of gun possession may have in the reduction of violent street crime.

Chapter III Research Design

1. Op. cit. D.C.J.S., p. 95.
2. The Criminal Justice Agency (C.J.A.) is a public benefit corporation whose staff interviews arrested defendants in New York City and makes recommendations for pre-trial release, notifies released defendants of upcoming criminal justice system. Additional tasks that C.J.A. performs relate to conducting research and disseminating information both in its own operation and specific research project.
3. New York City. Criminal Justice Agency "Gun Cases Tracking Procedure," (November 13, 1980).

IV. THE GUN STUDY: GENERAL FINDINGS AND INTERPRETATION

A. Course To Disposition of 265.02 Gun Possession Arrests

Chart 1.11 shows that 80% (N=163) of all the 203 randomly selected gun possession arrests were disposed of by guilty plea. In only 8% of the arrests did the defendant go to trial and where trial was the course to disposition, 75% were acquitted and 25% was found guilty. Of the four gun possession arrests that went to trial and where defendants were found guilty, all four defendants were found guilty of the same felony gun possession arrest charge — 265.02. However, none of the four defendants were sentenced to felony jail time¹ and only one of the four defendants was sentenced to misdemeanor jail time,² with three defendants being sentenced to no jail time.³ Twelve percent (N=24) of the 203 gun possession arrests were dismissed.

Of the 163 gun possession arrests, where the defendants plead guilty, 61% (N=99) were to the same felony charge as arrested — 265.02 a "D" felony and 33% (N=54) pled guilty to the lesser felony charge 110/265.02 a "E" felony, although they had been arrested and indicted a 265.02 gun possession charge. Sixty-one percent (N=10) of those who were arrested on a 265.02 gun possession charge pled guilty to a "A" misdemeanor charge — 265.01. The fact that 94% (N=153) of the defendants charged with 265.02 as the sole charge pled guilty to felony charges indicates that gun possession arrests were being taken seriously by judges, prosecutors and defense counsel when negotiating pleas both before the new law and after it and those defendants who pled guilty to felony charges now run the risk of facing more severe penalties if rearrested and convicted of a felony.

Of the 94% that pled guilty to felony charges, 61% were sentenced to jail time; 39% were sentenced to felony jail time and 22% were sentenced to misdemeanor jail time. However, when the defendant is allowed to plead guilty to misdemeanor charges, 70% received no jail sentences, but only ten defendants out of the 163 were allowed to plead guilty to misdemeanor charges.

It is interesting to compare the total dispositional pattern of the 203 1979-1981 gun possession sample (chart 1.11) with the dispositional pattern found by the Vera Institute's gun possession deep sample (chart 1.10) of 265.02 gun possession arrests. Two findings were similar, the 80% (N=163)

Chart 1.11

COURSE TO DISPOSITION FOR FELONY GUN ARRESTS

FELONY ARRESTS REACHING DISPOSITION

203
(100%)

DISMISSALS

24
(12)

TRIALS

16
(8)

GUILTY PLEAS

163
(80)

ACQUITTAL

12
(75)

FOUND GUILTY

4
(25)

128

CONVICTION
SAME FEL.
AS CHARGED

4
(100)

CONVICTION
LESSER FEL.
AS CHARGED

0

CONVICTION
MISD. OR
LESS

0

SAME FEL.
AS
CHARGED

99
(61)

LESSER FEL.
AS
CHARGED

54
(33)

MISD.
OR
LESS

10
(6)

FEL.
TIME

0

MISD.
TIME

1
(25)

NO
TIME

3
(75)

MISD.
TIME

0

NO
TIME

0

FEL.
TIME

60
(39)

MISD.
TIME

33
(22)

NO
TIME

60
(39)

MISD.
TIME

3
(38)

NO
TIME

7
(70)

Source: Bronx Pre-Law/Post Law Sample Data (1984): L. Pete Gun Study.

dispositions by guilty plea are compatible to the 79% (N=22) found in the Vera deep sample. Of those who plead guilty to misdemeanor charges, the majority did not go to jail in both populations — 67% of the Vera sample versus 70% of the 1979-1981 gun possession sample. There are several similar findings:

1. the deep Vera sample revealed only one trial out of the 28 gun possession arrests that reached disposition — whereas 16 trials occurred in the 1979-1981 gun possession sample;
2. in the Vera sample, only 32% pleaded guilty to felony charges in the 1979-1981 gun possession sample, and,
3. only 28% of the Vera sample did jail time after pleading to felony charges versus 61% in the 1979-1981 gun possession sample.

In order to compare the Vera sample and the current study on guilty pleas to felony charges a cross-tabulation of the Vera data and data from the current study was performed. It produced a chi square (X^2) of 54.26 (significant at the .0001 level) indicating that a significantly higher number of people plead guilty in the current study. By converting the X^2 into a phi coefficient of .5182 (p .0001) we have an indication of the strength of the increase in guilty pleas witnessed in the current study.

In comparing the number of persons who received jail time in the current study and the Vera studies a cross-tabulation produced a X^2 of 1.367 which is not statistically significant indicating there was no change in the current study in the number of people who received jail time.

The course to disposition of those defendants who went to trial, both before and after the law, whether the defendant waived indictment or not remained virtually the same. For those defendants whose cases were presented to the Grand Jury 11% before the law and 10% after the law had trials and of those almost all were acquitted — 74% before the law and 86% after the law. Most defendants who waive indictment pleaded guilty, but even fewer of those defendants had trials — 2% before the law and 4% after the law and both defendants before and after the law were found guilty of felony charges and received jail sentences.

A significant difference between those defendants who waived indictment and those who did not, is the difference in the percentage of those who were not sentenced to jail terms. Chart 3.2 shows that 69% of those defendants who waived indictment, did not go to jail before the law and 63% of those who waive indictment who did not go to jail after the law to 45% who did not waive indictment and did not go to jail before the law, and 48.6% who did not waive indictment and did not go to jail after the law. A chi square of 1.96 was found ($p < .05$).

The findings suggest that the mandatory minimum jail sentence did not influence whether a defendant decided to waive indictment or whether a prosecutor would consent to such waivers. Why should whether a defendant waives prosecution by formal grand jury indictment process be correlated with whether or not a defendant receives a jail sentence? One could predict that those who waive formal indictment have fewer prior convictions than those who do not waive and therefore were less likely to receive jail sentences based upon their prior criminal records. However, when one looks at Chart 3.3, it is evident that whether a defendant waives indictment or not, he/she was likely to have prior convictions — 82% of those defendants who waived had prior convictions before the law and 78.4% of those defendants who did not waive had prior convictions. The difference between the percentages was not found to be significant.

The answer to the question proposed is not to be found in whether the defendants had prior convictions or not. However, by looking at Chart 3.3, it becomes evident that there was a significant decrease between those defendants with prior convictions before the law who had waived indictment by grand jury, when compared with defendants who had prior

There was also a significant increase in the percentage of those who receive any jail sentence after pleading guilty to any felony charge — from 59% before the law to 62% after the law (X^2 3.63, $p < .10$). Although more defendants were pleading guilty to felonies and received jail sentences, there were also a substantial increase in the number of defendants who pleaded guilty to misdemeanors, who received no jail sentences. That figure went from 67% before the law to 100% after the law. Notwithstanding the above, the number of defendants that were allowed to plead guilty to misdemeanors both before and after the law was extremely small — one before the law and nine after the law.

The percentage of trials remained virtually the same, before the law as after the law — 8% and 7% respectively. Nonetheless, the percentage of those defendants who were acquitted showed a sharp increase from 67% in the 1979 sample to 86% in the after sample. The differences in the percentages however were not statistically significant due to the small number involved.

The higher acquittal rate after the law may indicate the frustration of jurors in finding defendants guilty of possessing guns. It is probably a combination of:

1. the jurors resistance to find a defendant guilty of 265.02 where there is a mandatory minimum sentence of one year incarceration;
2. the jurors' are given an opportunity to evaluate evidentiary issues in possession cases that come to light more clearly when presented in front of a jury and reasonable doubts may be more exposed than if the defendant were simple negotiating a plea before a judge; and
3. jurors are more likely to put themselves in the defendant's place and empathise with the defendant especially when they themselves, their friends, relatives or neighbors have been victims of violent street crime and can relate to a person arming themselves for self-protection.

An additional factor that might explain the high acquittal rate may be the restrictions placed upon the prosecutor's ability to exercise discretion in gun possession cases. Because of these restrictions, cases that otherwise might never have reach trial are being presented. Because

a defendant must be indicted, once charged with Pl. 265.02, before a judge may reduce the charges against the defendant, the defendant has little to lose by choosing to go to trial. If the defendant pleads guilty before trial, it must be to a felony; if the defendant goes to trial, he/she may be found not guilty. A defendant may avoid a jail or prison sentence once indicted for gun possession, but not the felony conviction. When the three factors listed above are taken into consideration with this last factor, the defendant is not necessarily placing him/herself at unacceptable risk by opting to go to trial. Even if a defendant was found guilty after trial a mitigation hearing may allow a defendant to avoid a jail or prison sentence making the risk of trial to the defendant even more in his/her favor.

Whether the defendants were found guilty before the law or after the law, the defendants were found guilty on felony charges. But both before and after the law the defendants did not receive felony jail sentences after being found guilty — before 23% who were found guilty received misdemeanor jail time, after the law no one received misdemeanor jail time and before the law 67% received no time after being found guilty and after the law no one received a jail sentence.

Although the total number of the defendants that went to trial is small, the correlation between those defendants that went to trial and those that were acquitted, or received no jail sentences after being found guilty is strong, and likewise the number and percentage of the defendants who pleaded guilty, both before and after the law and were sentenced to jail terms is high when compared to those who were found guilty. The reason for the above may be that there is something particular to either those defendants who pleaded guilty or those who were found guilty that is correlated either with jail terms or not. It is possible that defendants who were found guilty had fewer convictions than those who pleaded guilty. However, when trials were cross-tabulated with prior convictions, it was found that 75% of those who have been acquitted had prior convictions both before and after the law. The answer is more likely to be found among the reasons given for the high acquittal rate of those defendants that go to trial.

Chart 2.0

COURSE TO DISPOSITION FELONY GUN ARRESTS BEFORE LAW

FELONY ARRESTS REACHING DISPOSITION

109
(100)

DISMISSALS
10
(9)

TRIALS
9
(8)

GUILTY PLEAS
90
(83)

ACQUITTAL
6
(67)

FOUND GUILTY
3
(33)

CONVICTION
SAME FEL.
AS CHARGED
3
(100)

CONVICT.
LESSER
FEL. AS
CHARGED
0

CONVICTION
MISD. OR
NO
0

SAME FEL
AS
CHARGED
58
(64)

LESSER FEL.
AS
CHARGED
23
(26)

MISD.
OR
LESS
9
(10)

FEL TIME MISD TIME NO TIME MISD. TIME NO TIME

FEL TIME MISD TIME

NO TIME

MISD. TIME

NO TIME

133

Source: Bronx Pre-Law/Post Law Sample Data (1984): L. Pete Gun Study.

Chart 2.2

COURSE TO DISPOSITION OF TRIALS OF DEFENDANTS
INDICTED FOR POSSESSION BY PRIOR CONVICTIONS

				BEFORE	AFTER				
				TRIALS	TRIALS				
				4	4				
				out of 9	out of 7				
				40%	55%				
ACQUITTALS				FOUND GUILTY					
3	3			1	1				
		FOUND GUILTY		FOUND GUILTY		FOUND GUILTY			
		SAME FELONY CHARGE		LESSER FEL. CHARGE		MISD. OR LESS			
		1 1		0 0		0 0			
		(100) (100)							
		FELONY TIME	MISD. TIME	NO TIME		MISD. TIME		NO TIME	
		0 0	1 0	0 1		0 0		0 0	
			(100.0)	(100.0)					

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Source: Bronx Pre-law/Post law Sample Data (1984); L. Pete Gun Study.

Chart 2.1 COURSE TO DISPOSITION FELONY GUN ARRESTS AFTER LAW

FELONY ARRESTS REACHING DISPOSITION											
94 (100)											
DISMISSALS											
14 (15)											
TRIALS					GUILTY PLEAS						
7 (7)					73 (78)						
AQUITTAL			FOUND GUILTY								
6 (86)			1 (14)								
CONVICTION SAME FEL. AS CHARGED			CONVICT. LESSER FEL AS CHARGED		CONVICTION MISD. OR LESS		SAME FEL. AS CHARGED		LESSER FEL. AS CHARGED		MISD. OR LESS
1 (100)			0		0		41 (56)		31 (42)		1 (1)
FEL. TIME	MISD. TIME	NO TIME	MISD. TIME	NO TIME	FEL. TIME	MISD. TIME	NO TIME	MISD. TIME	NO TIME	NO TIME	
0	0	1 (100)	0	0	34 (47)	11 (15)	27 (38)	0	1 (100)		

Source: Bronx Pre-Law/Post Law Sample Data (1984): L. Pete Gun Study

CHART 2.3
Disposition by Before and After
(not collapsed)

Disposition	<u>Before</u>	<u>After</u>	<u>Total</u>
Jail	49 (24.1)	37 (18.2)	86 (42.4)
Jail - Probation	3 (1.5)	8 (3.9)	11 (5.4)
Fine	3 (1.5)	2 (1.0)	5 (2.5)
Probation 12	15 (5.9)	27 (7.4)	(13.3)
Adjudicated Y.O.	0 (0.0)	2 (1.0)	2 (1.0)
Adjudicated Y.O. \$ probation	6 (3.0)	0 (0.0)	6 (3.0)
Probation \$ Fine	13 (6.4)	10 (4.9)	23 (11.3)
Conditional Discharge	1 (.5)	0 (0.0)	1 (0.5)
Dismissed 10	14 (4.9)	24 (6.9)	(11.8)
Acquitted 6	6 (3.0)	12 (3.0)	(5.9)
Guilty 3	0 (1.5)	3 (0.0)	(1.5)
Time Served	2 (1.0)	0 (0.0)	2 (1.0)
Adjudicated Y.O. Probation \$ Fine	1 (.5)	0 (0.0)	1 (.5)
TOTAL 109	94 (53.7)	203 (46.3)	(100.0)

Source: Bronx Pre-law/Post law Sample Data (1984; L. Pete Gun Study)

CHART 2.4
Disposition by Before and After
 (collapsed)

	<u>Before</u>	<u>After</u>	<u>Total</u>
Disposition			
Jail	54 (26.6)	45 (22.2)	99 (48.8)
Up Jail	36 (17.7)	29 (14.3)	65 (32.0)
Dismissed	10 (4.9)	14 (6.9)	24 (11.8)
Acquitted	6 (3.0)	6 (3.0)	12 (5.9)
Found Guilty	3 (1.5)	0 (0.0)	3 (1.5)
TOTAL	109 (53.7)	94 (46.3)	203 (100.0)

($X^2 = 19.56$, 12 df $p < .07$; Cramer's $V = .31023$)

Source: Bronx Pre-law/Post law Sample Data (1984); L. Pete Gun Study

To further analyze the dispositional pattern of the 1979 and 1981 gun possession samples, chart 2.3 was produced.* However, since the percentages between specific dispositions before and after the law were so

*Chart 2.2 unlike charts 2.0 and 2.1 shows dispositional categories not used by the Vera Institute study such as probation/fine. Also chart 2.2 categorizes jail/no jail dispositions together irrespective of felony time/misdemeanor time distinctions.

small and tests of significance proved meaningless, I collapsed chart 2.3 and created chart 2.4. Twenty-six percent of those indicted for gun possession received jail sentences before the law and 22.2% received such sentences after the law indicating a decrease in those who received jail sentences, but the decrease was not statistically significant. The results of a chi square performed on the dispositional patterns revealed a significant difference in the dispositional pattern before and after the law ($X^2 = 19.56$, $df = 12$, $p < .07$).

Although a little less than half of the defendants in the entire sample 48.8% went to jail during the 1979-1981 period, this figure is an improvement over the previous years, where the chances of going to jail for gun possession was only one out of ten. In the 1979 sample 4.9% of the cases were dismissed before the law and after the law 6.9% of the cases were dismissed.

Three percent of those defendants charged with 265.02 were acquitted both before the law and after the law and the percentage of those found guilty did not change significantly — 1.5% before the law and 0% after the law. Although a slightly small percentage of defendants went to jail after the law, a larger percentage pleaded guilty to felony charges and were sentenced to felony jail time after the law took effect. This seems to indicate that gun possession cases in general were being prosecuted more severely and that judges were sentencing defendants more severely.

C. Factors Effecting the Dispositional Pattern of 265.02 Gun Possession Arrests

- 1. Waiver of Prosecution by Formal Grand Jury Indictment and Sentencing**
- 2. Pre-trial Detention Status and Sentencing**
- 3. Prior Convictions and Sentencing**
- 4. Ethnicity and Sentencing**

The use of prosecutorial and judicial discretion leads to selective criminalization. Judges and prosecutors must decide which defendants charged with illegal gun possession will face the one year mandatory minimum sentence. They must select and weigh which factors, known of each defendant, such as bail status, nature and extend of prior convictions, and the defendant's waiver of the grand jury process warrants an incarcerary or non-incarcerary sentence. How these factors effect the sentence the defendant ultimately receives will be discussed in this section.

1. Waiver of Prosecution by Formal Grand Jury Indictment and Sentencing

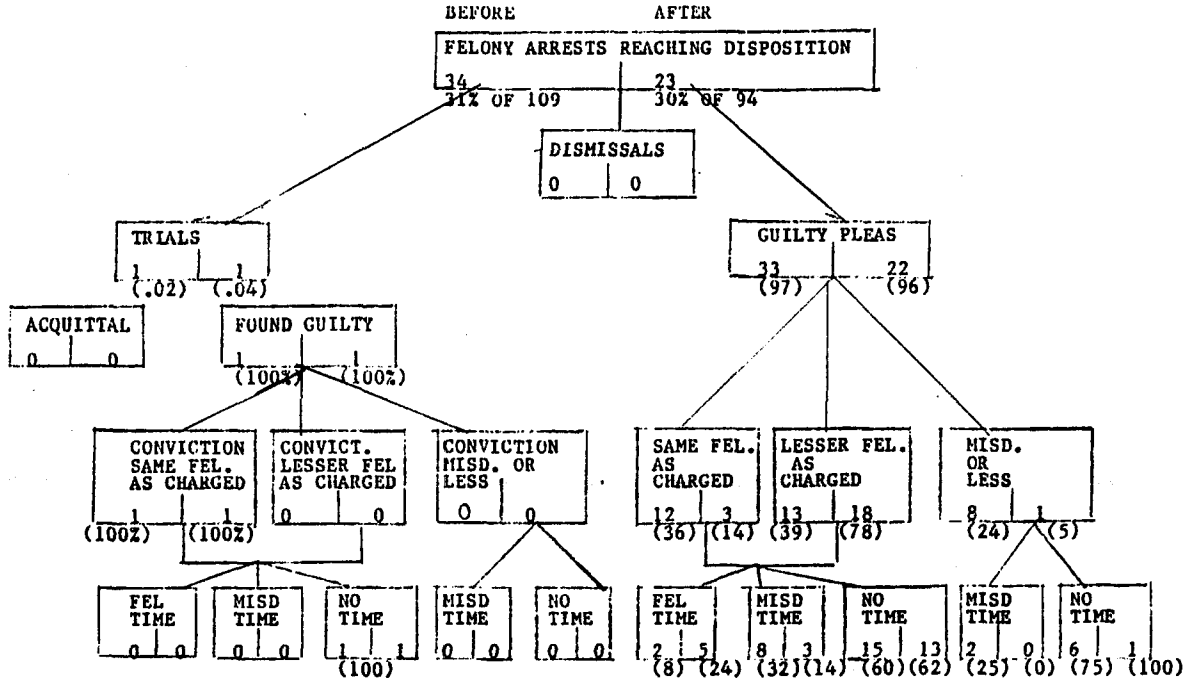
Any defendant may waive, with the prosecutor's consent, felony prosecution by formal indictment and proceed by prosecution by information (an accusatory instrument which serves as the basis for the commencement of the prosecution of the offenses charged). This procedure saves time and is utilized in many instances where the district attorney, defense counsel and the judge have negotiated a disposition that is fair and just to all parties. It is therefore almost always done in exchange for a particular promised sentence and plea charge for the defendant. This is demonstrated by the fact that of those defendants who waive formal prosecution by grand jury indictment, both before and after the law, almost all plead guilty — 97% before the law and 96% after the law (see charts 3.0 and 3.1). In contrast of those who are prosecuted by formal grand jury indictment, only 76% before the law and 72% after the law pled guilty. A cross-tabulation revealed a chi square 1.98, 1 df, p .10 for before the law and a chi square 2.31, 1 df, p .10 after the law.

Proceeding by grand jury indictment is however, the usual course to disposition, both before and after the law — 69% and 71% respectively do not waive formal grand jury indictment. Although the percentage and number of dismissals* was slightly different between those who waive indictment and those who do not —13% of those who did not waive had their cases dismissed before the law and 18% had their cases dismissed after the law, there were no dismissals of defendants cases both before and after the law where defendants waived indictment. If a defendant's case is weak, his/her lawyer will not allow him/her to waive formal indictment, but wait to see if the case will be dismissed by the grand jury since waiving indictment is tantamount to admitting guilt.

*Dismissals recorded occurred after indictment

Chart 3.0

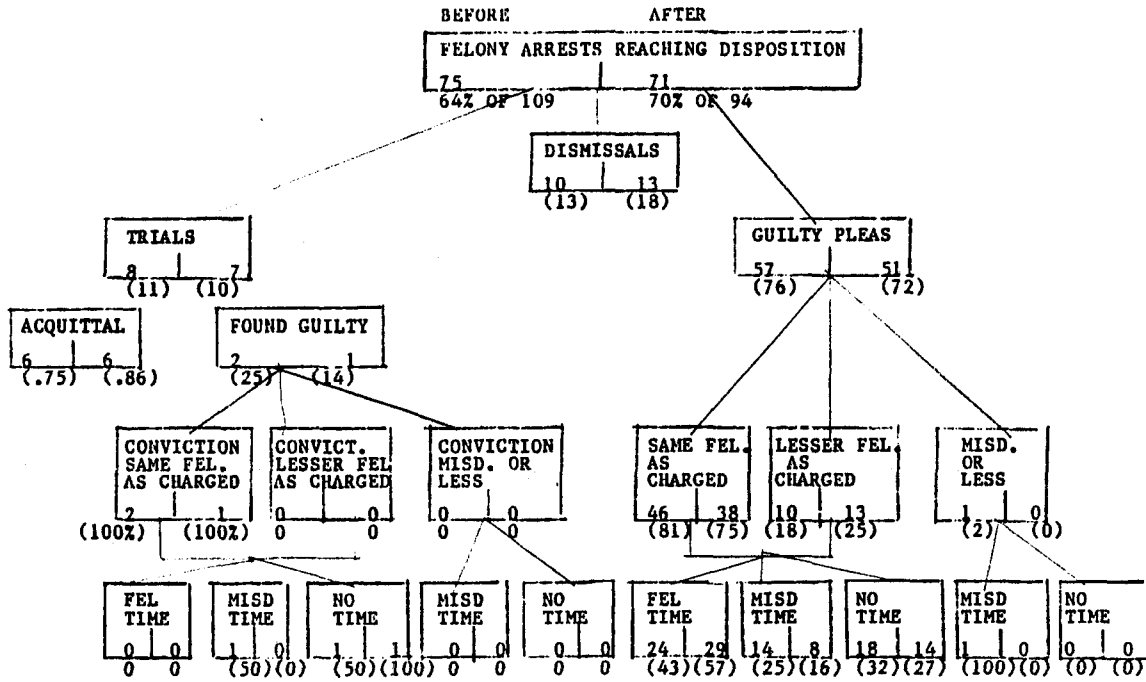
COURSE TO DISPOSITION BY WAIVER, BEFORE/AFTER



Source: Bronx Pre-law/Post law Sample Data (1984); L. Pete Gun Study.

Chart 3.1

COURSE TO DISPOSITION BY NO WAIVER, BEFORE/AFTER



Source: Bronx Pre-law/Post law Samples Data (1984) L. Pete Gun Study.

CHART 3.2

Felony Gun Possession Arrests, Waiver by Jail Time

<u>Before</u>	<u>No-Jail</u>	<u>Jail</u>	<u>Total</u>
<u>Waiver</u>			
Yes	22 (20.2)** (69.9)*	13 (11.9) (37.1)	35 (32.1)
No	34 (31.2) (45.9)	40 (36.7) (54.1)	74 (67.9)
Total	56 (51.4)	53 (48.6)	109 (100.0)
<u>After</u>	<u>No-Jail</u>	<u>Jail</u>	<u>Total</u>
<u>Waiver</u>			
Yes	14 (14.9) (63.6)	8 (8.5) (36.4)	22 (23.4)
No	35 (37.2) (48.6)	37 (39.4) (51.4)	72 (76.6)
Total	49 (52.1)	45 (47.9)	94 (100.0)

*Total %

**Row %

Source: Bronx Pre-law/Post law Sample Data (1984); L. Pete Gun Study

Chart 3.3

WAIVER BY PRIOR CONVICTION

BEFORE WAIVER	PRIORS		TOTAL
	YES	NO	
YES	29 (26.6)* (82.9)**	6 (5.5) (17.1)	35 (32.1)
NO	58 (53.2) (78.4)	16 (14.7) (21.6)	74 (67)
TOTAL	87 (79.8)	22 (20.2)	109 (100.0)

AFTER WAIVER	PRIORS		TOTAL
	YES	NO	
YES	10 (10.6) (45.5)	12 (12.8) (54.5)	23 (23.4)
NO	47 (50.0) (65.3)	25 (26.6) (34.7)	72 (76.6)
TOTAL	57 (60.6)	37 (39.4)	94 (100.0)

* Total percentage

** Row Percentage

Source: Bronx Pre-law/Post law Sample Data (1984); L. Pete Gun Study.

Chart 3.4

WAIVER BY PRE-TRIAL DETENTION STATUS

		BAIL	
BEFORE	IN	OUT	TOTAL
WAIVER			
YES	16 (14.7)* (45.7)**	19 (17.4) (54.3)	35 (32.1)
NO	46 (42.2) (62.2)	28 (25.7) (37.8)	74 (67.9)
TOTAL	62 (56.9)	47 (43.1)	109 (100.0)
AFTER	IN	OUT	TOTAL
WAIVER			
YES	12 (12.8) (54.5)	10 (10.6) (45.5)	23 (23.4)
NO	47 (50.0) (65.3)	25 (26.6) (34.7)	72 (76.6)
TOTAL	59 (62.8)	35 (37.2)	94 (100.0)

* Total percentage

** Row Percentage

Source: Bronx Pre-law/Post-law Sample Data (1984); L. Pete Gun Study.

The course to disposition of those defendants who went to trial, both before and after the law, whether the defendant waived indictment or not remained virtually the same. For those defendants whose cases were presented to the Grand Jury 11% before the law and 10% after the law had trials and of those almost all were acquitted — 74% before the law and 86% after the law. Most defendants who waive indictment pleaded guilty, but even fewer of those defendants had trials — 2% before the law and 4% after the law and both defendants before and after the law were found guilty of felony charges and received jail sentences.

A significant difference between those defendants who waived indictment and those who did not, is the difference in the percentage of those who were not sentenced to jail terms. Chart 3.2 shows that 69% of those defendants who waived indictment, did not go to jail before the law and 63% of those who waive indictment who did not go to jail after the law to 45% who did not waive indictment and did not go to jail before the law, and 48.6% who did not waive indictment and did not go to jail after the law. A chi square of 1.96 was found ($p < .05$).

The findings suggest that the mandatory minimum jail sentence did not influence whether a defendant decided to waive indictment or whether a prosecutor would consent to such waivers. Why should whether a defendant waive prosecution by formal grand jury indictment process be correlated with whether or not a defendant receives a jail sentence? One could predict that those who waive formal indictment have fewer prior convictions than those who do not waive and therefore were less likely to receive jail sentences based upon their prior criminal records. However, when one looks at Chart 3.3, it is evident that whether a defendant waives indictment or not, he/she was likely to have prior convictions — 82% of those defendants who waived had prior convictions before the law and 78.4% of those defendants who did not waive had prior convictions. The difference between the percentages was not found to be significant.

The answer to the question proposed is not to be found in whether the defendants had prior convictions or not. However, by looking at Chart 3.3, it becomes evident that there was a significant decrease between those defendants with prior convictions before the law who had waived indictment by grand jury, when compared with defendants who had prior

convictions after the law who waived indictment by the Grand Jury. After the law, only 45.5% of those defendants who waived had prior convictions, a decrease in percentage from 82.9% that had prior convictions before the law who waived indictment. Since the percentage of those who went to jail did not change significantly between those who waived indictment, before and after the law, one must assume that having a prior conviction became a more important factor in determining whether a defendant who waived indictment went to jail or not after the new law and this change may be attributed to the change in the law. It would appear that after the law, the prosecutors were much less likely to allow a defendant with prior convictions to plead guilty upon waiver of indictment so as not to go to jail, due to the increased vigor of prosecution of gun possession cases after the new law took effect. Because waiver is associated with nonincarceratory sentences, it was significant that defendants waive formal indictment less after the law. This reflects a policy shift in the way the district attorney's office handles gun possession cases.

Of those defendants who do not waive indictment, 78.4% (N=58) before the law and 65.3% (N=47) after the law had prior convictions, but there was a decrease of 13.1% in the percentage of those defendants who had prior convictions and who do not waive indictment and since the percentage of those who were sentenced to jail did not change significantly, one can conclude that prosecutors again were less likely to allow defendants to plead guilty and receive no jail sentences after the new gun law.

Returning to the question of why the defendants who waive indictment by the Grand Jury receive significantly less jail sentences, one can look at pre-trial detention status to see if there is a correlation between those defendants that waive to the Grand Jury and being held in pre-trial detention and those who do not waive and being held in pre-trial detention. It has been argued that the mere fact of being held in pre-trial detention increases the defendant's chances of being sentenced to jail (See Section 2 for a full discussion of the relationship between pre-trial detention status and dispositions).

Chart 3.4 shows an increase in the number of defendants who do not waive and who were held in pre-trial detention (62.2% before the law and 65.3% after the law). However, the increase was not significantly different.

Of those who did not waive indictment, 45.7% were being held in pre-trial detention before the law and 54.5% were being held in pre-trial detention after the law. So that being held in pre-trial detention is slightly predictive of jail sentences when comparing defendants who waive indictment with those who do not. The difference in percentages was not found to be statistically significant, probably due to the small number.

2. Pre-trial Detention Status and Sentencing

In medieval times, the accused was bailed to a third party who would be tried in place of the accused if the the accused failed to appear before the court. As the system evolved, the guarantee became the posting of a money bond that was forfeited if the accused failed to appear. In the United States, the Eighth Amendment states that bail shall not be excessive, but it does not grant the right to bail in all cases. The right to bail in many offenses was established by federal and state laws early in our history. Based upon the belief that detaining the poor, because they cannot afford bail, violated the prohibition against excessive bail, a movement developed in the 1960's whose members sought alternatives to the bail system or sought to improve its fairness. In response to the movement, the Vera Institute of Justice created the Manhattan Bail Project, which showed that defendant's with community ties could be released without bail, and in most cases, they still returned for trial.⁴

Pursuant to the New York Code of Criminal Procedure 510.30(20), the court must consider the kind and degree of control or restriction that is necessary to secure the defendant's court attendance when required. In determining that matter, the court must, on the basis of available information, consider and take into account:

1. The principle's character, reputation, habits, and mental conditions;
2. His employment and financial resources;
3. His family ties and the length of his residence, if any, in the community;
4. His criminal record, if any; d
5. His record of previous adjudication as a juvenile delinquent;
6. His previous record if any in responding to court appearances when required or with respect to flight to avoid criminal prosecution;
7. If he is a defendant, the weight of the evidence against him in the pending criminal action and any other factor indicating probability or improbability

of conviction; or, in the case of an application for bail or recognizance pending appeal, the merit or lack of merit of the appeal; and

8. If he is defendant, the sentence which may be imposed upon conviction.

The New York Penal Code only carries the following note as to the amount of bail:

Elements properly considered in fixing amount of bail are nature of offense, penalty imposed, probability of defendant's appearance or flight, pecuniary and social condition and apparent nature and strength of proof as bearing on the probability of his condition.

This leaves a lot of discretion up to the prosecutor, who recommends bail and to the judge who sets the bail. As to how these elements are to be related to the amount of bail, another note states:

Amount of bail is a question of sound discretion and judgment, depending upon primary conditions in the particular case.

In order to study how this "sound discretion" manifests itself in the courtroom, Frederic Suffet conducted a study of the New York courtroom by addressing the following questions:

- (1) What are the typical patterns of interaction between the judge, the prosecutor and defense counsel at bail setting?
- (2) How much disagreement over bail is there between the three parties? What is the effect of disagreement on bail amount and whose side will the judge usually take?
- (3) Who wields the greatest influence at bail setting?⁶

Suffet's study is based upon 1473 bail settings observed during 1964, in New York county criminal court. Of the 1473 defendants 19% of the defendants were released on their own recognizance (R.O.R.), 77% had bail set in an average amount of \$1,822.00 and 4% were remanded. Suffet found three variables related to the bail decision: (1) presence of a major charge; (2) prior record and (3) the absence of a R.O.R. recommendation.⁷ These variables increase the chances of an unfavorable bail disposition. Of the three variables charge had the strongest influence. During this study, the Office of Probation had the responsibility to recommend a defendant's

release on his/her own recognizance based upon the verification of the defendant's community ties (family, employment, residence); whether or not the defendant had been accused of a major crime, and whether the defendant had an extensive criminal record. Today, the New York City Criminal Justice Agency makes such recommendations. Suffet concludes that:

the standards used which govern bail setting emerge as relatively clear and unequivocal. The more serious the charge, the more extensive the prior record, and the weaker the defendant's community ties, the greater is chance for his bail or remand and the smaller is the chance for R.O.R.

The Suffet study drew attention to the fact that all of the prosecutor's suggestions for R.O.R. were followed, whereas the result of the defense attorney's suggestions for R.O.R. were that 2/5 of the time bail was set in a dollar amount. This held true even though the recommendations were for cases where the defendants had similar charges, prior records and R.O.R. recommendations.⁹ This is understandable and predictable because the prosecutor usually has the severest position on bail since he/she has the most to gain by the defendant being held in pre-trial detention — the court proceedings are not delayed by the absence of the defendant or defense counsel, and the defendant is more likely to plead guilty. So that if the prosecutor recommends that the defendant be R.O.R.'d, it would be unlikely that the judge would contradict the prosecutor's recommendation. Also the prosecutor knows the status of his/her case and whether he/she will be able to negotiate a jail sentence against the defendant. The strong position of the prosecutor vis-a-vis the defense counsel and the judge was described by Suffet in the following manner:

In sum, the defense counsel is the least influential member of the court; not only is he the least likely to make initial bail suggestions but he has the least chance of making his suggestion stick. The judge and the prosecutor are reciprocally supportive. They subscribe to the same bail setting standards, they disagree with each other for less often than either disagrees with the defense attorney, and they show the same concern for the people's interest. The role of the prosecutor is prescribed; he represents the public. But the judge is supposed to be, in theory, a neutral 'referee' between the two sets of interests.¹⁰

Suffet suggests that the judge's concern for the people's position stems from a desire to diffuse responsibility for a defendant being released on low bail or R.O.R.'d and that defendant committing a crime, which then brings the judge's decision under public scrutiny. Suffet concluded:

The reason why the judge adheres to the same bail standards as the prosecutor now becomes clear. Handling down bail dispositions which fall toward the severe end of the bail scale (much in line with the kinds of dispositions suggested by the prosecution) more broadly diffuses the responsibility for releasing the defendant. If the judge were to make more frequent use of R.O.R. or set generally lower bail amounts, he would not be sharing the responsibility for the defendant's release quite as much. If as assumed the judge is aware of the ever present possibility of negative public response should a case go wrong, it is to be his interest to increase others' share in the responsibility for release by being more severe. Thus, he finds himself in the same position as the prosecutor but for different reasons. The prosecutor is supposed to represent the public interest according to the prescriptions of his role. The judge, however, must keep the public in mind because, as the final decision-maker he is the most vulnerable target of criticism.

Observations of court practices over the past five years and conversations with assistant district attorneys, defense counsel and judges have led me to conclude that the basic patterns of setting bail have not changed.

In a just system, any relationship found between sentencing and R.O.R. recommendation should manifest itself equally among all defendants irrespective of their race or ethnicity. Some researchers¹² however argue that the bail system as it exists today, does, in effect, treat members of minority groups less favorably than whites. It is difficult to argue that charge, prior record, prior record of court appearances, and R.O.R. recommendation have little or no bearing upon the defendant's chances of appearing before the court for future court dates.

If these are legally acceptable factors upon which to judge whether a defendant should be held or released prior to trial, then they should have no effect upon the ultimate sentence a defendant receives when race of the defendant is correlated with pretrial detention status and ultimate sentence. Researchers like McDonald believe that pretrial detention status does have an effect upon the sentencing of the defendant and if this is true and the determining factor is an economic one, the ability of the defendant

to pay his/her way out of pretrial detention, then the effect may be more harmful to blacks and Hispanics due to the fact that they are usually found at the lower ends of the economic scale —especially those who come through the C.J.S.¹³

I shall discuss first the effect of pre-trial detention status upon the offender and then discuss whether pre-trial detention status has a more harmful effect upon minority members in gun possession cases.

The Legal Aid Society of New York in 1973 filed suit on behalf of a defendant named John Bellamy and on behalf of all jailed defendants. They argued that the "state's money bail system unfairly damaged their chances for acquittal and favorable treatment at time of sentencing, if convicted." They supplied statistical evidence to support their argument that the "fact of detention itself causes those detained to be convicted much more severely than those released." However, the New York State Supreme Court Appellate Division rejected this argument and stated:

Both experience and logic show us that, all other imperfections and discrepancies aside, the plaintiff's figures and statistics are but a shadow of reality, misconstruing cause and effect and putting the cart before the horse. A judge in his expertise and in applying the bail rules heretofore set forth, People ex rel. Lobell v. McDonnell my decide to hold the defendant. It is not because bail is required that the defendant is later convicted. It is because he is likely to be convicted that bail may be required. To put it another way, 'figures don't lie, but liars figure.'

The factors for allowing bail, when properly applied, generally lead to the conclusion that those denied bail are more likely to be convicted, and if the statistics prove this out, as they do, it shows that the system is working rather than, as plaintiffs contend, that it is, instead, detrimental to a defense against an accusation.¹⁴

The Appellate court assumed that judges know the "worth" of each case before them and what kinds of sentences other judges would impose. However, most judges setting bail at arraignment will not be the judge at later court appearances where the defendant is most likely to plea guilty. Also if a defendant can pay his/her way out of the system, the judge's prediction argument is not valid, especially if it can be shown that once a defendant is out, he/she is subjected to less severe dispositions and punishments than a defendant who is held in on bail. However, both sides

may be partially correct in their interpretation of what causes the correlation between pretrial detention status and harshness of sentence. Judges may indeed use pretrial detention status as a means of predicting which defendants will ultimately face jail or prison sentences, using indicators such as the nature and severity of the defendant's prior criminal record. Nonetheless after the initial decision at arraignments and the bail is set, the fact of being held in custody may set in motion a number of consequences which by their very nature have an effect upon the final disposition and sentence of the defendant.

From statistical analysis, court observations, and interviews with defendants, prosecutors, defense counsel and other court officials, McDonald lists a number of ways which a defendant suffers a disadvantage if he/she is held in pre-trial detention:

- (1) Detention Raises the Defendant's Costs. For every day a defendant being held in pre-trial detention doesn't plead guilty, he pays the price of having spent another day behind bars. Where defendants are in custody, the cost of pleading guilty to any kind of sentence is lower than it is for defendants who are "on the street". The district attorney and the judge can offer the detained defendants a much less attractive sentencing agreement, knowing that being in custody exacts a heavy penalty for delaying in hopes of a better deal.

The defendant at liberty is in a better position to let the situation remain static. Delaying tactics can be used by the defendant at liberty because witnesses get "cool" and memories fade. Defendants who are detained also use this tactic but it is more costly for them to do so:

- (2) Weakening the Ability to Prepare A Defence. Being held in pre-trial detention makes the work of the defense attorney harder. He/she must make extra efforts to visit the defendant and discuss strategy. It is also more difficult for the defendant held in to find potentially helpful witnesses and to "cool out" hostile ones.
- (3) Restricting the Defendants' Ability to 'Cooperate' with Prosecutors and Police.

Defendants at liberty while negotiating their case are able to trade more easily with the prosecutor and thereby obtain more advantageous plea and sentence concessions. Defendants are able to help themselves by working with police as informants and by introducing undercover

policemen to their accomplices, their drug dealing "connections" and so forth. Jailed defendants are less able to stick these kinds of quid pro quo.

(4) Presenting Oneself As a Bad Risk.

Judges forced to assess the chances of a defendant's breaking the law again if he is sentenced to probation or some other sanction which allows him to stay in the community. A defendant at liberty can get a job, go to a marriage counselor, be treated for drug or alcohol abuse, he can attempt to make restitution on his own initiative, thus presenting him/herself to the judge as someone¹⁵ who can be trusted in the community and not a risk to it.

It is fair to summarize McDonald's findings as follows:

In determining the in/out decision, prior record was generally found to be more important than the nature of the offense committed, measured either by arraignment or conviction charges. However, the length of imprisonment by the level of the conviction charge, and the offenders' prior criminal record was of secondary importance. For both the in/out and sentence length decisions, whether or not the offender was in pre-trial detention at time of sentencing was found to have a strong and independent impact on the sentence imposed. Those in detention were generally more likely to get jail or prison sentences and for longer terms than those at liberty. This probably resulted from the fact that offenders in detention were less able than those at liberty to win favorable concessions from prosecutors and judges.¹⁶

Pre-trial detention status for the 1979-1981 sample is illustrated in chart 4.0. The percentage of those held in pre-trial detention significantly increased after the law went into effect. 62.8% were held in pre-trial detention after the law while only 56.9% were held in pre-trial detention before the law. There was a significant increase in the percentage of defendants who had prior convictions before the law and this increased to 73.7% after the law. There was a significant increase in the percentage of defendants who had prior convictions and were being held in pre-trial detention ($Z=2.97$ above the critical value of 1.96). The relationship between being held in pre-trial detention and jail time (see chart 4.2) indicates that of those defendants who were being held in pre-trial detention 67.7% were sentenced to jail sentences before the law. After the law 64.4% were sentenced to jail terms. As one would expect 76.6% of those defendants who were not held in pre-trial detention, did not receive jail sentences before the law and 80.0% did not receive jail sentences after the law. Very few defendants in Criminal court will return, once released from detention

Chart 4.0 Felony gun possession arrests by pre-trial detention by before and after the law.

		BEFORE	AFTER
	IN	62 (56.9)	59 (62.3)
PRE-TRIAL DETENTION MEATUS	OUT	47 (43.1)	35 (37.2)
	TOTAL	109 (100.0)	94 (100.0)

$\chi^2 = 3.84$ 1 df p .05)

Source: Bronx Pre-law/Post law Sample Data (1984); L. Pete Gun Study

Chart 4.1 PRIORS BY PRE-TRIAL DETENTION STATUS

BEFORE

PRIORS	IN	OUT	TOTAL
HAVE	54 (62.1)* (49.5)**	33 (37.9) (30.3)	87 (79.8)
HAVE NO PRIORS	8 (36.4) (7.3)	14 (63.6) (12.8)	22 (20.2)
TOTAL	62 (56.9)	47 (43.1)	109 (100.0)

($X^2 = 3.74$, 1 df p .05)

AFTER

PRIORS	IN	OUT	TOTAL
HAVE	42 (73.7) (44.7)	15 (26.3) (16.0)	57 (60.6)
HAVE NO PRIORS	17 (45.9) (18.1)	20 (34.1) (21.3)	37 (39.4)
TOTAL	59 (62.3)	35 (37.2)	94 (100.0)

($X^2 = 6.24$, 1 df. p .01)

Source: Bronx Pre-law/Post law Sample Data (1984); L. Pete Gun Study.

Chart 4.2

PRE-TRIAL DETENTION STATUS BY JAIL TIME

BEFORE

JAIL		NO-JAIL	JAIL	TOTAL
	IN	20 (18.3)** (32.3)*	42 (38.5) (67.7)	62 (56.9)
	OUT	36 (33.0) (76.6)	11 (10.1) (23.4)	47 (43.1)
	TOTAL	56 (51.4)	53 (48.6)	109 (100.0)

AFTER

		NO-JAIL	JAIL	TOTAL
	IN	21 (22.3) (35.6)	38 (40.4) (64.4)	59 (62.8)
	OUT	28 (29.3) (80.0)	7 (7.4) (20.0)	35 (37.2) (37.2)
	TOTAL	49 (52.1)	45 (47.9)	94 (100.0)

* Row %
** Total %

Source: Bronx Pre-law/Post law Sample Data (1984); L. Pete Gun Study.

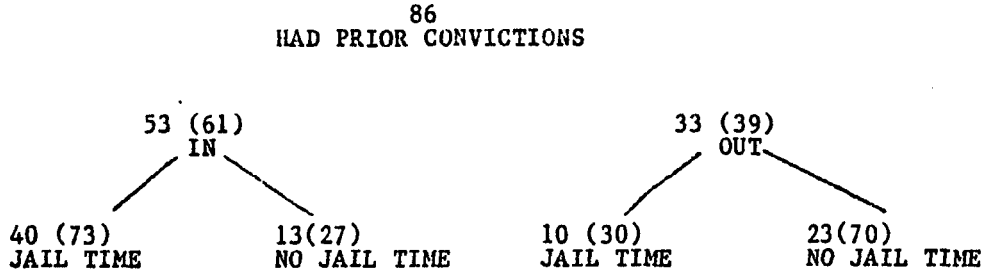
to return to court to plead guilty to a sentence that involves jail time. Chart 4.3 illustrates the comparisons between prior convictions, pre-trial detention and jail status. There seems to be a correlation between being sentenced to jail time and being held in pre-trial detention status and jail time. There is a strong correlation between those defendants who have prior convictions and are being held in pre-trial detention and who receive jail sentences. Before the law 73% of those who had misdemeanor convictions and were held in pre-trial detention received as opposed to only 30% who received jail sentences who were not held in pre-trial detention and who had prior convictions. After the law the correlation remains virtually the same. Seventy-four percent of those who had prior convictions and who were held in pre-trial detention received jail sentences as opposed to only 30% of the defendants who had prior convictions who were not being held in pre-trial detention who received jail sentences.

It has been shown that there is a relationship between pre-trial detention status, prior conviction and jail sentences. When waiver was cross-tabulated with pre-trial detention status a significant relationship was also found. It would seem that the reason why defendants who waive indictment by grand jury proceedings receive jail sentences far less often than those who did not waive indictment is that those who waive are less likely to be held in pre-trial detention and are therefore less likely to plead guilty to a sentence that involves incarceration.

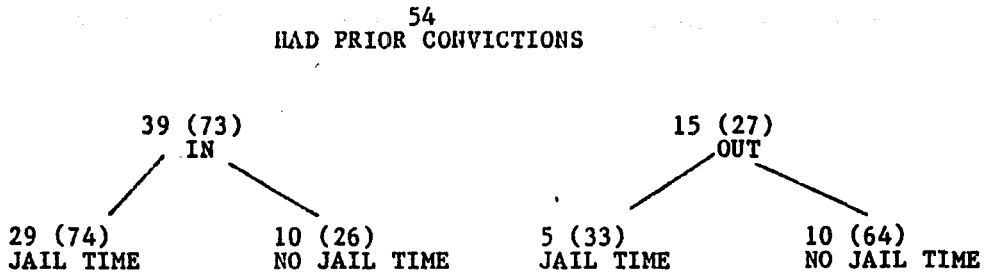
Chart 4.3

PRIOR CONVICTIONS BY PRE-TRIAL DETENTION BY JAIL TIME

BEFORE



AFTER



Source: Bronx Pre-law/Post law Sample Data (1984); L. Pete Gun Study.

3. Prior Criminal Conviction and Sentencing

Prior criminal conviction has been used by judges, prosecutors and defense counsel as a "rule of thumb" in estimating the possible dangerousness of the defenant. In many instances, the starting point for negotiations of a defendant's sentence will start with a recognition by all parties of the defendant's last sentence: that is, if the defendant received a three month jail sentence last time around, the starting point for plea-negotiations will be no lower than three months depending upon the nature of the present case and the nature of the defendant's prior convictions. This is true not just for jail sentences for all sentences.

As shown by McDonald prior criminal record effects length and type of sentence. His findings showed that persons with "longer criminal records are more likely to receive jail or prison sentences and longer ones at that" and that prior record strongly influenced the in/out decision. His findings are clearly illustrated in the table below:

Chart 4.4

PRIOR CRIMINAL RECORDS & SENTENCE
IMPOSED

<u>Type of Prior Record</u>	<u>Sentence Received</u>			<u># of Cases</u>
	<u>Prison/Jail</u>	<u>Probation</u>	<u>Fine/Discharge</u>	
no record	19.1	50.7	30.1	(205) 100%
arrest no conviction	31.2	50.0	20.4	(142) 100%
conviction but no jail prob. fine	31.7	51.5	16.8	(101) 100%
conviction sent. to disc.	39.1	56.5	4.3	(46) 100%
conviction sent. to probation	46.5	43.7	9.9	(142) 100%
conviction sent. to jail/prison	70.2	32.7	6.2	(325) 100%

Source: Douglas McDonald, On Blaming Judges: Criminal Sentencing Decisions in New York Courts, (New York: Citizens Inquiry on Parole and Criminal Justice, 1982), p 64.

The results were what would have been expected: those who had prior convictions where they had been sentenced to jail, received jail or prison sentences in 70.2% of the cases and those who had not criminal records received probation or fines in 80.8% of the cases. The relationship between prior arrests and sentencing of defendants charged with gun possession was previously demonstrated.

It should be noted that the New York Penal Code does not specify the use of prior records in determining sentence of the defendant except for "second felony offender," "persistent felony offender" and "youthful offender." However, McDonald found that even when these designations

were accounted for statistically there remained a strong correlation between prior record and length and type of sentence. This correlation he attributed to the informal rules used by judges and prosecutors to determine the recommended sentence and the ultimate sentence the defendant receives.¹⁵

In the 1979 sample 79.8% had prior convictions and in the 1981 sample 60.0% had prior convictions. There was a decrease in the percentage of the defendants who had prior convictions after the law (see chart 5.0). Chart 5.1 shows the nature of prior convictions of those defendants arrested and convicted of gun possession. Most defendants who had prior convictions both before and after the law had few felony convictions. Only 18.4% of the defendants had felony convictions before the law and 21.1% had felony convictions after the law. Most defendants had violations - 79.3% before the law and 89.5% after the law. This result adds support to the notion that those who are arrested for the sole crime of gun possession are not likely to have committed violent street crimes.

Chart 5.2 show that after the law the percentage of those defendants who had prior convictions and who went to jail increased from 57.5% before the law to 64.9% after the law. A Pearson correlation performed on the data indicated a relationship between having prior convictions and received jail sentences ($r=.37, p<.001$). If a defendant had prior convictions he/she was more likely to receive a jail sentence.

Chart 5.0 Defendants Charged with PL 265.02 with Prior Convictions

	<u>BEFORE</u>	<u>AFTER</u>	
Priors	87 (79.8)	57 (60.6)	144
no priors	22 (20.2)	37 (39.4)	59
TOTAL	109 (100.0)	94 (100.0)	203

($X^2=6.14$ 1 df $p<.02$)

Source: Bronx Pre-law/Post law Sample Data (1984); L. Pete Gun Study

Chart 5.1 Prior Convictions by Nature of Prior Convictions

	<u>Felonies</u>	<u>Misdemeanors</u>	<u>Violations</u>
<u>Before</u>	16 (18.4)	57 (65.5)	69 (79.3)
<u>After</u>	12 (21.1)	31 (54.4)	51 (89.5)

Source: Bronx Pre-law/Post law Sample Data (1984); L. Pete Gun Study

Chart 5.2 Prior Conviction by Jail

<u>Before</u>	<u>No Jail</u>	<u>Jail</u>	<u>Total</u>
Yes	37 (33.9)**	50 (45.9)	87 (79.8)
	(42.5)*	(57.5)	(79.8)
No	19 (17.4)	3 (2.8)	22 (20.2)
	(86.4)	(13.6)	
Total	56 (51.4)	53 (48.6)	109 (100.0)

($X^2=13.50, 1df, p<.0002$)

(Chart continued)

Source: Bronx Pre-law/Post law Sample Data (1984); L. Pete Gun Study

<u>After</u>	<u>No Jail</u>	<u>Jail</u>	<u>Total</u>
Yes	20 (21.3) (35.1)	37 (39.4) (64.9)	57 (60.6)
No	29 (30.90) (78.4)	8 (8.5) (21.6)	37 (39.4) (39.4)
Total	49 (52.1)	45 (47.9)	94 (100.0)

($\chi^2=16.84, 1df, p<.001$)

** total percentage

*row percentage

Source: Bronx Pre-law/Post law Sample Data (1984); L. Pete Gun Study

4. Ethnicity and Sentencing

A recurring question in social research on the criminal justice system is whether ethnicity plays a role in how a defendant is treated by the system—the circumstances surrounding apprehension, arrest, charge, pre-trial detention status, conviction and sentence. A common cry is that minority group members, such as blacks and Hispanics, are treated more harshly by the system, from the police officer who arrests them to the judge who sentences them and the parole board members who may shorten their sentence. Sociologists usually cite the overrepresentation of members of minority groups that are brought into the criminal justice system to justify their concern that minority group members suffer from discriminatory practices and attitudes by individuals in positions of power in the criminal justice system.¹⁷ One need only look at statistics prepared by the Bureau of Justice Statistics to understand the gravity of their concern:

1. The number of black victims and criminals is disproportionately high. Blacks were victimized by crime especially violent crime, at a higher rate than whites. Black males sustained the highest victimization rates of any race/sex/group, largely because of their vulnerability to robbery;
2. Blacks, who constituted 12% of the U. S. population in 1980, accounted for 26% of all arrests in 1981, 34% of all Uniform Crime Report crime index arrests, and 46% of all arrests for violent crime; blacks made up 40% of those in local jails and 47% of those in State prisons;

3. The pattern of racial involvement in arrests shown in police records closely parallels that reported by victims of crime in the National Crime Survey. For example, about 40% of the persons arrested for robbery in 1979 were black males aged between 18 and older; victim reports for the same period suggested that 44% of all robberies were black males aged 18 or older;

Lifetime probability of incarceration is six times higher for blacks. The likelihood that any adult male will have served time in a juvenile or adult jail or prison by age 64 is estimated to be 18% for blacks, 3% for whites. However, after the first confinement, the likelihood of further commitments is similar for white and black males;

Consistent with their arrest pattern, blacks were more likely than whites to have been sentenced to prison for violent crimes, particularly robbery and less likely to have been sentenced for property crimes, particularly burglary;

The proportion of Hispanics in prison and jails is greater than the proportion of Hispanics in the total U. S. population. 15 million Hispanics made up 6% of the U. S. population. Hispanics, both black and white, accounted for 12% of all arrests for violent crimes and 10% of all arrests for property crimes in 1981;

Hispanics made up 10% of the male prison population in 1979 and 11% of the jail population in 1978. They made up 7% of the female prison population in 1979 and 7% of the jail population in 1978. They were also more likely than non-Hispanics to be serving time for violent crime, but overall they resembled whites rather than blacks in the types of crimes for which there were imprisoned.¹⁸

A number of studies have shown a relationship between ethnicity and sentencing. In 1961, Henry Allen Bullock conducted a study in which he sought to look beyond existing official criminal statistics to show whether minorities suffered from discriminatory practices and attitudes in the criminal justice system. He stated:

We have attempted to make an objective study of racial and non-racial bias at the judicial level of law enforcement by seeking to test these assumptions:

1. The length of prison sentence will be significantly associated with non-racial characteristics of the offender of both legal and extra-legal nature;
2. Negro prisoners will be found to possess these non-racial characteristics in greater proportion to their number than will white prisoners;
3. Negro prisoners will be found to receive long sentences in greater proportion to their number than will white prisoners even when the two groups are similar in other characteristics found to be associated with length of prison sentence.¹⁹

Bullock collected data through a survey of prisoners in the Texas State prison at Huntsville in 1978. Bullock found that black prisoners are more likely than white prisoners to be committed for an offense for which juries (that were mostly composed of whites) usually assess long sentences—property crimes.²⁰

Over twenty years later, the Rand Corporation conducted a two year study called, "Racial Disparities in the Criminal Justice System" which was sponsored by the National Institute of Corrections, a division of the Justice Department. In that study, it was found that blacks and Hispanics in California, Michigan, and Texas received longer sentences and spent more time in jail than whites convicted of similar offenses and with a similar criminal records. In California alone they found that the California judges imposed sentences on the average of 6 1/2 months longer for Hispanics and 1 1/2 months longer for blacks than for whites. In Michigan, blacks get average sentences that are more than 7 months longer and in Texas blacks average 3 1/2 months longer, while Hispanics sentences are 2 months longer. Hispanic prisoners in Michigan were not surveyed because they did not make a sizable percentage of the population. It was also found that blacks and Hispanics serve a greater proportion of their original sentences in those states than whites. In California, Hispanics serve 5 months longer and blacks were found to serve nearly 2 1/2 months longer than whites. In Texas, blacks serve about 8 months longer.²¹

Most recently the association between race and sentence was brought again to public attention by the results found by a study of the relationship between the victim's race and the imposition of the death penalty. The latest study conducted by Samuel Gross and Robert Mauro of the Stanford University²¹ was a review of 17,000 homicides cases from 1976 - 1980. Their findings indicated that "the legal system values white lives more than black lives." The 17,000 cases resulted in 340 death sentences in Georgia, Illinois, Oklahoma, Arkansas, North Carolina, Mississippi, and Virginia. The researchers studied criminal homicides, in which negligence was not a factor and they were know suspects, at least 15 years old at the time of the killing. In each of the eight states, they found a person was more likely to be sentenced to death if he had killed a white, rather than a black, and in some states far more likely, as in Georgia. Of 773 slayings of whites, the death penalty was imposed in 67 cases or 8.7%. But in the 1345 slayings of blacks only 12 resulted in death penalties or 9/10th of 1%.

Although the researchers did not seek to determine the reasons for the differences found, they speculated that (1) unconscious racism on the part of the prosecutor, judge, and jurors who value white life more than black life exists or (2) a tendency for largely white jurors to identify with white victims exists. Their finding reinforce the findings of Bullock that one a black intrudes into the white community the penalties are more severe than if he had committed the same crime in the black community against black victims.²²

Although practices of racial discrimination were found in southern and western states, a study conducted by McDonald indicated, that at least for three New York counties, such patterns of discriminatory treatment did not exist. He stated that there was no basis for the commonly held notion that "courtroom culture in New York is distinctly biased against ethnic minorities." He concluded:

...the ethnic backgrounds of convicted offenders in prisons and jails seem at first glance to support this belief. Regardless of this however, statistical analysis of our three county sample provides no evidence that prejudicial attitudes generate ethnic differences in sentencing decisions. Blacks and Hispanics in the sample were only slightly likely to go to jail or prison than whites (37% verses 33.8%). The differences in percentages receiving probation as opposed to other non-incarceratory sentences was similarly minimal. Whites did receive on average somewhat shorter imprisonment sentences. But these differences were the result of blacks and Hispanics having longer criminal records and higher charges. Once these factors were taken into account statistically the apparent relationship between ethnicity sentencing vanished.²³

McDonald did imply that prior record may be the better indicator as to length and type of sentence rather than race. This conclusion is supported by research done by J. D. Hewitt in 1975 in Seattle, Washington. He conducted a multivariate analysis of legal and extra-legal factors in judicial sentencing. Using a sample of 504 convicted felons Hewitt emphasized casual modeling and path analysis to determine the effect of sex, race, marital status, education, socioeconomic status, work history and dependents on judicial sentencing. Intervening variables believed likely to mediate

portions of the sentence were primary offense, prior record, use of weapon or violence, number of initial charges, bail, plea, probation and prosecution presentence recommendations. Analysis of the 504 offenders' records showed that only 5 of the individual variables had statistical significance: sex, race, education, work history, and dependants. Race as a variable had little direct effect, but was closely related to the fact that non-whites were more likely to have had prior records, were more likely to have used weapons or violence and were more likely to be convicted of robbery. Variables which appeared to be most responsible for mediating the total effects were prior record, use of a weapon or violence, bail and the prosecution and probation presentence recommendation.²⁴

Of the few gun studies that have looked at race as a variable affecting sentencing, Beha found that there was no significant difference "in terms of sex, race or occupation between the Bartley-Fox defendants and those prosecuted in 1974. Although many critics were concerned that the black community would be disproportionately penalized under the new sanctions there was a noticeable decline in the proportion of defendants who were black."²⁵ Rossman, Pierce and Bowers found in their follow-up study of the effect of the Bartley-Fox law, that there was no evidence of a discriminatory pattern in the prosecution and sentencing of Bartley-Fox defendants.²⁶

The ethnic breakdown of the Bronx population during 1980 when compared to the ethnic breakdown of the '79-81 populations reveals that whites and blacks were overrepresented in the before and after samples ($X^2=26.89, 4df, p<.001$) (see chart 6.01 and 6.1) and that whites were underrepresented in the before and after samples.

Chart 6.0
ETHNIC BREAKDOWN OF THE BRONX 1980

Hispanic Population	396,353	(33.9)
Black Population	348,744	(29.9)
White Population (not Hispanic)	396,836	(33.9)
Others	27,067	(2.0)
Total	1,169,000	

SOURCE: U.S. Dept. of Commerce, Bureau of Census, 1983.

Chart 6.1 ETHNIC BREAKDOWN BY before and after the law

	<u>BEFORE</u>	<u>AFTER</u>
Whites	24 (22.0)	16 (17.0)
Blacks	41 (37.6)	44 (46.8)
Hispanics	42 (38.5)	31 (33.0)
Others	2 (1.8)	3 (3.2)
Total	109 (100.0)	94 (100.0)

$X^2=26.89, 4df, p < .001$

Source: Bronx Pre-law/Post law Sample Data (1984); L. Pete Gun Study

Chart 6.01 ETHNIC BREAKDOWN OF BRONX POPULATION BY ETHNIC BREAKDOWN OF '79-81 SAMPLE.

	<u>Sample</u>		<u>Population</u>	
White	40	(17.0)	396,836	(33.9)
Black	85	(46.8)	343,744	(29.9)
Hispanic	73	(33.0)	396,353	(33.9)
Other	5	(3.2)	27,067	(2.0)
Total	203		1,169,000	

Source: U.S. Census 1980; Bronx Pre-law/Post law Sample Data(1984); L. Pete Gun Study

If police officers are not stopping, searching or observing blacks and whites with any more vigor than they do Hispanics then the explanation for the overrepresentation of blacks may be due to: (1) the fact that blacks and whites possess more guns than Hispanics and/or face the possibility of being stopped, observed or searched and arrested by police officers more than Hispanics; and (2) Blacks live and work in some of the most deprived neighborhoods in the Bronx and in New York City; the need to carry and possess guns may from their point of view be justified when weighted against the fear of becoming a victim of a violent crime. But this threat and the conditions that many blacks must live under is true also for many Hispanics and some whites. Perhaps Hispanics have a higher level of tolerance for violent street crime or feel that possessing a gun sample is not a realistic or meaningful choice.

Since we do not know how many blacks, Hispanics or whites are actually carrying illegal guns in the Bronx, we cannot determine if blacks are overrepresented in the '79 - '81 samples; for the same reason we cannot determine if whites are underrepresented. Blacks may carry more illegal guns and therefore, are more likely to be arrested. However, if blacks are more likely to be stopped because they are black, then we would see an overrepresentation of blacks arrested for gun possession whether they actually carry more guns or not. Likewise, if whites are less likely to be stopped, then we would expect to find less arrests for gun possession among whites. This becomes evident when one considers the fact that the typical arrest for gun possession results from a police officer stopping individuals for a minor infraction, which of itself would not lead to an arrest. The officer observes the gun on the person of the defendant or observes it on the floor of a car and the arrest is made.

Chart 6.1 also reveals that there was a 9.2% increase in the percentage of blacks indicted for gun possession from 37.6% (n=41) to 46.8% (n=44) but a decrease of 5% in the percentage of Hispanics indicted for gun possession from 38.5% (n=42) to 33.0% (n=31) and a 4% decrease in the percentage of whites indicted for gun possession from 22.0% (n=24) to 17.0% (n=16). The increases and decreases were found to be statistically

significant. Assuming that the proportion of blacks, Hispanics and whites had not radically changed over the period studied, one can only speculate as to the reason for the 9.2% increase amongst blacks arrested for gun possession. Discriminatory arrest patterns of the police may be responsible, however police arrest patterns did not change in other large cities like Boston, where blacks were overrepresented in their crime statistics and where mandatory minimum sentences were enacted for illegal gun possession.

1. Disposition by Ethnicity, Guilty Pleas and Jail Sentences

Most defendants who are indicted for 265.02 gun possession do not go to trial but pleaded guilty. This remains true when ethnicity is taken into consideration. The guilty plea dispositional pattern can be observed by looking at chart 6.2. The percentage of the blacks, Hispanics and whites to pleaded guilty remained virtually the same both before and after the law. Seventy-eight percent (n=32) of blacks pleaded guilty before the law and 73% (n=32) after the law; with 86% (n=36) of the Hispanics before the law and 84% (n=26) after the law and with 83% (n=20) of the whites before the law and 75% (n=12) after the law pleading guilty.

Although blacks showed an increase in the percentage of the total population, they did not increase by as much in the percentage of guilty pleas. There was only an increase of 8% and there was not a significant increase in the percentage of blacks that pleaded guilty to the same felony charges as arrested—265.02. Before the law 56% (n=18) of the blacks pleaded guilty to 265.02, after the law, 53% (n=17) pleaded guilty to 265.02. There was an increase in the percentage of blacks that pleaded guilty to the lesser felony charge—110/265.02. Black defendants that pleaded guilty 110/265.02 increased from 25% (n=8) before the law to 47% (n=15) after the law ($Z=2.44$ above the critical value of 1.96). Black defendants who pleaded guilty to the misdemeanor charge—265.01 decreased from 19% before the law to 0 after the law. There was a slight increase for Hispanics, but it was not statistically significant.

There was a slight decrease in the percentage of Hispanics who plead guilty to the same felony charge as arrested and indicted for gun possession from 69% (n=25) to 62% (n=16). It is significant that in the above figures on charge pleaded to by defendants of all three ethnic groups, only white defendants plead guilty 100% of the time to felony charges both before and after the law - 70% pled guilty to the same felony charges as indicted and 30% to the lesser felony charge. This is also significant because without a finding of mitigating circumstances the white defendant faced mandatory minimum sentences after the law if convicted of felony charges. So it would seem that although whites make up much smaller percentages of the total population both before and after the law, whites plead guilty to heavier charges than both Hispanics and blacks.

Whites received jail sentences 58.3% of the time before the law (see chart 6.3) and 43.8% after the law. Blacks followed with 48.8% before the law and 38.6% after the law, while Hispanics were sent to jail 45.2% before the law and 58.1% after the law. The differences in percentages weren't statistically significant.

Chart 6.2 Guilty Pleas by Ethnicity by Conviction Charge
Whites

			Guilty Pleas				
			Before		After		
			20(83)		12(75)		
<u>To same felony as charged</u>			<u>To lesser felony as charged</u>		<u>To misdemeanor or lessor charge</u>		
	B	A			B	A	
14(70)	7(58)		6(30)	5(42)	(0)0	0(0)	

Blacks

			Guilty Pleas				
			Before		After		
			32(78)		32(73)		
<u>To same felony as charged</u>			<u>To lesser felony as charged</u>		<u>To misdemeanor or lessor charge</u>		
	B	A			B	A	
18(56)		17(53)	8(25)	15(47)	6(19)	0(0)	

Hispanics

			Guilty Pleas				
			Before		After		
			36(86)		26(84)		
<u>To same felony as charged</u>			<u>To lesser felony as charged</u>		<u>To misdemeanor or lessor charge</u>		
	B	A			B	A	
25(69)		16(62)	8(22)	9(35)	3(8)	1(4)	

$(X^2 = 105.04, p < .001)$

Source: Bronx Pre-law/Post law Sample Data (1984), L. Pete Gun Study

Chart 6.3 ETHNICITY BY DISPOSITION

Before

	<u>Black</u>	<u>Hispanic</u>	<u>White</u>	<u>Other</u>	<u>Total</u>
Jail	20 (48.8)	19 (45.2)	15 (58.3)	0 (0)	54 (48.6)
No Jail	21 (55.2)	23 (54.8)	8 (41.7)	2 (100.0)	55 (51.4)
Total	41 (100.0)	42 (100.0)	24 (100.0)	2 (100.0)	109 (100.0)

After

	<u>Black</u>	<u>Hispanic</u>	<u>White</u>	<u>Other</u>	<u>Total</u>
Jail	17 (38.6)	18 (58.1)	7 (43.8)	3 (100.0)	45 (47.9)
No Jail	27 (61.4)	13 (41.9)	9 (56.3)	0 (0.0)	49 (52.1)
Total	44 (100.0)	31 (100.0)	16 (100.0)	3 (100.0)	94 (100.0)

Source: Bronx Pre-law/Post law Sample Data (1984); L. Pete Gun Study

Chart 6.4 ETHNICITY BY THOSE DEFENDANTS THAT RECEIVED FELONY JAILTIME

Before

<u>Race</u>	<u>FELONY JAIL TIME</u>		<u>Total</u>
	<u>Yes</u>	<u>No</u>	
Black	14 (34.1)* (12.8)**	27 (65.9) (24.8)	41 (37.6) (37.6)
Hispanics	8 (19.0) (7.3)	34 (81.0) (31.2)	42 (38.5)
Whites	5 (20.8) (4.6)	19 (79.2) (17.4)	24 (22.0)
Other	0 (0.0) (0.0)	2 (100.0) (1.8)	2 (1.8)
Total	27 (24.8)	82 (75.2)	109 (100.0)

After

	<u>FELONY JAIL TIME</u>		
Black	13 (29.5) (13.8)	31 (70.5) (33.0)	44 (46.8)
Hispanics	14 (45.2) (14.9)	17 (54.8) (18.1)	31 (33.0)
White	5 (31.3) (5.3)	11 (68.8) (11.7)	16 (17.0)
Other	2 (66.7) (2.1)	1 (33.3) (1.1)	3 (3.2)
Total	34 (36.2)	60 (63.8)	94 (100.0)

* Row percentage

** Total percentage

Source: Bronx Pre-law/Post law Sample Data (1984); L. Pete Gun Study

Chart 6.5
 ETHNICITY BY THOSE DEFENDANTS
 THAT RECEIVED MISDEMEANOR JAIL TIME

Before

MISDEMEANOR JAIL TIME

<u>Race</u>	<u>No</u>	<u>Yes</u>	<u>Total</u>
Black	35 (85.4)* (32.1)**	6 (14.6) (5.5)	41 (37.6)
Hispanic	31 (73.8) (28.4)	11 (26.2) (10.1)	42 (38.5)
White (62.5)	15 (37.5) (13.8)	9 (22.0) (8.3)	24
Other	2 (100.0) (1.8)	0 (0.0) (0.0)	0 (1.8)
Total	83 (76.1)	26 (73.9)	109 (100.0)

After

Black	40 (90.9)	4 (9.1)	44 (46.8)
Hispanic	27 (87.1) (28.7)	4 (12.9) (4.3)	31 (33.0)
White	14 (87.5) (14.9)	2 (12.5) (2.1)	16 (17.0)
Other	2 (66.7) (2.1)	1 (33.3) (1.10)	3 (3.2)
Total	83 (88.3)	11 (11.7)	94 (100.0)

*Row percentage

** Total percentage

Source: Bronx Pre-law/Post law Sample Data (1984); L. Pete Gun Study

CHART 6.6
 ETHNICITY BY PRE-TRIAL
 DETENTION STATUS

Before

<u>Race</u>	<u>BAIL STATUS</u>		<u>Total</u>
	<u>In</u>	<u>Out</u>	
Black	22 (20.2)* (53.7)**	19 (17.4) (46.3)	41 (37.6)
Hispanic	23 (21.1) (54.8)	19 (17.4) (45.2)	42 (38.5)
White (14.7)	16 (7.3) (66.7)	8 (22.0) (33.3)	24 (22.0)
Other	1 (.9) (50.0)	1 (.9) (50.0)	2 (1.8)
Total	62 (56.9)	47 (43.1)	109 (100.0)

After

Black	25 (26.6) (56.8)	19 (20.2) (43.2)	44 (46.8)
Hispanic	22 (23.4) (71.0)	9 (9.6) (29.0)	31 (33.0)
White	9 (9.6) (56.3)	7 (7.4) (43.8)	16 (17.0)
Other	3 (3.2) (100.0)	0 (0.0) (0.0)	3 (3.2)
Total	59 (62.8)	35 (37.2)	94 (100.0)

*Total percentage

** Row percentage

Source: Bronx Pre-law/Post law Sample Data (1984); L. Pete Gun Study

2. Ethnicity and Pre-Trial Detention Status

Chart 6.6 compares ethnicity by pre-trial detention status. Most defendants regardless of ethnicity were held in pre-trial detention and were being held at time of sentencing—56.9% (n=62) before the law with a slight increase to 62.8% (n=59) after the law. Blacks were held in pre-trial detention 53.0% before the law and 56.8% after the law.

Although there is no correlation between pre-trial detention status and jail sentence by ethnicity, there is a correlation between ethnicity and pre-trial detention status. It is significant that for blacks there is a slight increase (from 53.7% before the law to 56.8% after the law); for Hispanics there is a large increase (from 54.8% before the law to 71.0% after the law); but for whites there is a decrease (from 66.7% to 56.3%). The fact that the percentage of whites decreased while the percentages for blacks and hispanics increased may be explained by the fact that whites may have greater resources available to meet bail. However, the percentage of defendants receiving jail sentences with prior convictions increased for blacks (from 54% to 60%), and Hispanics (from 58% to 78%), but not for whites (65% to 45%) which showed a significant decrease. It is difficult to explain the 20% decrease of whites receiving jail sentences with prior convictions, other than to suggest that often the law prosecutors through plea-bargaining and judges through sentencing used prior convictions as a factor in determining type of sentence for blacks and hispanics, but not for whites. This may indicate a racial basis on the part of prosecutors or judges, or it may be that there is a significant difference in the nature of prior convictions of blacks and Hispanics when compared to whites. Blacks and Hispanics may have more prior gun convictions, or convictions that involve violence against the person.

3. Ethnicity and Prior Conviction

The relationship between ethnicity and prior convictions can be seen on chart 6.7. The percentage of those defendants who had prior convictions decreased for all ethnic group—blacks 32.1% (n=35) before the law, 26.6% (n=25) after the law; Hispanics 28.4% (n=31) before the law,

Chart 6.7

ETHNICITY BY PRIORS BY JAILTIMEBEFORE

<u>BLACKS</u>		<u>NO PRIORS</u>		<u>HISPANICS</u>		<u>NO PRIORS</u>		<u>WHITES</u>		<u>NO PRIORS</u>		<u>OTHERS</u>		<u>NO PRIORS</u>		<u>Total</u>
<u>PRIORS</u>				<u>PRIORS</u>				<u>PRIORS</u>				<u>PRIORS</u>				
35		6		31		11		20		4		1		1		109
(32.1)		(5.5)		(28.4)		(10.1)		(18.3)		(3.7)		(0.9)		(0.9)		(100.0)
<u>JAIL</u>	<u>NO</u>	<u>JAIL</u>	<u>NO</u>	<u>JAIL</u>	<u>NO</u>	<u>JAIL</u>	<u>NO</u>	<u>JAIL</u>	<u>NO</u>	<u>JAIL</u>	<u>NO</u>	<u>JAIL</u>	<u>NO</u>	<u>JAIL</u>	<u>NO</u>	
	<u>JAIL</u>		<u>JAIL</u>		<u>JAIL</u>		<u>JAIL</u>		<u>JAIL</u>		<u>JAIL</u>		<u>JAIL</u>		<u>JAIL</u>	
19	16	1	5	18	13	1	10	13	7	1	3	0	1	0		
(54)	(46)	(17)	(83)	(58)	(42)	(9)	(91)	(65)	(35)	(25)	(75)	(0)	(100)			

AFTER

<u>BLACKS</u>		<u>NO PRIORS</u>		<u>HISPANICS</u>		<u>NO PRIORS</u>		<u>WHITES</u>		<u>NO PRIORS</u>		<u>OTHERS</u>		<u>NO PRIORS</u>		<u>TOTAL</u>
<u>PRIORS</u>				<u>PRIORS</u>				<u>PRIORS</u>				<u>PRIORS</u>				
25		19		18		13		11		5		3		0		94
(26.6)		(20.2)		(19.1)		(13.8)		(11.7)		(5.3)		(3.2)		(0.0)		(100.0)
<u>JAIL</u>	<u>NO</u>	<u>JAIL</u>	<u>NO</u>	<u>JAIL</u>	<u>NO</u>	<u>JAIL</u>	<u>NO</u>	<u>JAIL</u>	<u>NO</u>	<u>JAIL</u>	<u>NO</u>	<u>JAIL</u>	<u>NO</u>	<u>JAIL</u>	<u>NO</u>	
	<u>JAIL</u>		<u>JAIL</u>		<u>JAIL</u>		<u>JAIL</u>		<u>JAIL</u>		<u>JAIL</u>		<u>JAIL</u>		<u>JAIL</u>	
15	10	2	17	14	4	4	9	5	6	2	3	3	0	0	0	
(60)	(40)	(11)	(89)	(78)	(22)	(31)	(69)	(45)	(55)	(40)	(60)	(100)	(0)	(0)	(0)	

Source: Bronx Pre-Law/Post Law Sample Data (1984): L. Pete Gun Study

Chart 6.8

ETHNICITY BY PRIOR CONVICTION BY PRE-TRIAL
DETENTION STATUS BY WAIVER BY JAIL TIME BY CODE

BEFORE / AFTER
35 25
With Prior Convictions

BLACKS

(57) 20 / 18 (72)				(43) 15 / 7 (28)				
IN								
(25) 5 / 2 (11)		(75) 15 / 16 (89)		(53) 9 / 1 (15)		(47) 7 / 6 (85)		
WAIVER		NO WAIVER		WAIVER		NO WAIVER		
5 (100)	1 (50)	0/1 (50)	(74) 11/12 (75)	(26) 14/4 (25)	(25) 2/1 (100)	(75) 6/0	(15) 1/1 (18)	(85) 6/5 (82)
JAIL		NO JAIL	JAIL	NO JAIL	JAIL	NO JAIL	JAIL	NO JAIL

HISPANICS

31 / 18							
(64) 20 / 14 (76)				(36) 11 / 4 (24)			
(25) 5 / 0		(75) 15 / 14 (100)		(35) 4 / 1 (25)		(64) 7 / 3 (75)	
2 / 0	3 / 0	12 / 11	3 / 3	1 / 1	3 / 0	3 / 2	4 / 1
(40)	(60)	(80) (78)	(20) (22)	(25) (100)	(75)	(45) (66)	(55) (34)

WHITES

20 / 11							
(65) 13 / 7 (64)				(35) 7 / 4 (36)			
(23) 3/5 (72)		(77) 10/2 (28)		(44) 3/1 (25)		(56) 4/3 (75)	
2 / 3	1 / 2	8 / 2	2 / 0	1 / 0	2 / 1	2 / 0	2 / 3
(66) (60)	(34) (40)	(80) (100)	(20)	(34)	(66) (100)	(50)	(50) (100)

Source: Bronx Pre-Law/Post Law Sample Data (1984): L. Pete Gun Study

19.1% (n=18) after the law; whites 18.3% (n=20) before the law and 11.2% (n=11) after the law. The percentage of defendants receiving jail sentences with prior convictions decreased for only the white group. Whites receiving jail sentences, who also had prior convictions went from 65% to 45%.

The percentage of blacks who had prior convictions and received jail sentences increased—blacks went from 54% before the law to 60% after the law, but this was also found to be not statistically significant. Hispanics went from 58% before the law to 78% after the law. There was a significant increase in the percentage of Hispanics with prior convictions who went to jail after the law ($Z=2.2$ above the critical value).

As for those without prior conviction the percentage increased for all ethnic groups from 5.5% to 20.2% for blacks, from 10.1% to 13.8% for Hispanics and from 3.7% to 5.3% for whites, but there was only an increase in those without prior convictions, who received jail sentences in whites and Hispanics. Whites showed an increase from 25% to 40%. Hispanics showed an increase from 9% to 31%. Blacks, on the other hand showed a decrease from 17% to 11%.

Although blacks represented those defendants with the greatest percentage of prior convictions both before and after the law, whites showed the greatest percentage of those with prior convictions who went to jail before the law—65% and Hispanics showed the greatest percentage of those with prior convictions who went to jail after the law—78%.

It has been shown that there is a strong correlation between waiver and jail sentences. When ethnicity, pre-trial detention status and prior conviction are cross-tabulated chart 6.8 is produced. The relationship between waiver and jail sentences remains, even when prior conviction, pre-trial detention status and ethnicity are taken into consideration.

5. Recidivism and Sentencing

Chart 7.0 shows that there was a significant increase for those who were rearrested both before and after the law ($\chi^2=4.69, 1df, p<.05$). Chart 7.1 demonstrates that although 85.2% (n=23) of those who were rearrested had prior convictions before the law, that number and percentage only represents 21.1% (n=23) of the 109 defendants in the before sample.

Chart 7.0
 REARREST by Before and After the Law

<u>Rearrest</u>	<u>Before</u>	<u>After</u>	<u>Total</u>
Yes	27 (24.8)* (13.3)**	12 (30.8) (5.9)	39 (19.2)
No	82 (75.2) (40.4)	82 (87.2) (40.4)	164 (80.0)
Total	109 (53.7)	94 (46.3)	203 (100.0)

($X^2=4.69, 1df, p < .05$)

* Row percentage
 ** Total percentage

Source: Bronx Pre-law/Post law Sample Data (1984); L. Pete Gun Study

Chart 7.2

RE-ARREST BY NATURE OF RE-ARREST

BEFORE

GUN/PROPERTY	NATURE OF RE-ARREST						TOTAL
	GUN/ROBBERY	GUN/ASSAULT	OTHER VIOLENT CRIME	DRUGS	GUN POSSESSION	PROPERTY	
0 (0.0)	1 (3.7)	1 (3.7)	6 (22.2)	6 (22.2)	2 (7.4)	11 (40.7)	27 (100.0)

AFTER

GUN/PROPERTY	NATURE OF RE-ARREST						TOTAL
	GUN/ROBBERY	GUN/ASSAULT	OTHER VIOLENT CRIME	DRUGS	GUN POSSESSION	PROPERTY	
0 (0.0)	0 (0.0)	1 (8.3)	4 (33.3)	3 (25.0)	3 (25.0)	1 (8.3)	12 (100.0)

Source: Bronx Pre-Law/Post Law Sample Data (1984): L. Pete Gun Study

Chart 7.1 REARRESTS BY PRIOR CONVICTIONS BEFORE AND AFTER THE LAW
BEFORE

RE-ARREST	PRIORS		TOTAL
	YES	NO	
YES	23 (21.1)** (85.2)*	4 (3.7) (14.8)	27 (24.8)
NO	64 (58.7) (78.0)	18 (16.5) (22.0)	82 (75.2)
TOTAL	87 (79.8)	22 (20.2)	109 (100.0)

RE-ARREST	PRIORS		TOTAL
	YES	NO	
YES	10 (10.6) (83.3)	2 (2.1) (16.7)	12 (12.8)
NO	47 (50.0) (57.3)	35 (37.2) (42.7)	82 (87.2)
TOTAL	57 (60.6)	37 (39.4)	94 (100.0)

* Row percentage

** Total percentage

Source: Bronx Pre-law/Post law Sample Data (1984); L. Pete Gun Study

Likewise, after the law, although 83.3% (n=10) of the defendants who were rearrested who had prior convictions that number and percentage represents only 10.6% of the defendants in the after the law sample. Those who are rearrested include those who had previous convictions prior to the arrest and conviction for gun possession. Those defendants with prior convictions showed a significant increase in rearrest before the law (Z=2.56) and after the law (Z=2.16).

Most defendants who are indicted and convicted for gun possession are not rearrested. When they are, they are not generally rearrested for gun possession or violent crimes (gun assaults, gun robberies, property crimes with guns, or other crimes with guns). Chart 7.2 reveals that of the 27 defendants who were rearrested 40.7% (n=11) were for property crimes before the law. After the law the total number of those defendants rearrested dropped to 12. Although the number of those rearrested decreased dramatically, the nature of the crimes committed by those rearrested reflect a move toward gun possession (an increase from 7.4% before the law to 25.0% after the law) and other violent crimes (from 22.2% before the law to 33.3% after the law).

In general, for defendants indicted for illegal gun possession, both before and after the law:

- 1) most dispositions were by guilty plea;
- 2) the number of trial is small;
- 3) most defendants were being held in pre-trial detention at time of sentencing;
- 4) most guilty pleas were after formal Grand Jury indictment;
- 5) most defendants plead guilty to felony charges;
- 6) most defendants received jail sentences and were sentenced to felony jail time;
- 7) most defendants have prior criminal convictions, although most prior convictions were for misdemeanors and violations;

- 8) having prior convictions and being held in pre-trial detention were highly correlated with jail sentences, especially misdemeanor jail sentences;
- 9) among ethnic groups, blacks were overrepresented in both samples and whites were underrepresented.
- 10) the difference in dispositional pattern of all ethnic groups was not found to be statistically significant. approximately fifty percent of each ethnic group was sentenced to jail sentences.

Although indictments increased substantially (by 22.8%) after the law, once indicted the pattern of disposition did not change dramatically. This is not a cause for concern. It was revealed that gun possession indictments, for the most part, were treated equitably by judges and prosecuted to the full extent of the law with fairness by prosecutors. What changes the prosecutors could make, they did—indict defendants, offer felony convictions in exchange for felony guilty pleas and recommend jail sentences where appropriate. We were not dealing here with the element of society that commits violent street crimes with guns. These defendants, despite legislative mandates must be dealt with within the law, but in proportion to the seriousness of other crimes, jail sentences and pleas.

Notwithstanding the above, statistically significant differences were found between the before and after samples. After the law:

- 1) there was a decrease in the percentage of defendants who plead guilty;
- 2) there was an increase in the percentage of defendants whose cases were dismissed;
- 3) there was no significant increase in the percentage of those defendants who were sentenced to jail;
- 4) there was an increase in the percentage of those defendants who received felony jail sentences;

- 5) there was an increase in the percentage of those defendants who received any jail sentence after pleading guilty to any felony charge;
- 6) there was an decrease in the percentage of defendants who were being held in pre-trial detention;
- 7) there was a decrease in the percentage of defendants who had prior convictions;
- 8) there was an increase in the percentage of Hispanics who received jail sentences who had prior convictions;
- 9) there was an increase in the percentage of defendants who did not become rearrested after prosecution for gun possession.

Chapter IV The Gun Study: Findings and Interpretation

1. felony jail time: a defendant is to do one year prison time or more
2. misdemeanor jail time: a defendant is sentenced to less than one year jail time
3. no time: this category includes those defendants sentenced to time served.
4. Mariana Zamitz, ed. Report to the Nation on Crime and Justice (Michigan: Bureau of Justice Statistics, (1983), p. 58.
5. New York State Criminal Procedure Law, 550, case note 2.
6. Ibid Case note 3.
7. Frederick Suffet, "Bail Setting: A study of Courtroom Interaction" in Quinney. Crime and Justice in Society, (Boston: Little Brown & Co., 1969), p. 293.
8. Ibid. p. 294.
9. Ibid. p. 297.
10. Ibid. p. 303.
11. Ibid. p. 304.
12. Ibid. p. 307.
13. Op.cit. Zamitz, p. 37-38.
14. Ibid.
15. Op.cit., McDonald, p. 86.
16. Ibid. p. 104.
17. Ibid. p. 105.
18. M. Stein, On Racial Disproportionality of U.S. Prison Population, "Journal of Criminal Law and Criminology". 73 (1983), p. 1259.
19. Allen Bullock, "Significant of the Racial Factor in the Length of Prison Sentences", in Quinney, Crime and Justice Society, (Boston: Little Brown and Co.) p. 419.
20. Ibid.

21. Fay A. Silva, "Sentencing Disparity Shown" American Bar Association Journal, 69, (1983), p. 1355.
22. Ibid. p. 423-429.
23. Op.cit. McDonald, P. 71.
24. Op.cit. Wright, P. 082.
25. Op.cit. Beha, P. 300.
26. Op.cit. Rossman, P. 156.

V. CONCLUSIONS AND BROADER IMPLICATIONS

What has been the effect of the 1980 Gun Control Law on the role of the prosecutor in prosecuting gun possession cases? Of the prosecutors who had an opinion, it was generally felt that the law has had very little effect on the prosecution of such cases. A supervising district attorney stated:

The role of the prosecutor has not been affected a great deal by the new law. On the average, defense counsel's plea-bargaining power has been cut, but I don't believe the plea-bargaining power of the prosecutor has been enhanced. As it is with any crime for which the legislature enacts a mandatory minimum sentence, the perimeters are made smaller. I don't think it necessarily makes it more difficult.¹

However, several legal aid attorneys have expressed the opinion that indeed the prosecutor's power has been enhanced by the mandatory minimum sentence. One legal aid attorney, who has defended individuals so charged with gun possession both before and after the gun law, has stated:

The district attorney can hold out for a jail sentence in lieu of a plea to a charge less than 265.02, although the defendant doesn't get the year he still gets time, whereas before the law, the same defendant may get away with probation and/or a fine. In some cases it is justified, but in many more cases it is not, especially where the defendant has a job, family and no record to speak of.²

A private defense counsel who also has handled gun possession cases where 265.02 was the sole charge, both before and after the law has commented:

The D.A. doesn't sentence, but he can influence the judge. The D.A. can recommend a year sentence with the new law and be perfectly justified. It's up to me to bring out mitigating circumstances to the judges attention, but even with this, many more of the defendants getting more jail sentences after the law. The judge cannot keep ignoring the D.A. recommendations, especially if he wants to get pleas on other kinds and the judge knows the law. We still bargain but I have less to bargain with and the D.A. has more.³

Although there has been an increase in the percentage of 265.02 gun possession cases that were presented to the grand jury there seems to have

little effect on the ability of the grand jury to keep pace with the added presentations. The prosecutor's main vehicle for the prosecution of such cases seems not to have been overburdened. One supervising D.A. stated:

The grand jury process has not been burdened because of the new law because indictments in general have been down, overall violent crime has been down. The law came at a time when we can deal with it.

A supervising D.A. also acknowledged that the added indictments did not place a burden on the number of assistants available to present such cases to the grand jury nor did it effect the quality of the prosecution of such cases. In their words:

We have always taken gun possession cases seriously and prosecuted them to the full extent of the law but the new law did give us another weapon to recommend jail sentences for defendants so charged, other than that the law has have very little change with the way gun possession cases are prosecuted.

The rise in violent street crime with guns has led many jurisdictions to enact thousands of gun control laws in an effort to reduce the number of available guns for use in violent street crime. The effect of such laws on the reduction of violent street crime is debatable I have shown that the basic premissis upon which those laws have been enacted must be challenged. It is not at all clear whether such a reduction in the availability of guns will reduce violent street crime with guns, and it is even less clear whether mandatory minimum sentences for these defendants arrested and charged with simply possessing a gun will reduce violent street crime. It has been suggested that the legislators by enacting such mandatory minimum sentences for gun possession coupled with restrictions on plea bargaining by prosecutor and judges have led to the overcriminalization of a particular type of gun possessor, those who do not have prior convictions for violent street crime, who are not likely to become involved in violent street crime because they are basically "honest" citizens who carry their gun for self-protection, and who in many instances are people who own businesses in high crime areas, but who were unable to obtain a license to carry a gun. I am not suggesting that these defendants not be penalized for their illegal carrying of guns. It is the putting these defendants thought the grand jury process, denying the judge and

prosecutor the opportunity to deal with these cases as misdemeanors that is the problem. Given the right to set of circumstances, a defendant charged with gun possession could be allowed to avoid pleading to a misdemeanor, have a mitigation hearing, and if the judge finds mitigating circumstances, avoid a jail sentence. The fact that only about 1/3 of all defendants indicted for gun possession receive the mandatory one year minimum supports this argument. In addition, most of the defendants in the overcriminalized category receive probation and a fine and were allowed to plead to a lesser felony. What has been gained by indicting these defendants? Their indictments will have little deterrent effect upon those individuals who use their guns to commit violent street crim. Mr. Suitte in the Suitte v New York case is an example. His 30 day sentence is not likely to deter any person who is going to use a gun to commit violent street crime; nor is it likely to deter storekeepers who transport the day's receipts to the bank. It must be remembered that Mr. Suitte carried his gun for seven years without incident before his arrest. The message that this kind of sentence sends to the public is not one that elicits the response by the public that the legislators wanted, a fear to carry a gun because of the increased criminal sanction. The message is that instead of controlling crime, the legislators chose to prevent "honest" citizens from protecting themselves.

New York State legislators are currently considering more legislation dealing with firearms. As of April 4, 1984, there were 54 pieces of legislation pending before the legislature. The bills cover a wide variety of behavior and actions from possessing a bullet coated with a fluoropolymer resin to mandatory sentences for assaults on police officers with weapons. Included in the 54 bills are three which would permit a defendant to plead guilty (or to be found guilty) to a separate charge of using or possessing a gun while committing a crime if the defendant had been charged with an armed offense so that the defendants face a separate "add-on" charge and "add-on sentence" just for possessing or using the gun. All three bills disallow any parole of the 3 to 5 year sentence of imprisonment that the add-on charge would bring if found guilty or pleading guilty. Of the 54 bills pending only four pertained to the sale, manufacture or distribution of guns: sale by public auction, sale of ammunition and the transportation of pistols or revolvers; the remainder dealt with the further criminalization of

gun offenses by increasing penalties, and the broadening definitions of categories of those who are exempt from restrictions on possessing and carrying firearms. There is an obvious emphasis on the criminality of gun offenses, however, the use of add-on sentences, with prohibitions against early release for parole, is at least targetted at the right group of defendants — those who use or possess guns in violent street crimes. Even if defendants who possess guns receive these add-on sentences, there is heated debate over the effect of longer and longer prison sentences. Whether the fear of longer prison sentences deters defendants remains unanswered and the effects of longer prison sentences on a defendant may have more to do with the defendant's future criminality than had been previously suspected. However, defendants incarcerated under such statutes would not be free to prey upon the law-abiding citizen.

It can be argued that sale, distribution and manufacture of guns must be tackled at the federal level and that states with stringent gun control laws are at the mercy of other states that have more permissive gun control laws. In effect, New York State legislators are compelled to fight firearms abuse with the only tools at their disposal that have a chance of being effective—criminalization through the criminal justice system. They must direct their response not to public opinion or what is politically advantageous, to research on gun laws and their effect.

Although defendants who were indicted and convicted of gun possession are not generally rearrested two years after their sentence, whether these same defendants will be deterred from possessing guns and using them in future violent street crime is unclear. For most criminal offenses, the chances of being caught and convicted are less than seven out of one hundred. Exactly how small shifts within this already low range may affect the public's perception of the certainty of punishment is difficult to measure. Although a mandatory sentencing law may significantly increase the probability of being imprisoned at some point in a criminal career, the implication of this fact for deterrence theory is not clear. When the public is regularly exposed to news stories about the lack of prison space, the releasing of defendants from jails because of a lack of space, on one hand, and Major Koch strolling in front of empty jail cells stating that if you have the gun, we have the space, any deterrent effect is diluted. Those defendants who know the system and have been through it, who in all

likelihood commit a considerable proportion of violent street crime, certainly realize the absurdity of the situation and it doesn't take much "streetwise sophistication" on the part of the average citizen to realize the chances of being subjected to the full weight of the law is minimal. The citizen must balance the chances of being arrested for carrying or possessing a gun against his/her perceived threat of becoming a victim of violent street crime. In light of the proliferation of illegal guns and the chances of being caught carrying or possessing an illegal gun, for many the choice is an easy one.

Chapter V Conclusion and Broader Implications

1. Interviews conducted in the Bronx Supreme Court, Bronx County between March 1984 and August 1984.
2. Ibid.
3. Ibid.

APPENDIX

- A. Data Collection Form**
- B. New York State Mandatory Indeterminate Sentencing Scheme**
- C. New York State Firearm Sentencing Scheme**
- D. Title P, Offenses Against Public Safety, Article 265.00, Firearms and Other Dangerous Weapons**

A. Data Collection Form

DATA COLLECTION FORM

INDICTMENT NUMBER _____	SAMPLE CODE _____
DEFENDANT NAME _____	
NYSID _____	
DOCKET _____	
ARREST DATE _____	INDICTMENT DATE _____
	WAIVER _____
ARREST CHARGE _____	RE-ARREST DATA
	RE-ARREST YES _____ NO _____
INDICTMENT CHARGE _____	CHARGE OF RE-ARREST _____

CLOSED/OPEN CASE _____	_____
BAIL STATUS _____	NATURE OF RE-ARREST _____

HEARINGS _____	_____
AGE _____	DATE OF BIRTH _____
RACE _____	IF MORE THAN ONE RE-ARREST, STATE BELOW _____
SEX _____	_____
EMPLOYED/OCCUPATION _____	_____
MENTAL/HEALTH PROBLEMS _____	_____

MARITAL STATUS _____	
NO. YEARS IN STATE _____	
COMPLAINANT _____	
NO. ADJORNMENTS _____	
DIR. G.J./CRIM. CT. _____	
GUILTY PLEA _____	
PLEA OFFERINGS _____	
PAST CONVICTIONS/DISPOSITIONS _____	
NO. OF VIOLATIONS _____	NO. OF MISCL. _____
	NO. OF FELONIES _____
C.J.A. STAMP _____	
JUDGE NAME _____	
A.D.A. _____	

B. N.Y.S. MANDATORY INDETERMINATE SENTENCING SCHEME

NEW YORK

Present Mandatory/Indeterminate Sentencing

Sentencing generally is indeterminate, with separate ranges specified by statute for the minimum and for the maximum for Class A and B-II felonies. For other Class B and Class C felonies, the minimum is 1 year to 1/3 of the maximum; and for Classes D and E, the minimum is 1 year.

Mandatory sentencing began in 1974 with repeat drug-related offenses. In 1978, mandatory minimums were enacted for violent and non-violent felony offenders, and in August, 1980 mandatory minimums were imposed for use of a handgun. Sentences escalate for second offenses and again for third offenses. For third offenses the label "persistent" is applied.

Plea bargaining has been restricted to the extent that if the indictment charges a Class A, B, or C violent felony offense, the charges on which a plea is accepted must include a violent felony offense. This has the effect of prohibiting a plea that would avoid a prison sentence.

Mandatory Sentencing

Mandatory Offenses	No. Prior Convictions	Mandatory Minimum Sentencing		Notes
		Length	Subject to Reductions?	
Felony - Class A-I (except 1st degree murder)	0	15 yrs.	No	
Class A-II	0	3 yrs*	No	
"Violent Felony"				
Class B:	0	2 yrs.	No	
Attempted:				
Arson - 1;	1	6 yrs.	No	Prior in last 10 years in New York "Persistent" violent offender
Kidnap-1;				
Murder -2	2+	10 yrs.	No	
Kidnapping				
2nd degree				
Agg. Sexual assault				
Burglary - 1st degree				
Manslaughter- 1st degree				
Arson - 2nd degree				
Rape - 1st degree				
Robbery - 1st degree				

Mandatory Offenses	No. Prior Convictions	Length	Subject to Reductions?	Notes
Sodomy - 1st degree) Criminal possession of dangerous weapon, 1st deg.)				
Criminal use of firearm -1st deg)				
Agg. Assault on peace officer)				
<u>Class C:</u>				
Attempted Class B)	0	1½ yrs.	No	
Assault - 1st deg)	1	4 yrs.	No	
Burglary-2nd deg.)	2+	8 yrs.	No	
Robbery-2nd deg.)				
Criminal possession of weapon)				
2nd degree)				
Criminal use of firearm-2nd deg.)				
<u>Class D</u>				
Attempted Class C)	1**	2½ yrs.	No	
Assault-2nd deg.)	2+	6 yrs.	No	
Criminal sale firearm-2nd deg.)				
Sexual abuse - 1st deg.)				
<u>Non-Violent Felony</u>				
Class A-II	1+	6 yrs.	No	
Class B	0	1 yr*	No	
	1	4½ yrs*	No	
Class C	0	1 yr***	No	
	1	3 yrs*	No	
Class D	1	2 yrs*	No	

*Lifetime probation is permitted in return for material assistance to the State in connection with a drug offense.

**Term for assault 2nd degree or attempted assault 1st degree may be as little as 1 day.

***For drug 4th degree offenses, a sentence of 1 day is possible.

"Good Time" Provisions

The maximum portion of a sentence may be reduced by 1/3 for good behavior, but the minimum must be served.

Parole Provisions

There is supervision, but no release prior to serving the minimum.

C. N.Y.S. FIREARM SENTENCING SCHEME

Chart IX, which follows, is framed in terms of the three separate factors which determine the classification of handgun offenses:

1. Was the gun loaded or unloaded?
2. Where was the gun possessed?
3. What is the status of the accused in terms of previous record?

The standards of classification for the other weapons offenses have been similarly charted, and it is hoped Chart IX will assist in unraveling the New York 1980 Gun Control Law. (Note that the chart is a guide to classification only. For sentences, see Charts I and II for Felonies, and III and IV for Misdemeanors.)

**CHART IX
WEAPONS OFFENSES**

WEAPON AND PLACE OF POSSESSION	STATUS OF DEFENDANT	CLASSIFICATION
"Firearm" (handgun) loaded or unloaded in home or business. Note: See Charts I and II for Felony Sentences and III and IV for Misdemeanors	No prev. convictions	Cr. Poss.-4 Class A Misd. 265.01(1)
	Prev. conv. any crime	Cr. Poss.-3 Class D Non-Violent Felony 265.02(1) 265.01(1)
Unloaded "Firearm" (handgun) outside home or business See 265.00(3) for definition of "firearm" and 265.00(15) for definition of "loaded"	No prev. convictions	Cr. Poss.-4 Class A Misd. 265.01(1)
	Prev. conv. any crime	Cr. Poss.-3 Class D Non-Violent Felony 265.02(1) 265.01(1)
	Prev. conv. Class A Misd. within (or any felony) 5 yrs.	Cr. Poss.-3 Class D Violent Felony 265.02(5)(ii) 70.02-1(c)
Loaded "Firearm" (handgun) outside home or business	Prev. convictions immaterial	Cr. Poss.-3 Class D Violent Felony 265.02(4) 70.02-1(c)
20 or more "Firearms" (handguns) any place, loaded or unloaded	Prev. convictions immaterial	Cr. Poss.-3 Class D Violent Felony 265.02(5)(i) 70.02-1(c)

SENTENCE CHARTS

CHART IX—Continued

WEAPONS OFFENSES—Continued

WEAPON AND PLACE OF POSSESSION	STATUS OF DEFENDANT	CLASSIFICATION
Electronic dart gun, gravity knife, switchblade, cane sword, billy, blackjack, bludgeon, metal knuckles, chuka stick, sand bag, sand club, slingshot, detonating bullet, possessed any place	Same as "Firearm" in home or business, first entry, <i>supra</i> . 265.01(1); 265.02(1)	
Any dangerous or deadly weapon possessed any place by non-citizen.	Same as "Firearm" in home or business, first entry, <i>supra</i> . 265.01(5); 265.02(1)	
Dagger, dangerous knife, dirk, razor, stiletto, imitation pistol, shirken or kung fu star, or "any other dangerous or deadly instrument or weapon" plus intention to use unlawfully any place.	Same as "Firearm" in home or business, first entry, <i>supra</i> . 265.01(2); 265.02(1)	
Rifle, shotgun, or "firearm" (handgun) on educational instit. grounds	Same as "Firearm" in home or business, first entry, <i>supra</i> . 265.01(3); 265.02(1)	
Explosive or incendiary bomb, bombshell, firearm silencer, machine gun, simulated machine gun, firearm or machine gun defaced for purpose of concealment possessed any place	Previous convictions immaterial	Cr. Poss.-3 Class D <i>Non-Violent</i> Felony 265.02(2)(3)
Rifle or shotgun, possessed any place	Prev. conv. any Felony or any "serious offense" in 265.00-17	Cr. Poss.-4 Class A Misdemeanor 265.01(4)
Machine gun or loaded "firearm" (handgun) plus intention to use unlawfully, possessed any place	Previous convictions immaterial	Cr. Poss.-2 Class C <i>Violent</i> Felony 265.03 70.02-1(b)
Explosive substance plus intention to use unlawfully, possessed any place	Previous convictions immaterial	Cr. Poss.-1 Class B <i>Violent</i> Felony 265.04 70.02-1(a)

Note: For Criminal Use of Firearms see 265.08, 265.09; for Criminal Sale of Firearms see 265.11, 265.12.
For additional limitations see 265.01(6), 265.05, 265.10, 265.35, 265.40.
And see 265.20 for exemptions.
For presumptions applicable to weapons, see 265.15
For definitions, see 265.00.

SENTENCE CHARTS

CHART XI

PLEA BARGAINING LIMITATIONS

A. GENERAL RULES

1. Defendant may always plead guilty to entire indictment, except for Murder-1. 220.10-2, 5(e), 220.30-3(b)(vii) CPL.
2. Except for limitations listed below, defendant may plead to any one of multiple counts or to any "lesser included offense" thereof, in satisfaction of entire indictment, or in satisfaction of one or more other indictments. 220.10-3, 4; 220.30-3(a)(i) CPL.
3. On all pleas, except plea of guilty to entire indictment (220.10-2 CPL), consent of Court and D.A. is required. 220.10, 220.30, 180.50 CPL.

B. PRE-INDICTMENT PLEADING LIMITATIONS

Almost all plea-bargaining limitations apply only *after indictment*. By specific provision, plea bargaining before indictment "in the interest of justice" is permitted with respect to any and all crimes *Except*

Any Class A (non-drug) Felony and
Any "armed felony"

180.50-2(b) CPL

C. POST-INDICTMENT PLEADING LIMITATIONS—SINGLE INDICTMENT

CLASSIFICATION OF CRIME	LOWEST PERMISSIBLE PLEA
Class A (non-Drug) Felony	C Violent Felony 220.10-5(d)(i) CPL
Class A-I Drug Felony	A-II Drug Felony (<i>except</i> eligible youth, 720.10 CPL, may plead to B Felony for purpose of Y.O. adjudication. 220.10-5(a)(i) CPL).
Class A-II Drug Felony	B Felony 220.10-5(a)(ii) CPL
Class B Violent and Armed Felony	C Violent Felony 220.10-5(d)(i) CPL
Class B Violent (not armed) Felony	D Violent Felony 220.10-5(d)(ii) CPL
Class B Drug Felony	D Felony 220.10-5(a)(iii) CPL
All other Class B Felonies	E Felony 220.10-5(b) CPL
Class C Violent Felony	D Violent Felony 220.10-5(d)(ii) CPL
Class C Non-Violent Felonies	No Limitations (<i>except</i> "predicate fel- ons", see below)
Class D Violent handgun, 265.02-4 (loaded, outside home/business, no prev. A Misd. conv. in 5 yrs.)	E Violent, or A Misdemeanor (gun) 220.10-5(d)(iii) CPL
Class D Violent handgun, 265.02-5 (loaded or unloaded outside home/ business, plus prev. A Misd. conv. in 5 yrs.)	E Violent 220.10-5(d)(iv) CPL
Class D Violent handgun, 265.12 (Cr. Sale-1)	E Violent 220.10-5(d)(iv) CPL
All other Class D Violent & Non-Vio- lent Felonies, and all Class E Felo- nies	No Limitations (<i>except</i> "predicate fel- ons", see below)

Note: As to Defendants with predicate felony convictions, as per 70.06 PL, in addition to above limitations, a felony plea is always required. 220.10-5(c) CPL

SENTENCE CHARTS

CHART XI—Continued

PLEA BARGAINING LIMITATIONS--Continued

D. POST-INDICTMENT PLEADING LIMITATIONS—MULTIPLE INDICTMENTS

Where Any Indictment Charges the Following Crimes:	A Plea to Another Indictment May Be Taken in Satisfaction Only if Such Plea Includes:
Class A (non-Drug) Felony	A. A Felony, or B or C Violent Felony 220.30-3(b)(iii) CPL.
Class A-I Drug Felony	A-II Drug Felony (except eligible youth, 720.10 CPL. may take B Felony for purpose of Y.O. adjudication.) 220.30-3(b)(i) CPL)
Class A-II Drug Felony	Any A or B Felony. 220.30-3(b)(viii) CPL
Class B Violent and Armed Felony	Any A Felony, or B, C Violent Felony 220.30-3(b)(iii) CPL
Class B Violent (not armed) Felony	Any A Felony, or B, C/D Violent Felony 220.30-3(b)(iv) CPL
Class B Drug Felony	Any B, C, or D Felony 220.30-3(b)(ix) CPL
All other Class B Felonies	Any Felony 220.30-3(b)(vi) CPL
Class C Violent Felony	An A Felony, or B, C/D Violent Felony 220.30-3(b)(iv) CPL
All other Class C Felonies	No Limitations (except "predicate felons", see below).
Class D Violent handgun, 265.02-4, (loaded, outside home/business, no prev. A Misd. conv. in 5 yrs.)	Any Violent Felony or handgun Misdemeanor 220.30-3(b)(v) CPL
Class D Violent handgun, 265.02-5, (loaded or unloaded outside home/business plus prev. A Misd. conv. in 5 yrs.)	Any Violent Felony 220.30-3(b)(v) CPL
Class D Violent handgun, 265.12, Cr. Sale-1	Any Violent Felony 220.30-3(b)(v) CPL
All other Class D Violent & Non-Violent Felonies, and all Class E Felonies	No Limitations (except "predicate felons", see below)

Note: As to defendants with predicate felony convictions, as per 70.06 PL, in addition to the above limitations, a felony plea is always required to satisfy any other indictment. 220.30-3(b)(ii) CPL

NOTE: FOR SPECIAL PROVISIONS GOVERNING PLEA-BARGAINING FOR JUVENILE OFFENDERS (Defendants age 13, 14, 15 at time of crime) see Sec. 220.10-5(g), 220.30-3(c) CPL).

TITLE P

OFFENSES AGAINST PUBLIC SAFETY

ARTICLE 265

FIREARMS AND OTHER DANGEROUS WEAPONS

- § 265.00 Definitions.
- § 265.01 Criminal possession of a weapon in the fourth degree.
- § 265.02 Criminal possession of a weapon in the third degree.
- § 265.03 Criminal possession of a weapon in the second degree.
- § 265.04 Criminal possession of a dangerous weapon in the first degree.
- § 265.05 [Repealed, eff. Sept. 1, 1974]
- § 265.05 Unlawful possession of weapons by persons under sixteen.
- § 265.08 Criminal use of a firearm in the second degree.
- § 265.09 Criminal use of a firearm in the first degree.
- § 265.10 Manufacture, transport, disposition and defacement of weapons and dangerous instruments and appliances.
- § 265.11 Criminal sale of a firearm in the second degree.
- § 265.12 Criminal sale of a firearm in the first degree.
- § 265.15 Presumptions of possession, unlawful intent and defacement.
- § 265.20 Exemptions.
- § 265.25 Certain wounds to be reported.
- § 265.30 Certain convictions to be reported.
- § 265.35 Prohibited use of weapons.
- § 265.40 Purchase of rifles and/or shotguns in contiguous states.

§ 265.00 Definitions.

As used in this article and in article four hundred, the following terms shall mean and include:

1. "Machine-gun" means a weapon of any description, irrespective of size, by whatever name known, loaded or unloaded, from which a number of shots or bullets may be rapidly or automatically discharged from a magazine with one continuous pull of the trigger and includes a sub-machine gun.

2. "Firearm silencer" means any instrument, attachment, weapon or appliance for causing the firing of any gun, revolver, pistol or other firearms to be silent, or intended to lessen or muffle the noise of the firing of any gun, revolver, pistol or other firearms.

3. "Firearm" means any pistol, revolver, sawed-off shotgun or other

firearm of a size which may be concealed upon the person, except an antique firearm.

4. "Switchblade knife" means any knife which has a blade which opens automatically by hand pressure applied to a button, spring or other device in the handle of the knife.

5. "Gravity knife" means any knife which has a blade which is released from the handle or sheath thereof by the force of gravity or the application of centrifugal force which, when released, is locked in place by means of a button, spring, lever or other device.

6. "Dispose of" means to dispose of, give, give away, lease, loan, keep for sale, offer, offer for sale, sell, transfer and otherwise dispose of.

7. "Deface" means to remove, deface, cover, alter or destroy the manufacturer's serial number or any other distinguishing number or identification mark.

8. "Gunsmith" means any person, firm, partnership, corporation or company who engages in the business of repairing, altering, assembling, manufacturing, cleaning, polishing, engraving or trueing, or who performs any mechanical operation on, any firearm or machine-gun.

9. "Dealer in firearms" means any person, firm, partnership, corporation or company who engages in the business of purchasing, selling, keeping for sale, loaning, leasing, or in any manner disposing of, any pistol or revolver.

10. "Licensing officer" means in the city of New York the police commissioner of that city; in the county of Nassau the commissioner of police of that county; in the county of Suffolk the sheriff of that county except in the towns of Babylon, Brookhaven, Huntington, Islip and Smithtown, the commissioner of police of that county; and elsewhere in the state a judge or justice of a court of record having his office in the county of issuance.

11. "Rifle" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed metallic cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger.

12. "Shotgun" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a

fixed shotgun shell to fire through a smooth bore either a number of ball shot or a single projectile for each single pull of the trigger.

13. "Cane Sword" means a cane or swagger stick having concealed within it a blade that may be used as a sword or stiletto.

14. "Chuka stick" means any device designed primarily as a weapon, consisting of two or more lengths of a rigid material joined together by a thong, rope or chain in such a manner as to allow free movement of a portion of the device while held in the hand and capable of being rotated in such a manner as to inflict serious injury upon a person by striking or choking. These devices are also known as nunchakus and centrifugal force sticks.

14. "Antique firearm" means:

Any unloaded muzzle loading pistol or revolver with a matchlock, flintlock, percussion cap, or similar type of ignition system, or a pistol or revolver which uses fixed cartridges which are no longer available in the ordinary channels of commercial trade.

15. "Loaded firearm" means any firearm loaded with ammunition or any firearm which is possessed by one who, at the same time, possesses a quantity of ammunition which may be used to discharge such firearm.

15-a. "Electronic dart gun" means any device designed primarily as a weapon, the purpose of which is to momentarily stun, knock out or paralyze a person by passing an electrical shock to such person by means of a dart or projectile.

16. "Certified not suitable to possess a rifle or shotgun" means that the director or physician in charge of any hospital or institution for mental illness, public or private, has certified to the superintendent of state police or to any organized police department of a county, city, town or village of this state, that a person who has been judicially adjudicated incompetent, or who has been confined to such institution for mental illness pursuant to judicial authority, is not suitable to possess a rifle or shotgun.

17. "Serious offense" means (a) any of the following offenses defined in the former penal law as in force and effect immediately prior to September first, nineteen hundred sixty-seven: illegally using, carrying or possessing a pistol or other dangerous weapon; making or possessing burglar's instruments; buying or receiving stolen property; unlawful entry of a building; aiding escape from prison; that kind of disorderly conduct defined in subdivisions six and eight of section seven hundred twenty-two of such former penal law; violations of sections four hundred

eighty-three, four hundred eighty-three-b, four hundred eighty-four-h and article one hundred six of such former penal law; that kind of sodomy or rape which was designated as a misdemeanor; violation of section seventeen hundred forty-seven-d and seventeen hundred forty-seven-e of such former penal law; any violation of any provision of article thirty-three of the public health law relating to narcotic drugs which was defined as a misdemeanor by section seventeen hundred fifty-one-a of such former penal law, and any violation of any provision of article thirty-three-A of the public health law relating to depressant and stimulant drugs which was defined as a misdemeanor by section seventeen hundred forty-seven-b of such former penal law.

(b) any of the following offenses defined in the penal law: illegally using, carrying or possessing a pistol or other dangerous weapon; possession of burglar's tools; criminal possession of stolen property in the third degree; escape in the third degree; jostling; fraudulent accosting; that kind of loitering defined in subdivision three of section 240.35; endangering the welfare of a child; the offenses defined in article two hundred thirty-five; issuing abortifacient articles; permitting prostitution; promoting prostitution in the third degree; the offenses defined in article one hundred thirty; the offenses defined in article two hundred twenty.

Amended by L. 1967, Ch. 791; L. 1969, Ch. 123; L. 1972, Chs. 588, 605; L. 1974, Chs. 179, 462, 986, 1041; L. 1976, Ch. 217.

§ 265.01 Criminal possession of a weapon in the fourth degree.

A person is guilty of criminal possession of a weapon in the fourth degree when:

(1) He possesses any firearm, electronic dart gun, gravity knife, switchblade knife, cane sword, billy, blackjack, bludgeon, metal knuckles, chuka stick, sand bag, sandclub or slungshot; or

(2) He possesses any dagger, dangerous knife, dirk, razor, stiletto, imitation pistol or any other dangerous or deadly instrument or weapon with intent to use the same unlawfully against another; or

(3) He knowingly has in his possession a rifle, shotgun or firearm in or upon a building or grounds, used for educational purposes, of any school, college or university, except the forestry lands, wherever located, owned and maintained by the State University of New York college of environmental science and forestry, without the written authorization of such educational institution; or

(4) He possesses a rifle or shotgun and has been convicted of a felony or serious offense; or

(5) He possesses any dangerous or deadly weapon and is not a citizen of the United States; or

(6) He is a person who has been certified not suitable to possess a rifle or shotgun, as defined in subdivision sixteen of section 265.00, and refuses to yield possession of such rifle or shotgun upon the demand of a police officer. Whenever a person is certified not suitable to possess a rifle or shotgun, a member of the police department to which such certification is made, or of the state police, shall forthwith seize any rifle or shotgun possessed by such person. A rifle or shotgun seized as herein provided shall not be destroyed, but shall be delivered to the headquarters of such police department, or state police, and there retained until the aforesaid certificate has been rescinded by the director or physician in charge, or other disposition of such rifle or shotgun has been ordered or authorized by a court of competent jurisdiction.

Criminal possession of a weapon in the fourth degree is a class A misdemeanor.

Added by L. 1974, Ch. 1041; Amended by L. 1976, Ch. 217.

§ 265.02 Criminal possession of a weapon in the third degree.

A person is guilty of criminal possession of a weapon in the third degree when:

(1) He commits the crime of criminal possession of a weapon in the fourth degree as defined in subdivision one, two, three or five of section 265.01, and has been previously convicted of any crime; or

(2) He possesses any explosive or incendiary bomb, bombshell, firearm silencer, machine-gun or any other firearm or weapon simulating a machine-gun and which is adaptable for such use; or

(3) He knowingly has in his possession a machine-gun or firearm which has been defaced for the purpose of concealment or prevention of the detection of a crime or misrepresenting the identity of such machine-gun or firearm; or

(4) He possesses any loaded firearm. Such possession shall not, except as provided in subdivision one, constitute a violation of this section if such possession takes place in such person's home or place of business.

(5) (i) He possesses twenty or more firearms; or (ii) he possesses a firearm and has been previously convicted of a class A misdemeanor

defined in this chapter within the five years immediately preceding the commission of the offense and such possession did not take place in the person's home or place of business.

Criminal possession of a weapon in the third degree is a class D felony.

Added by L. 1974, Ch. 1041; Amended by L. 1980, Ch. 233, eff. Aug. 12, 1980, adding subd. (5).

§ 265.03 Criminal possession of a weapon in the second degree.

A person is guilty of criminal possession of a weapon in the second degree when he possesses a machine-gun or loaded firearm with intent to use the same unlawfully against another.

Criminal possession of a weapon in the second degree is a class C felony.

Added by L. 1974, Ch. 1041.

§ 265.04 Criminal possession of a dangerous weapon in the first degree.

A person is guilty of criminal possession of a dangerous weapon in the first degree when he possesses any explosive substance with intent to use the same unlawfully against the person or property of another.

Criminal possession of a weapon in the first degree is a class B felony.

Added by L. 1974, Ch. 1041.

§ 265.05 Unlawful possession of weapons by persons under sixteen.

It shall be unlawful for any person under the age of sixteen to possess any air-gun, spring-gun or other instrument or weapon in which the propelling force is a spring or air, or any gun or any instrument or weapon in or upon which any loaded or blank cartridges may be used, or any loaded or blank cartridges or ammunition therefor, or any dangerous knife.

A person who violates the provisions of this section shall be adjudged a juvenile delinquent.

Repealed former § 265.05 and Added new § 265.05 by L. 1974, Ch. 1041.

§ 265.08 Criminal use of a firearm in the second degree.

A person is guilty of criminal use of a firearm in the second degree

when he commits any class C violent felony offense as defined in paragraph (b) of subdivision one of section 70.02 and he either: ✓

(1) possesses a deadly weapon, if the weapon is a loaded weapon from which a shot, readily capable of producing death or other serious injury may be discharged; or

(2) displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm.

Criminal use of a firearm in the second degree is a class C felony.

Added by L. 1980, Ch. 233, eff. Aug. 12, 1980.

§ 265.09 Criminal use of a firearm in the first degree.

A person is guilty of criminal use of a firearm in the first degree when he commits any class B violent offense as defined in paragraph (a) of subdivision one of section 70.02 and he either:

(1) possesses a deadly weapon, if the weapon is a loaded weapon from which a shot, readily capable of producing death or other serious injury may be discharged; or

(2) displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm.

Criminal use of a firearm in the first degree is a class B felony.

Added by L. 1980, Ch. 233, eff. Aug. 12, 1980.

§ 265.10 Manufacture, transport, disposition and defacement of weapons and dangerous instruments and appliances.

1. Any person who manufactures or causes to be manufactured any machine-gun is guilty of a class D felony. Any person who manufactures or causes to be manufactured any switchblade knife, gravity knife, billy, blackjack, bludgeon, metal knuckles, chuka stick, sandbag, sandclub or slungshot is guilty of a class A misdemeanor.

2. Any person who transports or ships any machine-gun or firearm silencer is guilty of a class D felony. Any person who transports or ships as merchandise any firearm, switchblade knife, gravity knife, billy, blackjack, bludgeon, metal knuckles, chuka stick, sandbag or slungshot is guilty of a class A misdemeanor.

3. Any person who disposes of any machine-gun or firearm silencer is guilty of a class D felony. Any person who knowingly buys, receives, disposes of, or conceals a machine-gun or firearm which has been defaced for the purpose of concealment or prevention of the detection of a crime or misrepresenting the identity of such machine-gun or firearm is guilty of a class D felony.

4. Any person who disposes of any of the weapons, instruments or appliances specified in subdivision one of section 265.01, except a firearm, is guilty of a class A misdemeanor, and he is guilty of a class D felony if he has previously been convicted of any crime.

(Eff. 8/12/80, Ch. 233, L. 1980)

5. Any person who disposes of any of the weapons, instruments, appliances or substances specified in section 265.05 to any other person under the age of sixteen years is guilty of a class A misdemeanor.

6. Any person who wilfully defaces any machine-gun or firearm is guilty of a class D felony.

7. Any person, other than a wholesale dealer, or gunsmith or dealer in firearms duly licensed pursuant to section 400.00, lawfully in possession of a firearm, who disposes of the same without first notifying in writing the licensing officer in the city of New York and counties of Nassau and Suffolk and elsewhere in the state the executive department, division of state police, Albany, is guilty of a class A misdemeanor.

§ 265.11 Criminal sale of a firearm in the second degree. (E/FEL)

A person is guilty of criminal sale of a firearm in the second degree when he is not authorized pursuant to law to possess a firearm and he unlawfully either:

(1) sells, exchanges, gives or disposes of a firearm to another person not authorized pursuant to law to possess a firearm; or

(2) possesses a firearm with the intent to sell it.

(Eff. 8/12/80, Ch. 233, L. 1980)

Criminal sale of a firearm in the second degree is a class E felony.

§ 265.12 Criminal sale of a firearm in the first degree. (D/FELONY)

A person is guilty of criminal sale of a firearm in the first degree when he unlawfully sells, exchanges, gives or disposes of to another twenty or more firearms.

(Eff. 8/12/80, Ch. 233, L. 1980)

Criminal sale of a firearm in the first degree is a class D felony.

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