Some Observations on the Disposition of CCW Cases in Detroit

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Some Observations on the Disposition of CCW Cases in Detroit

Recent years have witnessed an alarming increase in the number of crimes involving firearms committed in Detroit and other large metropolitan areas. In response to this increase and to studies indicating a significant relationship between firearm availability and the rate of firearm-related felonies, many commentators have made proposals to augment or alter current gun control legislation. Typical of the current legislation is the Michigan scheme, which requires a license to purchase a firearm and a license to carry a concealed weapon.

Realizing that no gun control statute can deter the commission of firearm-related felonies unless adequately enforced, the author of this Note undertook a study of the enforcement in Detroit's recorder's court of the Michigan carrying concealed weapons (CCW) statute. The CCW statute was passed by the Michigan legislature in 1975.

4. See, e.g., To Establish Justice, supra note 2, at xviii-xix.
5. Mich. Comp. Laws Ann. § 28.422 (Supp. 1975). An applicant for a license must be at least 18 years of age, a citizen of the United States, a resident of the state of Michigan for 6 months or more, a nonfelon, and legally sane.
6. Mich. Comp. Laws Ann. § 28.426 (Supp. 1975). In addition to meeting the requirements for a license to purchase, see note 5 supra, an applicant for a license to carry a concealed weapon must demonstrate reasonable need.

Enforcement of the licensing provisions is regulated by Mich. Comp. Laws Ann. § 750.227 (Supp. 1975): "A person who shall carry a dagger, dirk, stiletto, or other dangerous weapon except hunting knives adapted and carried as such, concealed on or about his person, or whether concealed or otherwise in any vehicle operated or occupied by..."
order to discourage the carrying of firearms in situations where they might be used to commit serious crimes. This study was aimed at determining whether the judges of the Detroit recorder's court deal with CCW cases and offenders in a manner likely to accomplish that statutory purpose.

The results of the study, set forth in this Note, reveal that the members of the bench of the Detroit recorder's court view CCW as a minor, relatively inoffensive crime. They devote comparatively few of their limited judicial resources to CCW cases and deal with offenders leniently. Thus, of those individuals initially charged with CCW, a relatively low proportion are convicted of the offense or a lesser offense; of those convicted, very few receive prison sentences even though the offense carries a five-year maximum sentence and many of the offenders have prior felony records. When considered in light of recent studies on deterrence, the results of this study suggest that efforts at countering the increase in firearm-related felonies might beneficially be directed toward punishing violators of existing legislation with greater regularity.

Part I of this Note details the disposition of cases alleging violations of the Michigan CCW statute that were brought in the Detroit recorder's court during 1973. Although the statute is only part of the current scheme of gun control in Michigan, it is the principal weapon available to the police and prosecutor in the preventive battle against the illegal use of firearms. To give meaning to the dispositional statistics and to aid in perceiving the over-all judicial attitude toward CCW cases, the statistical results of the study are compared with statistics on the disposition of cases involving felonies similar in nature or maximum sentence. Part II considers whether the current enforcement scheme is adequate in light of accepted deterrence theories and concludes that a significant increase in the certainty and severity of punishment of offenders is necessary if the CCW statute is to operate with any degree of effectiveness. Part

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10. See Table 3 infra.
11. See Tables 5 & 6 infra.
III suggests a sentencing scheme that is more likely to satisfy the purpose of the CCW statute.

I. THE FINDINGS

The data for this study, gathered during the summer of 1974, were compiled by examining CCW cases initiated in Detroit in 1973. Because all CCW cases are begun by a prosecution request for an arrest warrant, it was possible to amass a complete list of all CCW cases from the daily reports of the warrants division. Every fourth case was selected until the sample size reached 475, 11 of which were dropped because the files could not be located. Information was gathered from the files, where available and relevant, on all aspects of the criminal proceedings: initial appearance, probable-cause examination, plea negotiation, disposition.

13. The author participated in the Wayne County Prosecutor's Summer Intern Program. This study was conducted at the request of Prosecutor William Cahalen and was funded through the intern program and by a special consultant grant.

14. Some CCW offenders are charged under Code of the City of Detroit § 66-4-2 (1973), or under one of the miscellaneous firearm misdemeanor provisions, Mich. Comp. Laws §§ 750.228 (safety inspection), .232a (purchasing without a license), .237 (use of firearm under the influence of alcohol) (1970), rather than under the felony statute, Mich. Comp. Laws Ann. § 750.227 (Supp. 1975). The arresting officer seems to make the decision regarding which provision to use. This study does not include any misdemeanor or ordinance violation cases.


16. Files on criminal proceedings in recorder's court are maintained by both the recorder's court clerk and the prosecutor's office. The recorder's court files are usually complete, except for the defendant's criminal history and the prosecutor's records of plea negotiation. If a case is at trial, being reviewed by a judge, prosecutor, or probation official, or if the file is simply mislaid after dismissal by a clerk, the file is not readily accessible; such cases were therefore excluded from this study. It is doubtful that the absence of these cases could have significantly affected the results of the study. A subsequent check of the missing files revealed many different reasons for their absence—in fact, the only factor in common was their absence.

17. Early disposition of a case will, of course, result in the elimination of later stages. For instance, no sentencing information will be available if the case was dismissed.
at trial, criminal history, and personal data. The files generally provided accurate information on these items. Where gaps existed, the case was removed from the study unless the missing data could reasonably be supplied in light of the circumstances.

The study is limited to cases where the defendant was charged in the warrant and information with the felony of carrying a concealed weapon. There are situations, however, where either the officer in the street or the prosecutor in the warrants division decides that criminal sanctions are inappropriate in the particular case and thus fails to initiate a prosecution. In such cases the weapon is usually confiscated and the offender released. These cases generally are not reported and their incidence remains unknown. The cases actually commenced are examined in this Note at each of the major stages of the criminal proceeding, with particular attention given to explaining why cases are dismissed at each stage. Although understanding why the CCW statute is being enforced at the present level is unnecessary for determining whether that level is adequate to deter potential offenders, it is essential in order to prevent any new scheme of enforcement from being circumvented. The following discussion critiques the disposition of the CCW cases as they flowed through recorder's court.

In 9.3 per cent of all the CCW cases, the defendant was allowed

18. TABLE: PERSONAL DATA ON 464 CCW DEFENDANTS

<table>
<thead>
<tr>
<th>Age</th>
<th>Percentage</th>
<th>Number of cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Under 21</td>
<td>12.9</td>
<td>60</td>
</tr>
<tr>
<td>21-24</td>
<td>21.9</td>
<td>102</td>
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<tr>
<td>25-29</td>
<td>23.0</td>
<td>107</td>
</tr>
<tr>
<td>30-39</td>
<td>22.8</td>
<td>106</td>
</tr>
<tr>
<td>40-49</td>
<td>11.6</td>
<td>54</td>
</tr>
<tr>
<td>Over 50</td>
<td>7.5</td>
<td>35</td>
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<table>
<thead>
<tr>
<th>Sex</th>
<th></th>
<th></th>
</tr>
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<tbody>
<tr>
<td>Male</td>
<td>89.4</td>
<td>415</td>
</tr>
<tr>
<td>Female</td>
<td>10.6</td>
<td>49</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Race</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Black</td>
<td>88.7</td>
<td>412</td>
</tr>
<tr>
<td>White</td>
<td>11.3</td>
<td>52</td>
</tr>
</tbody>
</table>

19. For example, if there was no record of a probable cause hearing, but the file shows that an initial appearance and trial took place on different dates, it was reasonable to assume that the defendant was bound over after a waiver of the preliminary hearing.

20. Although the Detroit Police Department does not readily admit to this practice, it is a well-known police procedure. Boyle Interview, supra note 12. CODE OF CITY OF DETROIT § 66-4-5 (1973) specifically provides: "It shall be the duty of any police officer of the city to arrest any person found violating [CODE OF THE CITY OF DETROIT § 66-4-2 (1973) (set out in note 6 supra)] . . . ." (Emphasis added.)
to plead guilty to a lesser offense at the initial appearance. In all of these cases, the prosecutor was either absent or objected. In over half of these cases (56 per cent), the judge at the initial appearance allowed the defendant charged with CCW to plead guilty to a misdemeanor. In dismissing CCW charges in this manner, judges assume control over the executive task of instituting and controlling prosecutions without authority to do so and in direct violation of the Michigan supreme court's decision in Genesee Prosecutor v. Genesee Circuit Judge (Genesee I).22

In Genesee I, the court concluded that it was improper for a trial judge to determine under which of two applicable statutes a prosecution should be instituted. In particular, the court held that a trial judge abused his discretion by allowing a defendant charged with possession of a stolen vehicle to plead guilty, over the prosecutor's objection, to the crime of unlawfully driving away an automobile.23 This holding was expanded in Genesee II,24 where the court concluded that it was improper for a trial judge to allow a defendant to plead guilty at trial to a lesser included offense over the prosecutor's objection. Taken together, Genesee I & II evidence a trend by the Michigan supreme court to restrict the discretion of trial judges to reduce charges that, while supported by sufficient evidence, seem unduly harsh. Genesee II was decided after the final disposition of most of the cases in this study. Accordingly, the study does not indicate whether that decision is being followed in CCW cases by members of the Detroit recorder's court bench.

In addition to disregarding Genesee I, this behavior by judges at initial appearances may be in violation of Michigan General Court Rule 785.7(2), which requires that, if there is a plea agreement, it must be acknowledged on the record by the defendant, his counsel, and the prosecutor.25 Indeed, the Michigan court rules explic-
ity state that plea agreements are void and subject to mandatory re­
versal unless acknowledged by the prosecutor. 26

These initial-appearance statistics evidence an inclination on be­
half of the Michigan judiciary to dispose of CCW cases in a summary
and lenient fashion. This inclination, which as the statistics pre­
sent below make clear is apparent throughout the various stages
of the criminal process, perhaps stems from a pervasive view of
CCW as somehow a “different” or less offensive type of crime. Car­
rying a concealed weapon without a license cannot be placed into
either of the traditional criminal law categories—crime against the
person or crime against property—because the crime has no immedi­
ate, identifiable, victim. Rather, akin to many narcotics offenses,
it is a possessory crime enacted by the legislature out of fear of the
possible consequences of the activity. For this reason, it is quite
possible that judges might personally view CCW as a less serious
crime than felonies having identifiable victims, 27 a view that may en­
ter into their disposition of CCW cases. Judicial leniency may also
stem from a vague notion that an individual’s right to bear arms
somehow affects the seriousness of the act of carrying a concealed
weapon without a license.

TABLE 1
RESULTS OF PRELIMINARY EXAMINATIONS OF 464 CCW DEFENDANTS

<table>
<thead>
<tr>
<th>Case dismissed</th>
<th>Percentage</th>
<th>Number of Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Examination held, defendant bound over</td>
<td>42.2</td>
<td>196</td>
</tr>
<tr>
<td>Examination waived, defendant bound over</td>
<td>25.6</td>
<td>119</td>
</tr>
<tr>
<td>Insufficient evidence</td>
<td>11.6</td>
<td>54</td>
</tr>
<tr>
<td>Illegal search and seizure</td>
<td>7.3</td>
<td>34</td>
</tr>
<tr>
<td>Lack of jurisdiction</td>
<td>0.6</td>
<td>3</td>
</tr>
<tr>
<td>Failure of witness to appear</td>
<td>1.5</td>
<td>7</td>
</tr>
<tr>
<td>Capias</td>
<td>1.9</td>
<td>9</td>
</tr>
<tr>
<td>No record of examination</td>
<td>9.3</td>
<td>42</td>
</tr>
</tbody>
</table>

Twenty-one per cent of the CCW cases were dismissed at the
second stage of the criminal process, the preliminary examination:
11.6 per cent for insufficient evidence, 7.3 per cent for illegal
search and seizure, 28 1.5 per cent because the complaining witness

26. MICH. GEN. CT. R. 785.7(5).
28. Dismissals for insufficient evidence and for illegal search and seizure can be
failed to appear, and .6 per cent because the court lacked jurisdiction. By way of comparison, 16.75 per cent of all other felony cases during the same period were dismissed at this stage.20

A number of possible explanations exist for the higher dismissal rate for CCW cases at preliminary examinations. Negligent or intentional misconduct on the part of the police during the initial investigation or search30 and judicial suspicion that the prosecution's testimonial evidence of probable cause is perjured31 account for most illegal search and seizure and insufficient evidence dismissals. These reasons for dismissal are clearly valid. But the complicated nature of the search and seizure questions that so commonly arise in CCW cases affords the examining judge a great deal of discretion in deciding whether to bind the case over for trial. It is not clear that this discretion is being exercised in a manner consistent with the manifest state goal of reducing the incidence of firearm-related felonies.

A study conducted by the Wayne County Prosecutor in February and March of 1974 comparing the reasons given for the dismissal of CCW and narcotic cases indicates that the high dismissal rate for CCW cases is not caused primarily by a higher incidence of truly illegal searches and seizures. Both CCW and narcotics offenses are by their nature possessory, and it is reasonable to assume that dismissal rates for illegal search and seizure should be about the same for both. The statistics indicated, however, that this was not the case. Nearly 85 per cent of the CCW dismissals were for illegal

analyzed together since there is no apparent difference in what is meant by the two terms. See Boyle Interview, supra note 12. Either phrase is appropriate where the evidence is excluded because the police officer either conducted an improper search or lacked probable cause to search at all. The prosecutor's office treats these categories alike and notes on each file, "The Assistant Prosecuting Attorney does not necessarily agree with the ruling of the court: however, most cases are discretionary and not appealable."

29. See ANNUAL REPORT, supra note 1, at 10 (1973).

30. Constitutional questions concerning the propriety of searches and seizures arise during CCW prosecutions due to the possessory nature of the offense. The CCW statute requires that the weapon be "concealed," but it need not be completely hidden. It is sufficient if it is not readily observable by a person in the ordinary and usual associations of life. Therefore, detection of an offender can occur only when the weapon is observed by the officer or witness in the ordinary course of affairs or discovered incident to a lawful search based on probable cause. In the complex area of search and seizure, good faith errors on the part of the police are not uncommon. See, e.g., Chevigny, Police Abuses in Connection with the Law of Search and Seizure, 5 CIN. L. BULL. 3 (1969); LaFave, "Street Encounters" and the Constitution: Terry, Sibron, Peters, and Beyond, 67 MICH. L. REV. 40 (1968); LaFave, Search and Seizure: The Course of True Law . . . Has Not . . . Run Smooth, 1966 U. ILL. L.F. 255.

31. Even in cases of legitimate police error, the officer may not want to admit his mistake, and police testimony may be tailored to conform with well-established legal standards. See, e.g., People v. Berrios, 28 N.Y.2d 361, 270 N.E.2d 709, 321 N.Y.S.2d 884 (1971).
search and seizure, as compared to only 57 per cent of the narcotics dismissals. Moreover, a month-long study of "arbitrary dismissals," conducted by the Wayne County Prosecutor in November 1974, revealed that 10 of the 14 dismissals deemed arbitrary were CCW cases. These high dismissal-rate statistics suggest that the recorder's court bench views CCW violations as insufficiently serious to warrant the expenditure of valuable judicial time to unravel the complex fourth amendment issues often raised. Yet it is the role of the judges to decide the controversies brought before them. The dismissal of cases to avoid deciding complex issues can only be viewed as an abusive abdication of that role.

Many of the CCW dismissals might be attributed to a "docket clearing" program conducted by the recorder's court bench in an effort to reduce case loads to more manageable levels. Such dismissals frustrate the efforts of police and prosecutors, detract from the deterrent effect of the criminal statutes, and evidence a clear need for additional judges and courtrooms to handle the continually increasing case loads. Perhaps more importantly, such dismissals suggest that programs to increase the number of CCW offenders apprehended will not necessarily serve the ends of justice without a concurrent increase in the number of judges or a shift in the attitude of judges to viewing CCW as indeed a serious offense.

The stage of the criminal proceedings between the preliminary examination and the trial is the plea negotiation stage.  

32. Ninety-eight cases were dismissed at the preliminary examination; of these, 88 were dismissed because of insufficient evidence or illegal search and seizure. See Table 1 supra; note 28 supra.  
33. Internal files of the Wayne County Prosecutor, Preliminary Examination Department, Feb. and March 1974.  
34. Internal files of the Wayne County Prosecutor, Preliminary Examination Department, Nov. 1974.  
35. Although the court's role at the preliminary hearing is simply to determine whether sufficient probable cause exists to bind over the accused, see Mich. Comp. Laws §§ 766.3, 13 (1970), both societal interests in judicial economy and fundamental fairness to defendants require that the court keep its dockets running smoothly. See, e.g., ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Pleas of Guilty 37-40 (1968); Enker, Perspectives on Plea Bargaining, in U.S. Task Force on the Administration of Justice, The President's Comm'n on Law Enforcement and Administration of Justice, Task Force Report: The Courts app. A, at 112-14 (1967). In order to maintain the number of felony trials at a level where these goals can be achieved, many cases must be disposed of either by dismissal at examination or by plea negotiation before trial.  
36. Statistics for this stage are more uncertain than for other stages. Plea negotiation continues throughout the trial process, and records are often incomplete.
TABLE 2
RESULTS OF PLEA NEGOTIATIONS FOR 357 CCW DEFENDANTS
WHOSE CASES HAD NOT BEEN DISMISSED AFTER
PRELIMINARY EXAMINATION

<table>
<thead>
<tr>
<th>Plea to lesser charge offered by prosecutor</th>
<th>Percentage</th>
<th>Number of Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Attempted CCW (felony)</td>
<td>59.3</td>
<td>212</td>
</tr>
<tr>
<td>Misdemeanor</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Failure to present for safety inspection</td>
<td>2.0</td>
<td>7</td>
</tr>
<tr>
<td>Disorderly conduct</td>
<td>0.5</td>
<td>2</td>
</tr>
<tr>
<td>Possession of gun without a license</td>
<td>0.5</td>
<td>2</td>
</tr>
<tr>
<td>No reduced plea offered</td>
<td>8.7</td>
<td>31</td>
</tr>
<tr>
<td>Case dismissed</td>
<td>0.8</td>
<td>3</td>
</tr>
<tr>
<td>No record of plea negotiation</td>
<td>28.0</td>
<td>100</td>
</tr>
</tbody>
</table>

As a general policy, the Wayne County Prosecutor allows those bound over for trial on CCW charges (a felony with a 5-year maximum sentence) to plead guilty to attempted CCW (a felony with a 2½-year maximum sentence).\(^ {37}\) In the cases studied, 59.3 per cent of those bound over were offered attempted CCW by the prosecutor. Over three quarters of these (78.3 per cent, or 46.8 per cent of those bound over) accepted the offer. In 8.7 per cent of the cases, the prosecutor insisted on bringing the original charge. Generally, these were cases in which either the defendant insisted upon vindicating himself completely or the prosecutor felt that the defendant, because of his circumstances, should be prosecuted to the fullest extent of the law. In 3 per cent of the cases, the defendants were offered misdemeanors,\(^ {38}\) and in 0.8 per cent of the cases, the charges were dismissed at this stage.\(^ {39}\) The remaining cases (28 per cent) showed no record of the plea negotiation stage.\(^ {40}\)

The general prosecutorial policy of offering a reduced charge in exchange for a guilty plea stems from the inability of the prosecutor's


\(^ {38}\) Of those defendants offered a misdemeanor, 81 per cent pleaded guilty with two thirds of those receiving probation and/or fine and one third receiving suspended sentences. Over half of the guilty misdemeanor defendants had prior criminal records, including one third who had prior felony records. Charged with a misdemeanor, the defendant faces only a one-year maximum sentence and avoids the classification of "felon."

\(^ {39}\) Dismissals at the plea negotiation stage are usually given as part of a larger bargain or entered because the defendant has died, the court lacks jurisdiction, or the "ends of justice have been met."

\(^ {40}\) It is not clear why such a substantial number of cases show no record of plea negotiation. In over half of the cases, earlier guilty pleas at the initial appearance or preliminary examination or a capias may explain the absence of plea negotiation. In the remaining cases, it is possible that a conference was held, but no record kept. These cases are not lost to the remainder of the study and affect only this part of the data.
small staff to try more than a small fraction of the total cases. The practice of offering attempted CCW to those charged with CCW is particularly common because both crimes are felonies and because, as discussed below, the recorder's court bench rarely imposes a prison term on those convicted of either of the offenses. Thus, the prosecutor saves judicial resources without making substantial concessions.

In light of current sentencing patterns, there is little reason to criticize the prosecutorial policy of routinely allowing defendants originally charged with CCW to plead guilty to attempted CCW. Grounds for criticism would arise, however, if a higher sentence or a mandatory minimum sentence were imposed in CCW cases and prosecutorial plea bargaining significantly detracted from the deterrent effect of the CCW statute.

Slightly over one fourth of the cases in the study were dismissed either before or during the plea negotiation stage. Those that were not dismissed, including those in which a guilty plea was offered, reached what may be called the trial stage. Of the defendants reaching the trial stage, approximately 68 per cent pleaded or were found guilty and 7.5 per cent were found not guilty. Approximately 24 per cent of the cases reaching the trial stage were dismissed.

<table>
<thead>
<tr>
<th>Table 3</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Disposition at Trial for 348 CCW Defendants Brought to Trial</strong></td>
</tr>
<tr>
<td><strong>Percentage</strong></td>
</tr>
<tr>
<td>Conviction</td>
</tr>
<tr>
<td>CCW</td>
</tr>
<tr>
<td>Attempted CCW</td>
</tr>
<tr>
<td>Misdemeanors</td>
</tr>
<tr>
<td>Failure to present for safety inspection</td>
</tr>
<tr>
<td>Disorderly conduct</td>
</tr>
<tr>
<td>Possession of gun without a license</td>
</tr>
<tr>
<td>Acquittal</td>
</tr>
<tr>
<td>Dismissal</td>
</tr>
<tr>
<td>No record available</td>
</tr>
</tbody>
</table>

41. See Table 5 infra. However, higher sentences seem to be given for CCW than for attempted CCW. See text at note 52 infra.

42. This group includes those cases that were disposed of by plea at the initial appearance.

43. Of the 275 defendants whose cases were not dismissed at trial, 230 (83.6 per cent) pleaded guilty, 23 (8.3 per cent) had a bench trial, 8 (3.0 per cent) had a jury trial, 6 (2.1 per cent) did not appear, and records were not available for 8 (3.0 per cent).
A total of only 2.9 per cent of all cases reaching the trial level (10 cases of the beginning 464) resulted in a conviction on the original CCW charge. Convictions for attempted CCW were obtained in 53.8 per cent of the cases (187 cases), while misdemeanor convictions accounted for 10.1 per cent of all trial dispositions (35 cases).

A variety of explanations were given for the dismissals at the trial stage.

| TABLE 4 | REASONS FOR DISMISSALS OF 83 CCW CASES AT TRIAL |
|---------------------------------|---------------------------------|---------------------------------|
| Reason                          | Percentage | Number of Cases |
| Motion of prosecutor            | 3.6        | 3                |
| Illegal search and seizure      | 36.0       | 30               |
| Insufficient evidence           | 19.2       | 16               |
| Lack of jurisdiction            | 1.2        | 1                |
| Failure of witness to appear    | 4.8        | 4                |
| "Ends of justice met"           | 8.4        | 7                |
| Death of defendant              | 7.2        | 6                |
| Plea in another case            | 7.2        | 6                |
| Sentenced on another charge     | 6.0        | 5                |
| Other                           | 6.0        | 5                |

Illegal search and seizure and insufficient evidence were the reasons for over half of the dismissals. As at earlier stages, this high dismissal rate at trial suggests that the judges are dismissing CCW cases that raise complex issues in order to devote more of their time to more serious criminal violations. And again, the result presumably is that the deterrent effect of the CCW statute is thereby lessened. Eleven of the cases reaching the trial stage were terminated out of necessity, because the defendant died, the court lacked jurisdiction, or the complaining witness failed to appear.

Eleven more cases were dismissed because the defendant agreed to plead guilty to another criminal charge or because the defendant was recently sentenced for an unrelated conviction. This last group of dismissals makes good judicial sense. Because any sentence received for the CCW violation would be served concurrently with the other sentence, it would generally be an unnecessary duplication

44. The appropriate time to raise such a claim is either at the preliminary examination or in a motion to suppress made prior to trial. Trial strategy, including unwillingness to disclose defense theories before trial and knowledge about different judges' attitudes toward gun control, might well lead a defendant to wait until trial to raise an illegal search claim.

45. Responsibility for the final group must rest with the police, since the complaining witnesses in CCW cases are generally police officers.

of judicial expense to expend resources to obtain a conviction on the
CCW charge.

Seven of the cases were dismissed because the “ends of justice
[were] met” without proceeding any further in the case. These
cases were dismissed because the trial judge, in his discretion, de­
cided there no longer was any reason to prosecute the offender. A
wide variety of cases dismissed under this heading are so designated
for lack of any other appropriate explanation. Most, presumably,
are cases involving defendants not considered dangerous in which
the judge concludes that the threat of prosecution, coupled with forc­
ing the defendant through the initial stages of the criminal process,
is sufficient punishment.

In 232 of the 464 cases, the defendant either pleaded or was
found guilty.47 The over-all sentencing pattern48 for these cases was
as follows: 9.9 per cent jail or prison only; 2.1 per cent jail or prison
and probation; 6.0 per cent jail or prison, probation, and fine; 50.0
per cent probation and fine; 15.0 per cent probation only; 7.0 per
cent fine only; 9.1 per cent suspended sentence; and 0.9 per cent
capias (failed to appear for sentencing, bench warrant issued). In
short, a total of 18.0 per cent of those convicted were sentenced to
some form of confinement, while the remainder either received pro­
bation and/or a fine, or a suspended sentence.

TABLE 5

SENTENCES GIVEN TO 232 GUILTY CCW DEFENDANTS

<table>
<thead>
<tr>
<th>TYPE OF SENTENCE</th>
<th>Percentage</th>
<th>Number of Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jail or prison only</td>
<td>9.9</td>
<td>23</td>
</tr>
<tr>
<td>Jail or prison and probation</td>
<td>2.1</td>
<td>5</td>
</tr>
<tr>
<td>Jail or prison, probation,</td>
<td>6.0</td>
<td>14</td>
</tr>
<tr>
<td>and fine</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Probation and fine</td>
<td>50.0</td>
<td>116</td>
</tr>
<tr>
<td>Probation only</td>
<td>15.0</td>
<td>35</td>
</tr>
<tr>
<td>Fine only</td>
<td>7.0</td>
<td>16</td>
</tr>
<tr>
<td>Suspended sentence</td>
<td>9.1</td>
<td>21</td>
</tr>
<tr>
<td>Capias</td>
<td>0.9</td>
<td>2</td>
</tr>
</tbody>
</table>

“In Michigan all sentences run concurrently in the absence of a statute otherwise
providing . . . Accordingly, after a defendant has pled guilty to one of several
multiple charges pending against him, prosecutors generally dismiss the other charges
after the defendant has been sentenced.”

47. See TABLE 3 supra.

48. This pattern does not separate the cases according to the particular crime
involved for each defendant.
### SEVERITY OF SENTENCE

<table>
<thead>
<tr>
<th>Number of Cases</th>
<th>Length of incarceration</th>
<th>Length of probation</th>
<th>Amount of fine</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Less than or equal to 90 days</td>
<td>Less than or equal to 1 year</td>
<td>Less than or equal to $100</td>
</tr>
<tr>
<td></td>
<td>13</td>
<td>77</td>
<td>46</td>
</tr>
<tr>
<td></td>
<td>90 days to 6 months</td>
<td>More than 1 year</td>
<td>$100 to $250</td>
</tr>
<tr>
<td></td>
<td>7</td>
<td>92</td>
<td>50</td>
</tr>
<tr>
<td></td>
<td>6 months to 1 year</td>
<td>No record available</td>
<td>$250 to $500</td>
</tr>
<tr>
<td></td>
<td>4</td>
<td></td>
<td>50</td>
</tr>
<tr>
<td></td>
<td>More than 1 year</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>18</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Among felonies carrying a 5-year maximum sentence, the incidence of incarceration during the period studied was lowest for CCW violations.\(^{49}\) Convictions for receiving stolen property resulted in prison or jail sentences in 33.9 per cent of the cases, while in cases of larceny over $100, 34.5 per cent of the convicted defendants were imprisoned.\(^{50}\)

Not only was the imposition of incarceration relatively infrequent, but, when the sentence was a jail or prison term, the prescribed period was usually quite short. Only 7.2 per cent of all convicted defendants (18 total) were sentenced to a prison term exceeding 1 year, while 4.7 per cent (11 total) received between 3 months and 1 year and 5.5 per cent (13 total), less than 90 days.\(^{51}\) This sentencing pattern seems particularly lenient in light of the fact that fewer than half of those convicted were first offenders, while over 36 per cent had prior felony records.

\(^{49}\) See State of Michigan Dept. of Corrections, Criminal Statistics 4-7 (1973) [hereinafter Criminal Statistics]. The statistics presented here are for the entire state. There is no reason to suspect that there would be a significant difference between the state statistics and those from Detroit. The incarceration rate for CCW cases for the state was 19.7 per cent. \textit{Id.} at 4. The rate in Detroit was 18.0 per cent. \textit{See Table 4 supra.}

\(^{50}\) Criminal Statistics, \textit{supra} note 49, at 4.

\(^{51}\) The over-all sentencing pattern for the entire state indicates that those convicted for CCW outside of Detroit received longer sentences. Only 33 per cent of those sentenced to jail or prison in the whole state, including Detroit, received 1 year or less. \textit{Id.} at 11.
TABLE 6

Prior Criminal Records of 232 Convicted CCW Defendants

<table>
<thead>
<tr>
<th>Category</th>
<th>Percentage</th>
<th>Number of Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>First offender</td>
<td>46.1</td>
<td>107</td>
</tr>
<tr>
<td>Previous misdemeanor</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Gun-related</td>
<td>2.1</td>
<td>5</td>
</tr>
<tr>
<td>Not gun-related</td>
<td>12.5</td>
<td>29</td>
</tr>
<tr>
<td>Previous felony</td>
<td></td>
<td></td>
</tr>
<tr>
<td>With dangerous weapon</td>
<td>13.3</td>
<td>31</td>
</tr>
<tr>
<td>Without dangerous weapon</td>
<td>16.4</td>
<td>38</td>
</tr>
<tr>
<td>CCW</td>
<td>6.0</td>
<td>14</td>
</tr>
<tr>
<td>Another felony pending</td>
<td>2.6</td>
<td>6</td>
</tr>
<tr>
<td>No record available</td>
<td>0.9</td>
<td>2</td>
</tr>
</tbody>
</table>

The leniency of the sentences imposed in the cases studied is illustrated by the sentencing pattern for attempted CCW, which accounted for over 80 per cent of the convictions in the sample. Although attempted CCW is a felony carrying a maximum sentence of 2½ years, only 17.8 per cent of the guilty defendants received a jail or prison term, and only 6 per cent received a term equal to or exceeding 1 year. Over 73.6 per cent of the cases resulted in probation and/or a fine only, and 4 per cent of the defendants received a suspended sentence. Of the defendants who were sentenced to probation and/or a fine, 46.5 per cent had prior criminal records and 28.5 per cent had been previously convicted of a felony.

Sentence leniency extended to those convicted of CCW misdemeanors (14.4 per cent of all convictions). None of the defendants convicted of a misdemeanor was incarcerated, while 29.4 per cent of those convicted had prior criminal records.

There are no easily ascertainable explanations why penalties imposed for CCW violations are significantly milder than those imposed for violations of felonies carrying the same maximum sentence. Obviously, the attitude of the particular judge plays an important role in determining the sentence in each case. Judge Colombo of the recorder's court bench, for example, contends that many of those arrested for CCW are honest citizens resorting to a necessary means of self-defense and that harsh penalties are inappropriate, especially where the violator is a first offender.

52. This figure includes those defendants with another felony charge pending at the time of trial.

53. Interview with Judge Robert Colombo, Judge, Recorder's Court of the City of Detroit, in Detroit, March 1974. The view that most first offenders should not receive harsh penalties is widely accepted throughout the criminal court system. It is felt that in most instances an individual deserves a second chance and that the high...
Doubtless there are many individuals charged with CCW whose reasons for carrying a weapon are noncriminal in nature.\textsuperscript{64} Sentencing based on the culpability of the offender, the criminality of the conduct, and the offender's prospects for rehabilitation would result in lenient treatment for such offenders and, in general, may explain the high dismissal rate and over-all sentence leniency in CCW cases. Yet, it must be remembered that the CCW statute was passed to deter conduct that could lead to criminal actions, rather than to punish acts that are themselves inherently criminal. Because of this relatively unusual statutory purpose, general sentencing considerations are less applicable in CCW cases. To comport with the predominantly deterrent function of the CCW statute, sentencing should be conducted to maximize the deterrence of CCW violations, and hence, the deterrence of firearm-related felonies.

II. THE FINDINGS IN LIGHT OF DETERRENCE THEORY

The dispositional statistics set forth in part I make clear that CCW is being treated as a low-priority offense by those who administer the criminal justice system in Detroit. It is equally clear that the present enforcement of the CCW statute has not decreased the incidence of firearm-related felonies in Detroit.\textsuperscript{55} Between 1972 and 1973, the homicide rate in the city of Detroit rose 11.8 per cent\textsuperscript{65} while the national rate increased only 4.5 per cent.\textsuperscript{66} The incidence of aggravated assault increased 8.2 per cent in Wayne County during the same period\textsuperscript{67} compared to a 6.2 per cent rise nationally,\textsuperscript{68} although the occurrence of armed robbery remained virtually constant for both.\textsuperscript{69}

\textsuperscript{54}The fact that so many of the individuals charged with CCW have prior \textsuperscript{criminal records, see TABLE 6 supra, however, suggests that Judge Colombo's view of CCW offenders as "honest citizens" is at best true of only a minority of the offenders. See generally S. Krantz, The Law of the Corrections and Prisoners' Rights 24-29 (1973). In Michigan, as in many other jurisdictions, provision is made for harsher sentences for repeat offenders. Mich. Comp. Laws § 769.10 (1970). See note 111 infra.

\textsuperscript{55}See Edwards, supra note 1, at 1341. One 1969 study reported that Michigan had the fourth strictest gun control regulations in the nation. Geisel, Roll & Wettick, The Effectiveness of State and Local Regulations of Handguns: A Statistical Analysis, 1969 DUKE L.J. 652-54.

\textsuperscript{56}Detroit Police Dept., Annual Report 45 (1973).

\textsuperscript{57}FBI, Uniform Crime Reports 1 (1973) [hereinafter FBI Crime Reports]. A firearm was the murder weapon in 67 per cent of these cases. Id. at 9.

\textsuperscript{58}Michigan State Police, Uniform Crime Reports 93 (1973) [hereinafter Michigan Crime Reports].

\textsuperscript{59}FBI Crime Reports, supra note 57, at 1.

\textsuperscript{60}Compare Michigan Crime Reports, supra note 58, at 93, with FBI Crime Reports, supra note 56, at 1. A study conducted by the Law Enforcement Assistance Administration for 1973 indicated that Detroit had the highest violent crime rate...
This section considers whether the plausible justifications for lax enforcement of the CCW statute outweigh the societal costs inherent in allowing individuals to carry concealed weapons with relative impunity. Upon concluding that they do not, a model of deterrence is constructed and used to critique the current sentencing scheme. In part III, a new enforcement scheme is suggested that is more consistent with the teachings of deterrence theories and less susceptible to subversion by those administering the criminal justice system who disagree with the societal assessment of the severity of the offense.

A. Justifications for Leniency

The two principal reasons for treating the average CCW offender leniently are that the offense is "victimless" and that individual interests in carrying weapons for self-defense mitigate the criminality of the act. Neither rationale, however, can withstand examination.

"Victimless" concealed weapon offenses in the aggregate generate significant costs, including accidental injuries, homicides, and other crimes involving firearms. Most homicides today are products of emotional or drunken altercations rather than planned slayings.61 A large majority are committed against a friend, relative, lover, or spouse of the offender.62 Many result from domestic quarrels. It is arguable that, but for the availability of a firearm, many of these intentional homicides would not have occurred. Indeed, "[t]he basic intent of the [Michigan] legislature as indicated in the concealed weapons statute was that weapons should not be carried where they might be used to take lives."63 Even clearer costs to society from "victimless" concealed weapon offenses are the accidental injuries and deaths that result from the presence of firearms.64

61. See Zimring, supra note 3, at 723. That article was based on data from 1967 Chicago police reports.


64. Whether guns cause violence, contribute to it, or are merely coincidental to it has long been debated. After extensive study we find that the availability of guns contributes substantially to violence in American society. Firearms, particularly handguns, facilitate the commission and increase the danger of the most violent crimes—assassination, murder, robbery and assault. The widespread availability of guns can also increase the level of violence associated with civil disorder. Firearms accidents, while they account for only a small percentage of all accidents, cause thousands of deaths and injuries each year.

To ESTABLISH JUSTICE, supra note 2, at 169.

A 1972 report found that in 1966 there were 23,000 recorded firearm accidents in the United States and that the rate of accidental firearm death by region paralleled the geographic pattern of firearm ownership. See G. Newton & F. Zimring, STAFF REPORT TO THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIO-
Lax enforcement of the CCW statute presumably causes a general feeling of immunity from prosecution among present and prospective violators and decreases the likelihood that individuals will be deterred from carrying weapons. Of course, the cost to society from lax enforcement of the CCW statute probably is not significant with regard to persons who commit premeditated crimes, since the behavior contemplated by such persons is usually prohibited by a statute that has a greater penalty and deterrent effect than does the CCW statute. The only ameliorative impact of stricter enforcement of the CCW statute against such individuals would be the preventive, incapacitative effect of confiscating the weapon and temporarily removing the offender from the street. The cost of treating CCW as a low priority offense may be much more dramatic, however, with regard to individuals who do not carry weapons with any definite criminal purpose in mind. Quite often the motivation of such persons is merely peer group approval. When confronted with emotionally charged situations, they may use weapons to vent their emotions when they would not otherwise have done so had weapons not been readily available.

It would seem, therefore, that there exists a significant danger in allowing even individuals without any premeditated criminal intent to carry firearms. Indeed, findings from a recent study support the proposition that, but for the availability of firearms, the number of homicides committed in emotionally charged situations would be much lower. As more persons carry weapons, a firearm culture arises, which in turn encourages others to obtain weapons and increases, presumably, the frequency of violent firearm crimes. In short, CCW violations in the aggregate are far from costless, and laxity in the enforcement of the CCW statute augments those costs.

The contention that the severity of a CCW violation is mitigated by the offender's interest in self-defense is no more forceful in justifying the current lax treatment of CCW cases than is the contention that CCW cases are victimless. One obvious flaw in the contention is the fact that guns purchased and carried for self-defense are frequently used offensively. Following the riots of 1967, the yearly issuance of gun permits in Detroit quadrupled, presumably because people felt a greater need to defend themselves. Perhaps as a consequence of this buildup of handguns, between 1965 and 1968 homicides committed with firearms increased 400 per cent (compared to only a 30 per cent increase in homicides committed with other

— Firearm Culture: The Cost-Benefit Analysis of Firearms Ownership

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weapons), accidental deaths from firearms tripled, and firearm robberies increased in frequency twice as fast as unarmed robberies.67

A second problem with the self-defense contention is that it is based on, and in fact sanctions, an exaggerated view of the benefits derived from carrying a weapon for self-defense.68 The chance of being murdered is slight. To put that chance in perspective, it is approximately one fifth as great as the chance of being killed in an auto accident.69 Moreover, most murders, as indicated above, are committed during sudden quarrels with friends, relatives, or lovers. In these cases, the victim presumably feels little need for self-protection and, if carrying a weapon, will often have set it aside. Even in cases of premeditated attack or robbery, most attackers move with such dispatch that the victim has insufficient time to respond. In cases where the victim does have time to react, he will often have time to escape or to use other, less deadly means of self-defense. And, as a general rule, state laws require that these lesser means be employed if possible.70

In short, the self-defense justification for lax enforcement of the CCW statute is unpersuasive since few situations arise in which an individual both has time to use a handgun in self-defense and is legally justified in doing so.71 As the National Commission on the Causes and Prevention of Violence concluded in its chapter on firearms: "The evidence is convincing . . . that the armed segment of our population is paying a heavy price in accidents and in the shooting of family members, friends and acquaintances for whatever deterrent effect their possession of self-defense firearms may be providing."72

B. A Model of Deterrence

The formulation of a sentencing scheme for CCW offenders that is more consistent with the underlying purpose of the CCW statute may begin with a survey of the acknowledged precepts of deterrence theory. The analysis that follows is based upon the model proposed by Zimring and Hawkins.73 Deterrence, the foundation of virtually

67. To Establish Justice, supra note 2, at 171.
68. See Edwards, supra note 1, at 1335.
69. Id.
71. Deadly force may be used legally in self-defense only as a last resort in order to repel an attacker who is realistically threatening to use deadly force. See W. LaFave & A. Scott, Criminal Law 392-93 (1972).
72. To Establish Justice, supra note 2, at 175.
73. F. Zimring & G. Hawkins, supra note 65. It is a basic assumption of this Note that deterrence is a viable means of crime prevention and that unlawfully carrying a firearm can be deterred by proper enforcement of an adequate provision prohibiting such behavior.
all modern criminal justice systems,\textsuperscript{74} is a process whereby some harm, loss, deprivation, or pain is threatened for noncompliance with specific commands.\textsuperscript{75} The degree to which these threats are effective in inducing compliance with the commands is determined by the response of the threatened audience of potential offenders.\textsuperscript{76}

Deterrence theory postulates that behavior can be controlled only if the threats employed are adequate and credible.\textsuperscript{77} A threat is adequate if it is sufficiently stringent and credible if the threatened punishment is applied sufficiently often that the potential violators know that the punishment will be applied to them. The level of threat that is sufficiently adequate and credible to deter varies among offenses according to three factors: the degree to which the average offender responds to threats and changes in the severity and certainty of the threats; the value of the benefit that the offender receives, or perceives that he receives, from offending; and the probability that an offender will be sanctioned for offending. To determine an appropriate sanction for CCW offenders, these three factors need to be examined in detail.

1. \textit{Offender Responsiveness to Threats}

Whether the average offender for a particular type of offense responds to threats depends, in turn, upon the nature of the offense, the context in which it occurs, and the characteristics of the average offender. An offender is more likely to respond to threatened sanctions if the behavior he engages in is \textit{not} a breach of the prevailing moral code.\textsuperscript{78} Individuals who act in disregard of existing moral precepts are subjected to considerable opprobrium. The prospect of public condemnation deters most individuals who consider committing an immoral offense so that only individuals who are anti-social or who act irrationally or impulsively actually commit the of-

\textsuperscript{74} Id. at 1; Morris, \textit{Impediments to Penal Reform}, 33 U. Chi. L. Rev. 627, 631 (1966).

\textsuperscript{75} See F. Zimring \& G. Hawkins, supra note 65, at 91.

\textsuperscript{76} Id. At least one empirical study has applied deterrence theory and found that crime rates varied inversely with the probability of apprehension and punishment by imprisonment and inversely with the length of imprisonment. See Ehrlich, \textit{The Deterrent Effect of Criminal Law Enforcement}, 1 J. Legal Studies 259, 272 (1972).

\textsuperscript{77} See generally F. Zimring \& G. Hawkins, supra note 65, at 160-72, 194-209.

\textsuperscript{78} See id. at 120-21. Cf. Andenaes, \textit{Deterrence and Specific Offenses}, 38 U. Chi. L. Rev. 537, 553 (1971). Zimring and Hawkins contrast homicide and illegal parking to illustrate this point. With regard to homicide, they hypothesize that only .5 per cent of those tempted to commit murder are deterred by legal threats while 99 per cent are restrained because of such factors as a personal abhorrence of killing and commitments to religious and ethical value systems. F. Zimring \& G. Hawkins, supra, at 133. With regard to parking violations, however, they state that only 5 per cent of those tempted to violate are restrained by extra-legal considerations, while 80 per cent are deterred by the possibility that a fine will be imposed. \textit{Id}.
fense. Such individuals are generally least likely to respond to additional sanctions imposed by a legal system. In contrast, those individuals who contemplate committing an offense that is morally neutral are apt to be constrained only by the prospect of a legal sanction. Changes in the severity and certainty of the sanction for a morally neutral offense are therefore likely to have measurable effects in terms of the number of individuals who commit the offense. In short, offenders committing offenses that are not considered immoral are more likely to respond to threatened sanctions than are those who commit offenses that are considered immoral. 79

An offender is also more likely to respond to threatened sanctions if the offense he commits is one commonly committed in an unemotional context. Decisions made quickly in response to sudden impulses are less susceptible to the influence of legal and extra-legal threats than are carefully planned acts. 80 Accordingly, offenders who commit offenses that require some planning, or that are committed knowingly and in a rational state of mind, are more likely to be influenced by threats of undesirable consequences.

A final and related factor affecting the responsiveness of an offender to legal sanctions is whether the offender is by nature a rational decisionmaker. In a detailed analysis, Zimring and Hawkins have concluded that an offender is most easily deterred (1) if he is future-oriented rather than present-oriented, (2) if he is pessimistic rather than optimistic, (3) if he is a risk avoider rather than a risk preferrer, (4) if he is reflective rather than impulsive, and (5) if he is normal rather than neurotic. 81 To this list might be added whether or not the individual is strongly socialized. 82

When considered in light of these factors, the average CCW offender appears to be relatively responsive to the threat of sanctions and changes in the severity and certainty of sanctions. Because carrying a concealed weapon does not, without more, cause injury to other persons, it seems likely that CCW is not viewed by most people as an immoral offense. Moreover, except in situations where a firearm is negligently left in clothing or in an automobile, it is reasonable to assume that carrying the weapon is an intentional act of the off-

79. Zimring and Hawkins conclude that
where a threatened behavior is considered to be a serious breach of society's moral code, the higher rate of compliant behavior on the part of the strongly socialized citizen can be attributed mainly to his sense of right and wrong rather than to his special sensitivity to the negative aspects of threatened consequences. When a threatened behavior is considered a less drastic breach of the moral code, his threat sensitivity may play a greater role.

F. ZIMRING & G. HAWKINS, supra note 65, at 120-21.

80. See id. at 106-08.

81. See id. at 98-111.

82. See id. at 119-21. Socialization is a nonlegal factor that is probably an adequate deterrent for most citizens.
fender based on "'rational' considerations of gain or loss." Application of the final factor to the average CCW offender is more difficult because, presumably, CCW offenders differ considerably in their personality traits. It is likely, however, that at least some CCW offenders are relatively reflective, future-oriented, risk averse, and nonneurotic.

2. Average Perceived Benefit from Offending

Whether a threatened sanction is sufficiently adequate and credible to deter a certain type of conduct also turns on the average offender's perceived benefit from offending. The validity of this proposition is easily shown by comparing acts of theft and violations of parking ordinances. The individual violating a parking ordinance generally profits little from his violation. He may save the money it would cost to rent a parking space, or the time it would take to find a proper place to park. The individual committing a theft generally benefits or expects to benefit a great deal more from his criminal act. The prospective violator of a parking ordinance usually will be deterred by the threat of a small fine. The same sanction, however, even if certain to be imposed, is unlikely to deter the potential violator of a theft statute.

The perceived benefit that the average CCW offender receives from offending varies in value in most cases somewhere between the benefit received by the parking ordinance violator and the benefit received by the thief. The offender who carries a concealed weapon for no particular purpose other than to create a general sense of security would probably forgo offending in lieu of paying a $100 fine or serving any time in jail or prison. The offender who carries a weapon out of a clearly perceived need for self-defense may view his benefit from offending as being considerably higher. While comparisons are difficult, it is probably accurate to assume that the average CCW offender benefits somewhat less from his offense than does the thief, who receives tangible, monetary benefits, and the individual committing a crime of violence, who receives appreciable psychological benefits.

84. See generally Ehrlich, supra note 76, at 261-63.
85. The individual who carries a concealed weapon with a fixed criminal design in mind probably benefits more from his entire criminal episode than does the CCW offender without any definite criminal goal. For purposes of determining what type of sanction is adequate to deter CCW offenders, however, it seems appropriate for two reasons to consider the benefit received by the offender who carries a weapon without design rather than the benefit received by the offender with a particular criminal goal in mind. First, the primary purpose of the CCW statute is to deter the carrying of weapons that might be used in emotionally charged situations rather than to deter weapon-carrying by those individuals with definite designs to commit specific...
3. **Probability of Sanction Imposition**

To be an effective deterrent, a sanction must impose a detriment on the offender at least as great as the benefit received by the offender from offending, for if the sanction is less, the offender can offend, suffer the sanction, and still register a net gain. If a sanction is imposed on every offender, it can be an effective deterrent if it is just slightly greater than the benefit received by the average offender from offending.

If a sanction is not imposed on every offender, however, whether because the offender is not apprehended, is not convicted, or receives lenient judicial treatment, the sanction must be considerably greater than the average offender's benefit from offending to serve as a deterrent.86 In deciding whether to offend, a rational offender discounts the threatened sanction by the probability that it will be imposed. To use a simple example, assume an offender benefits $5 from offending. A $10 sanction will deter him if it is certain to be imposed. If the sanction is imposed on only one fifth of all offenders, however, the offender will view his expected sanction as being only $2 and will not be deterred. Accordingly, for a sanction to be an effective deterrent it must be greater than the average offender's benefit from offending after being discounted by the probability of its imposition.

Presumably, most CCW offenders are not apprehended because CCW is a possessory crime that is extremely difficult to detect.87 Thus, a sanction must be considerably larger than the average CCW offender's benefit from offending if it is to deter with any degree of effectiveness. The sanction must be larger still if, as is apparently true at present, many CCW offenders have the charges against them dismissed. If an appreciable proportion of apprehended offenders are released without being legally sanctioned, potential offenders will further discount the severity of the sanction in deciding whether to offend because they will factor in the prospect of having charges against them dropped.

Before proceeding, it seems appropriate to summarize the deterrence concepts just discussed. The deterrence function of a particular statute is implemented only if the sanction imposed on those who violate the statute is sufficiently adequate and credible to deter potential offenders. Whether a threatened sanction is adequate and credible turns on the responsiveness of the potential offender to violent crimes. Deterrence of the latter type of activity is a task properly left to the substantive statute proscribing the particular crime in which the CCW offender intends to engage. Second, the sanction for violation of the CCW statute would be well above the adequacy level if it were set at the level at which those intending to commit violent crimes would be deterred.

86. See generally Ehrlich, supra note 76, at 265-67.
87. See note 30 supra.
threats, on the average offender's benefit or perceived benefit from offending, and on the probability that an individual committing the offense will be sanctioned. The responsiveness of CCW offenders to threats appears to vary, but in general is probably high compared to those who commit violent crimes. The average CCW offender's perceived benefit from offending is significant (particularly for offenders with clearly felt needs to protect themselves), but in most cases is probably much less than the benefit received by the individual who commits a crime of violence or theft. Finally, the chance that a CCW offender will be apprehended is slight. And, currently, slightly over half of those individuals apprehended for carrying a concealed weapon without a license are released without having a legal sanction imposed. Because of the ease with which police can in most cases determine whether an apprehended individual has committed the offense, most of the individuals released, presumably, were offenders.

Before attempting to use these conclusions to construct a sentencing scheme, it seems beneficial to critique the assumption that violations of the Michigan CCW statute should be punished, if at all, only by fine, probation, or both. As the data in part I indicate, this assumption currently prevails among those charged with the enforcement of the criminal justice system in Detroit.

C. The Deterrent Impact of Fines and Probation

An individual convicted of a criminal offense is subjected to a varying amount of public condemnation, depending on the type of the offense, the severity of the sentence, and the social class of the offender. This condemnation is part of the sanction for committing an offense and must be taken into account in determining whether a particular legal sanction is sufficient to deter potential offenders. It is the sum of the legal and extra-legal sanctions that the potential offender will consider in deciding whether to offend.

Because CCW is a morally neutral offense, the opprobrium associated with a conviction probably varies considerably as the severity of the sentence varies. Thus, if an individual convicted of CCW receives a suspended sentence or a small fine, his criminal act will probably be viewed as a minor infraction, and he will accordingly not be subjected to considerable condemnation. If the offender receives a more severe sentence, society may conclude that his criminal behavior has been more significant and may consequently condemn him to a greater extent. If an offender is imprisoned, the condemnation takes on a new dimension because of the severe stigma that arises from the mere fact of imprisonment.88

88. See F. ZIMRING & G. HAWKINS, supra note 65, at 177-78.
Because it triggers little public condemnation, a fine is a relatively ineffective sanction for the commission of a morally neutral offense. If an offense not inherently immoral is regularly punished only by a fine, “both the offender and the authorities may come to view the fine as the ‘price’” of engaging in the unlawful behavior.\textsuperscript{89} Thus, those who pay the price often feel no moral contriteness from having committed the offense, and those who collect the fine often attach less moral significance to the offense than if other forms of punishment had been used.\textsuperscript{90} In a recent study conducted by the Arizona State Legislature Criminal Code Revision Commission, a cross-section of a community was polled to ascertain what aspects of the criminal law system posed the greatest threats to them. Out of sixteen possible responses, the threat of a fine ranked fifteenth, the threat of probation ranked eleventh, and the threat of incarceration, third.\textsuperscript{91} In short, the commission of a morally neutral offense that is punished solely by a fine engenders few extra-legal sanctions. Consequently, the fine must be large in amount to deter potential offenders effectively.

The relative ineffectiveness of a fine as a sanction is compounded by the fact that the deterrent effect of a fine varies according to the financial means of the potential offender.\textsuperscript{92} A fine may have little deterrent effect on indigents both because indigents often fail to pay fines and because bench warrants generally are not issued for failure to pay a fine.\textsuperscript{93} A small fine may have its greatest effect on individuals in low income categories. A larger fine may not deter such individuals to a greater extent because they will be unable to pay it. Only a substantial fine is apt to have much of a deterrent effect on wealthy offenders.

In light of the characteristics of the CCW offense and CCW offenders, and in light of the problems with using a fine as a deterrent, it is reasonably clear that a fine alone cannot adequately deter the commission of CCW offenses. Because CCW is a relatively neutral offense in moral terms, extra-legal sanctions can be virtually ignored in determining the level at which the fine must be set in order to deter effectively.\textsuperscript{94} To deter, therefore, a fine must be set so that when discounted by the probability of imposition it exceeds the aver-

\textsuperscript{89} Id. at 176.
\textsuperscript{90} Id.
\textsuperscript{91} Arizona State Legislature Criminal Code Revision Commn., Criminal Justice System Research 230a (n.d.). This study began in 1974.
\textsuperscript{92} See F. ZIMRING & G. HAWKINS, supra note 65, at 178.
\textsuperscript{93} Boyle Interview, supra note 12.
\textsuperscript{94} There will of course be some potential offenders deterred by the extra-legal sanctions flowing from a CCW conviction. But most potential offenders are probably those who contemplate committing the offense and whose moral beliefs do not bar them from doing so.
age offender's benefit from offending. While, as noted above, the
average CCW offender's perceived benefit from offending varies, it
is far from de minimis. For purposes of analysis, that value can be
conservatively set at $100 per year. The chances of nonapprehen-
sion are very high because CCW is a possessory crime that is difficult
to detect. Accordingly, we can estimate that roughly 10 per cent of
those individuals who carry a concealed weapon without a license
at some time during the year are apprehended.

The above model of deterrence suggests, using these figures,
that the average CCW offender would be deterred from committing
CCW during the course of a year by the prospect of a $1000 fine. This
calculation assumes, however, that the average offender is com-
pletely rational in deciding whether to offend and that all offenders
apprehended are sanctioned. Because neither of these assumptions
is true, the $1000 figure must be raised even higher; in the absence
of concrete data, a figure of $2000 can be used. But there are fur-
ther problems. To state that the average offender would be de-
terred by a $2000 fine means only that half of the potential offenders
would be deterred by the fine and half would not. The half that
would not be deterred would probably include those potential of-
fenders who are the best off financially, since many such potential
offenders would not accept $100 in lieu of offending, and since such
offenders are probably apprehended less frequently than average.

The most significant problem with a $2000 fine is that indigent
and low-income offenders will be unable to pay it and may therefore
not be deterred by it at all: A potential offender who can pay no
more than $200 will be deterred by the prospect of a $2000 fine
little more than by the prospect of a $200 fine. If that offender
benefits $100 from offending per year, he will be deterred by a fine
only if he faces a 50 per cent chance of being apprehended and sanc-
tioned in a given year. If his chance of being sanctioned is only
10 per cent, however, it may be that no fine will deter him because
he will pay only $200 no matter what the amount of the fine. More
generally, it seems true that most potential CCW offenders who can-
not pay a fine of $2000 will not be deterred by a fine of any size.
Many if not most CCW offenders are presumably in this category.

95. According to Zimring and Hawkins, three conditions must be met for a fine to
serve its purpose adequately: "First, the fine must be at least sufficient to outweigh
the value of the behavior . . . . Second, it must be sufficient to allow for the fact
that, in considering the present value of the prospect of future loss, a discount is
commonly implicit in the postponement of the consequences. Third, it must be
sufficient to offset the perceived chances of nonapprehension." F. ZIMRING & G.
HAWKINS, supra note 65, at 176.

96. Actual fines imposed in the CCW cases studied ranged from less than $100 to
$500. See note 48 supra.

97. There are, however, no public records on the extent to which fines are
actually paid.
In sum, a $2000 fine for violation of the CCW statute would probably deter fewer than half of the potential offenders. A larger fine would add to the number deterred, but it would not effectively deter the large number of CCW offenders who are indigents or in low-income categories, who act irrationally, or who carry a weapon out of a strongly perceived need for self-defense.

Probation is probably somewhat more effective than a fine in terms of its deterrent impact, but it is still apt to be insufficient to stem the rise in firearm-related felonies committed in emotionally charged situations. The increased efficacy of probation stems first from the fact that a more deleterious stigma attaches to those placed on probation than to those simply fined and second from the fact that probation affects indigent and low-income offenders to a greater extent than does a fine. But the opprobrium engendered by the imposition of probation is still relatively slight when the offense committed is one, like CCW, accompanied by no real overtones of immorality. Moreover, the adverse impact of probation in terms of deprivation of liberty and invasion of privacy is minimal for cooperative offenders. Generally, the imposition of probation warns an offender that more serious sanctions will be imposed for further violations. For CCW offenders this warning is currently weakened by the fact that those convicted of CCW who have prior criminal records are not subjected to more serious legal sanctions.

Although generalizations in the area of deterrence are difficult to make, it is probably true that the discounted threat of probation operates as an effective deterrent only against those potential CCW offenders who view a criminal conviction of any sort as imposing unacceptable social costs and who rationally act upon that view.

III. A PROPOSED SENTENCING SCHEME

The principal shortcoming of the current sentencing pattern of CCW offenders is that it inadequately triggers the extra-legal sanctions that could be brought to bear upon CCW offenders. A second shortcoming is that a low proportion of apprehended offenders are legally sanctioned, which means in turn that a higher legal sanction must be imposed on those actually sanctioned to deter potential offenders.

A sentencing scheme that would materially mitigate these shortcomings without punishing offenders unduly is a scheme requiring the imposition of a five-day minimum jail sentence on all individuals convicted of CCW or attempted CCW. A five-day jail term, from 98.

98. See generally S. Krantz, supra note 53, at 46-54.

99. The Massachusetts CCW statute was amended in 1974 to provide for a one-year mandatory minimum sentence. MASS. GEN. LAWS ANN. ch. 269, § 10(a) (Supp. 1974). The general impact of this change has not yet been ascertained, but one
the offender's point of view, involves the "loss of freedom to act and make choices, deprivation of the opportunity to make money, sexual deprivation, invasion of privacy, rigid discipline, and living conditions far below the ordinary standards of society." The threat of incarceration operates with equal effectiveness for both the rich and the poor and should in general deter most potential CCW offenders.

The principal attribute of such a sentencing scheme is that it would make better use of extra-legal sanctions than does the current sentencing pattern. Incarceration, more than other forms of punishment, generally carries with it significant measures of social reprobation. As Zimring has remarked: "Imprisonment involves demotion to the socially depressed and disapproved status of prisoner or convict, and the label is likely to remain longer than the sentence of imprisonment." Thus, the infamy flowing from imprisonment is likely to be much greater than the infamy flowing from a fine or probation; this phenomenon has the two-fold beneficial effect of increasing the extra-legal sanctions on the offender and sharpening public awareness of the seriousness of the offense.

A mandatory jail sentence, if conscientiously applied by judges to all CCW and attempted CCW offenders, would increase the number of offenders punished and thereby increase the deterrent effect of the statute. Moreover, it would do so without increasing the punishment imposed on those offenders who currently receive fairly stiff punishments. A further advantage of the five-result was a marked increase in firearm registration. The first day the statute was in effect, over 700 firearms were registered in Boston alone. Boston Globe, April 1, 1975, at 1.

The Michigan legislature has recently enacted a statute, Enrolled House Bill No. 5073, 78th Legislature (1976), to add the following section to Mich. Comp. Laws ch. 750:

Sec. 227b. (1) A person who carries or has in his possession a firearm at the time he commits or attempts to commit a felony, except the violation of section 227 or section 227a, is guilty of a felony, and shall be imprisoned for 2 years. Upon a second conviction under this section, the person shall be imprisoned for 5 years. Upon a third subsequent conviction under this section, the person shall be imprisoned for 10 years.

(2) The term of imprisonment prescribed by this section shall be in addition to the sentence imposed for the conviction of the felony or the attempt to commit the felony, and shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the felony or attempt to commit the felony.

(3) The term of imprisonment imposed under this section shall not be suspended. The person subject to the sentence mandated by this section shall not be eligible for parole or probation during the mandatory term imposed pursuant to subsection (1).

The act becomes effective on Jan. 1, 1977. Enrolled House Bill No. 5073, § 2. It should be noted that the CCW felony, Mich. Comp. Laws Ann. § 750.227 (Supp. 1975), is specifically excluded from the mandatory sentence imposed by this bill.

100. F. ZIMRING & G. HAWKINS, supra note 65, at 183.

101. Id. at 185.

day minimum sentence is that it would encourage police to arrest offenders and encourage prosecutors to pursue cases they might otherwise have dismissed. Many CCW offenders do not need a heavy sentence, yet do need to be punished in some noteworthy, exemplary manner. If a policeman or prosecutor realizes that judges will deal with such offenders by either sentencing them severely or dismissing the charges against them, the policeman or prosecutor may decide not to commence the case. If judges sentence such offenders to five days in jail as a general practice, police and prosecutors who realize the need to combat firearm-related felonies might be encouraged to follow through on otherwise marginal cases.

Various commentators since the beginning of the nineteenth century have adopted the view that all crime would be eliminated if punishment could be made more certain. One commentator has argued that "[t]he effectiveness of a deterrent is derived less from its severity than from its certainty." While these contentions are difficult to prove or disprove, a number of recent empirical studies do indicate that the certainty of some punishment is capable of exerting at least a mild impact on the crime. Ehrlich has found support for his thesis that "offenders, as a group, respond to opportunities (cost and gains) available to them in legitimate and criminal activities in much the same way that those engaged in strictly legitimate activities do as a group." He asserts that prison sentences deter crime because they increase the cost of crime. Mandatory minimum sentences increase that deterrent effect when employed in lieu of other measures taken against the criminal that cost him less. Sociologists have "found that fear at relatively low levels may produce increased attitude changes," whereas high levels of fear may increase resistance to persuasion. The fear of a five-day imprisonment term should suffice to deter most prospective violators without causing a "forbidden fruit" effect.

106. Ehrlich, supra note 76, at 274.
107. Id. at 262.
108. See Berkowitz & Cottingham, The Interest Value and Relevance of Fear Arousing Communication, 60 J. ABNORMAL & SOC. PSYCH. 37, 42 (1960), cited in F. Zimring & G. Hawkins, supra note 65, at 152.
First offenders would be most affected by the mandatory minimum sentence. The experience of five days in prison should be sufficiently unpleasant to raise severe doubts in the offender's mind about further criminal activity. At the same time, the sentence should be sufficiently brief that many of the negative aspects of incarceration would not have had an opportunity to criminalize the individual.\textsuperscript{110}

The five-day jail sentence is, of course, only a minimum. Offenders with prior criminal records may require a more severe sanction, which judges remain free to impose up to the statutory maximums.\textsuperscript{111}

The credibility of a sanction turns not only on the certainty with which it is imposed but also on the effectiveness of the communication of the threat to the public.\textsuperscript{112} It seems reasonable to assume that some people may be unaware of the illegality of certain behavior, such as carrying a concealed weapon, that is not inherently immoral. At a minimum, potential offenders must be aware that the behavior is prohibited and that violations may be punished. It therefore might prove useful for those who administer the criminal justice system in Detroit to initiate a campaign to educate the public about the costs and benefits associated with firearm ownership. Information could be furnished concerning gun registration, requirements for obtaining a permit to carry a concealed weapon, and hunting regulations. Yearly statistics could be provided pointing out the number of criminal homicides, accidents, and suicides committed with firearms. Further, the various criminal statutes, including the CCW statute, could be set forth and discussed. It might also be possible to construct reminders of the various prohibitions and penalties along the streets in high-crime areas. A recent campaign in Michigan to post signs that read “Drunk drivers go to jail”\textsuperscript{113} is an example of this possibility. Use of local billboards, as well as posting signs in government buildings, would help focus local attention on the firearm problem.\textsuperscript{114}

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\textsuperscript{111} Of those defendants convicted of CCW, 53.5 per cent had a prior record, including 36.1 per cent with prior felonies. See Table 6 supra. Mich. Comp. Laws § 769.10 (1970) provides that a person convicted of a second felony may be sentenced to a term up to one and one-half times longer than the normal penalty for that felony. The decision whether to use this provision is within the sole discretion of the prosecutor. See People v. Stratton, 13 Mich. App. 350, 356, 164 N.W.2d 555, 558 (1968). The Detroit prosecutor's office has made only limited use of the statute. Boyle Interview, supra note 12. Increased use of this statute could be one way to deter chronic CCW offenders.
\textsuperscript{112} See F. Zimring & G. Hawkins, supra note 65, at 141-42.
\textsuperscript{113} See id. at 149.
\textsuperscript{114} Zimring and Hawkins conclude, “Extensive publicity and increased severity
The statistics in part I suggest that the low rate of sanctioning of CCW offenders is partially attributable to the attitudes of the trial judges. Mandatory minimum sentences would reduce the sentencing discretion of the recorder’s court bench. Controls should also be placed on the bench to prevent the dismissal of meritorious cases, whether for docket clearing purposes or because the judge questions the wisdom of the CCW statute. Clearly, the judiciary must have unfettered discretion in determining whether sufficient probable cause exists to warrant a bind-over at the preliminary examination stage. Further, it is the duty of the judge to determine whether the defendant’s constitutional rights have been violated. A requirement that the judge state on the record his or her reasons for dismissing the case (including, where appropriate, findings of fact and conclusions of law) might aid in eliminating clearly unreasonable dismissals. Plea bargaining abuses should be curtailed by requiring adherence to Genesee I & II and the Michigan court rules.

Only if CCW legislation is adequately enforced can headway be made in halting the further development of a firearm culture in Detroit and other major cities. In the absence of effective enforcement, the number of firearms owned and carried is likely to increase, with a consequent increase in the incidence of firearm-related crimes. Increased crime is apt to solidify nascent fears and encourage persons to purchase weapons for self-defense, which may in turn further increase the crime rate.

If a relatively strong sanction is imposed on violators with sufficient frequency, many ostensibly law abiding citizens will conclude that the costs of gun ownership outweigh the benefits and will give up their guns. This first step must be taken if the rise in firearm-related felonies, particularly those committed in emotionally charged settings, is to be combated with any degree of effectiveness.

of sanctions may conjointly achieve substantial marginal general deterrence.” Id. at 157.

115. For instance, the number of firearms in the city of Detroit quadrupled between 1965 and 1969. Edwards, supra note 1, at 1341.