

Probation Terms and Public Safety

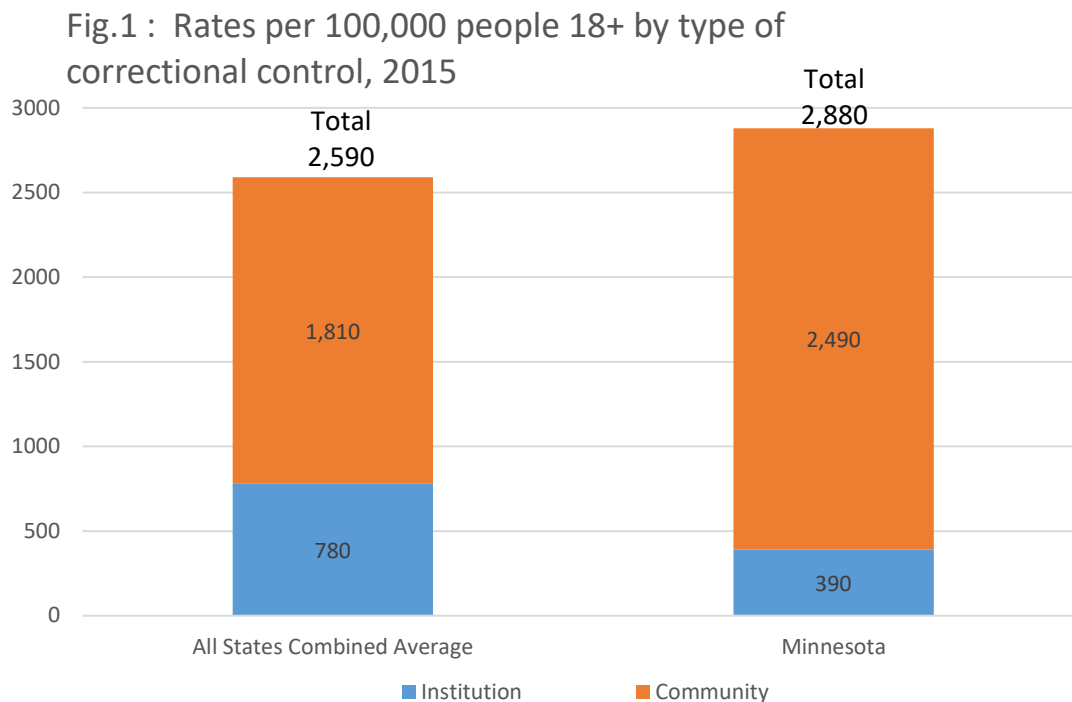
Minnesota has long been known for its low imprisonment rate. This is partially due to its investment in community corrections. While other states got tough on crime by putting more people in prison, Minnesota went a different direction and put more people on probation. The state developed a strong community corrections system in the 1970s and 80s, thanks to the Community Corrections Act and other initiatives.

The result is that Minnesota has an imprisonment rate lower than all but two states. At the same time, it has the seventh *highest* community supervision rate and the fourteenth highest total control rate in the country.¹ This difference is shown in Figure 1.

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¹ Bureau of Justice Statistics, Annual Surveys of Probation and Parole, Deaths in Custody Reporting Program, and National Prisoner Statistics Program, 2015; and U.S. Census Bureau, unpublished U.S. resident population estimates; "Rate" refers to the number of persons under supervision per 100,000 adults within the jurisdiction. "Total Control Rate" is the rate of residents under all types of correctional supervision.

Evolution of Probation Practices

Probation began in the nineteenth century as a rehabilitative alternative to punishment. People weren't sentenced for particular terms of probation because of what they had done, but rather for what they needed to do. Probation was an opportunity to help the offender change so that they could successfully re-enter law-abiding society.

This punitive nature of probation increased in the 1970s to the 1990s. In addition to rehabilitative interventions, surveillance, and punishment strategies became common. Supervision fees, fees for drug testing, and other financial burdens were added to the probation experience. Sentencing to Service and Community Work Service, while restorative to the local communities where crime occurs, were also designed as a short-term punitive reparation. This is in addition to other penal effects. For example, those on probation for a felony cannot vote. Felony convictions can also result in ineligibility for some benefits, whether the sentence is served on probation or in prison.

Across the nation and in Minnesota during the early 2000s, a new, research-based philosophy of community corrections began to grow. Evidence-based practices were identified and put into practice in corrections. These practices are based on research that shows probation is most effective at reducing recidivism and improving public safety when using proven interventions with specific offenders who pose the highest risk. It also indicates that we should do as little as possible with low risk offenders.

Felony Probation

A person with a felony conviction sentenced to probation is able to stay in the community, but must comply with conditions pronounced by the judge. These can include treatment, education attainment, reparations, and up to a year in a local correctional facility. Violation of those conditions can lead to revocation of probation, either partially or for the full stayed prison term.

Felony probation in Minnesota can last as long as the statutory maximum imprisonment term for an offense.² This is quite different from most other states. A recent study found that 14 out of 21 states had maximum lengths of probations different from the statutory maximum: most of them (12) had probation terms of five years or less.³

These abnormally long probation terms have contributed to several significant issues in Minnesota.

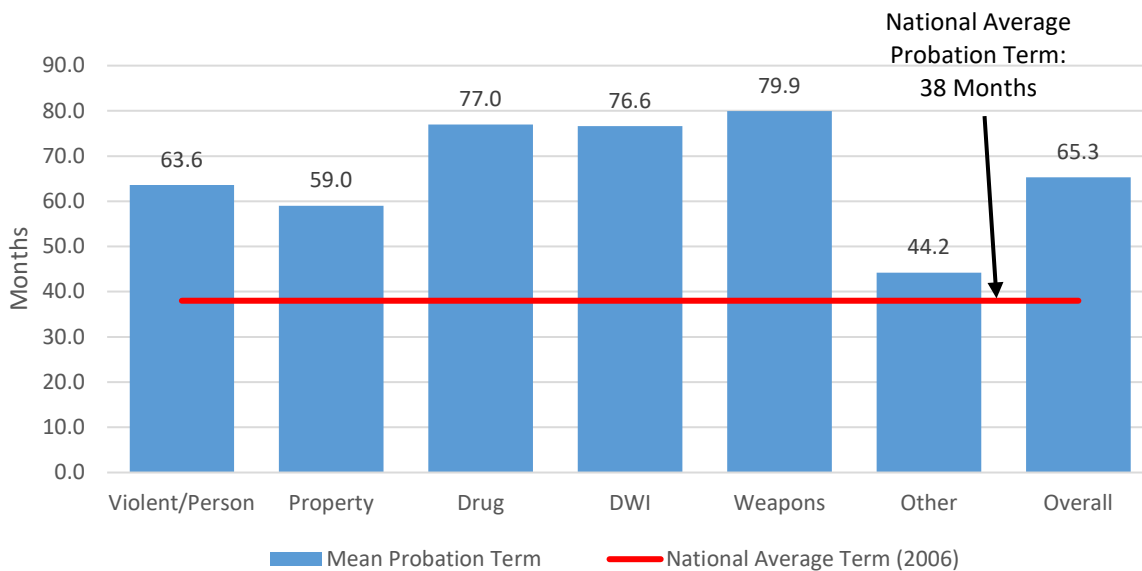
² Felony statutes in Minnesota reflect the old indeterminate sentencing structure that was in place before the Sentencing Guidelines were established in 1981. Most statutes set punishments as “....imprisonment for up to XX years.” Before the Guidelines, judges could sentence offenders to any amount of time up to the maximum.

³ Watts, Alexis, *Probation in Depth: The Length of Probation Sentences*, Robina Institute, University of Minnesota Law School, 2015. For example, Florida allows a maximum term of probation for a felony of two years, (FL Stat 948.04) with the option of transfers to administrative (non-supervised) probation after one year (Ibid. 948.013). Iowa mandates a probation term of two to five years for felonies (Iowa Code 907.7). Maine sets felony probation at terms of one to five years depending on the class of crime (Maine Revised Statutes Title 17A Sec. 1202).

Disparity in Probation Terms by Offense Type

The overall average probation term in Minnesota for the period 2012 – 2016 was 65.3 months. In comparison, a 2009 Bureau of Justice Statistics report showed that the average felony probation term nationwide was only 38 months.⁴

Fig. 2: Minnesota Mean Probation Term by Offense Type, 2012 - 2016



Source: MN Sentencing Guidelines Commission public data set; Bureau of Justice Statistics, Felony Sentences in State Courts, 2006 - Statistical Tables NCJ 226846

Figure 2 shows that the length of probation terms varies significantly by offense types. The crimes with the longest average sentences are among those which had the most public attention in the 1990s and 2000s: drug offenses, felony DWI, and weapons crimes. All of those offense types were established or significantly modified during that period.

This is borne out in Hennepin County probation lengths as well. A 2017 study indicated that the median time served on probation for those with a felony conviction was three years for most offenses, but five years for

⁴ Bureau of Justice Statistics, Felony Sentences in State Courts, 2006 - Statistical Tables NCJ 226846

DWI, weapons and criminal sexual conduct offenses: all areas under intense scrutiny during the 1980s and 90s.

Other drivers for differing probation terms by offense type might be found in the way Minnesota's sentencing laws have changed.

The last major restructuring of the criminal code was in 1963, before the Sentencing Guidelines went into effect in 1981. At that time, the state had an indeterminate sentencing system: judges could sentence those with felony convictions either to probation or prison for any period from a year and a day up to the statutory maximum. Once in prison, the actual length of a prison stay for a convicted felon was determined by the state's parole authority.⁵ Most judges at that time "routinely pronounced the statutory maximum when imprisoning offenders."⁶ But the full pronounced sentence was rarely served.⁷

When the Minnesota Sentencing Guidelines went into effect, the Guidelines presumptive sentences determined the actual time to be served. This determinate system did away with parole. The Guidelines presumptive sentences would govern in all but a few departure cases. The time to be actually served was known at the time of sentencing, with 2/3s served in prison and 1/3 on supervised release post-incarceration.

Maximum terms devised after the Guidelines went into effect became disproportionately longer than maximums established in the pre-Guidelines era. To illustrate this point, Table 1 shows the maximum statutory terms for four offenses, two enacted with the 1963 code, and two established in 1989. The two more recently enacted crimes have similar statutory lengths to the older crimes: but the presumptive guidelines sentences (a better gauge of the perceived severity of the

⁵ Parent, Dale G., *Structuring Criminal Sentences: The Evolution of Minnesota's Sentencing Guidelines*, Butterworth Legal Publishers, 1988, pp 16-17

⁶ Ibid, p. 17

⁷ Ibid. p. 23 This is shown by an early determinate sentencing scheme considered by a legislative committee in 1976 that would have established flat felony imprisonment sentences of 40% of the statutory maximum. Parent characterizes this group as being predominantly conservative in nature. One can assume from this that the 40% figure was probably at least reflective of current actual prison terms, if not more stringent.

offense) are significantly shorter for the two drug crimes than for the homicide-related offenses with identical statutory maximums.

Table 1: Comparing Statutory Maximum Sentences and Guidelines Presumptive Sentences		
Offense (year encoded)	Statutory Maximum Sentence (Months)	Presumptive Guidelines Sentence (Months)
Murder 2 (1963)	480	306 - 402
Controlled Substance 1 (Aggravated) (1989)	480	86 - 158
Manslaughter 1 (1963)	180	86 - 158
Controlled Substance 4 (1989)	180	12 - 30

While the statutory maximum no longer aligns with imposed prison sentences, it does play a part on the pronounced *probation* terms. In the period from 2012 – 2016, 34% of probation terms for Controlled Substance 4 were for 180 months or more (169 cases out of 494).⁸

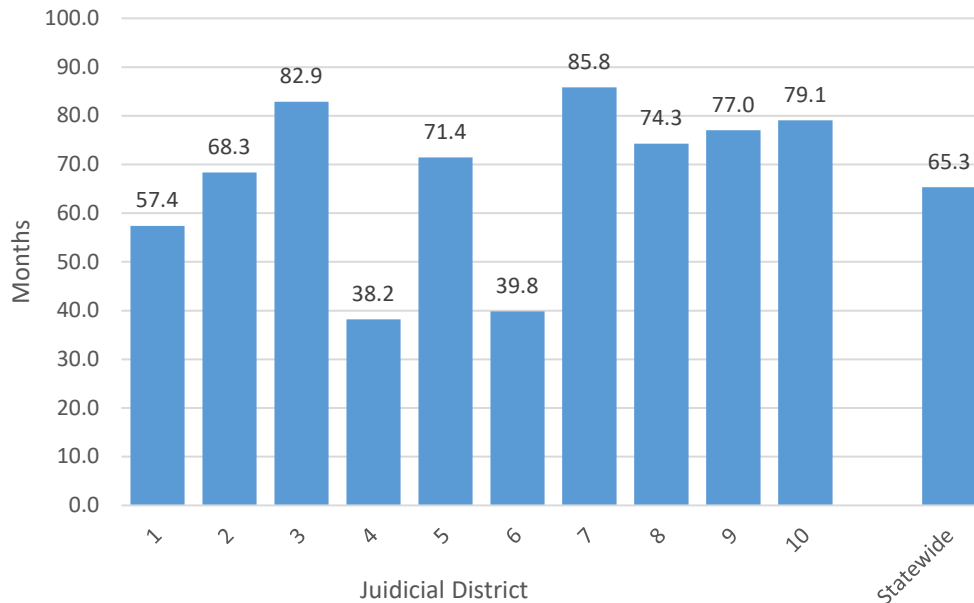
Disparity by Judicial District

Probation terms vary not only by offense type, but there are striking disparities in probation terms across the state. The average probation terms over the years from 2012 – 2016 vary from a low of 38 months in

⁸ Analysis of Minnesota Sentencing Guidelines Commission public data set.

the Fourth Judicial District to a high of 86 months in the Seventh Judicial District.⁹

Fig 3: Average Probation Terms by Judicial District, 2012 - 2016



Source: Minnesota Sentencing Guidelines Commission Public Data Set 2012 - 2016

These large differences are troubling, especially given the punitive aspects of probation. It is particularly troubling when there appears to be no impact on recidivism as a result of these longer terms. Figure 4 plots the three year felony recidivism rate for those sentenced to felony probation in 2013 – 2014 by district against the average probation terms.¹⁰ The

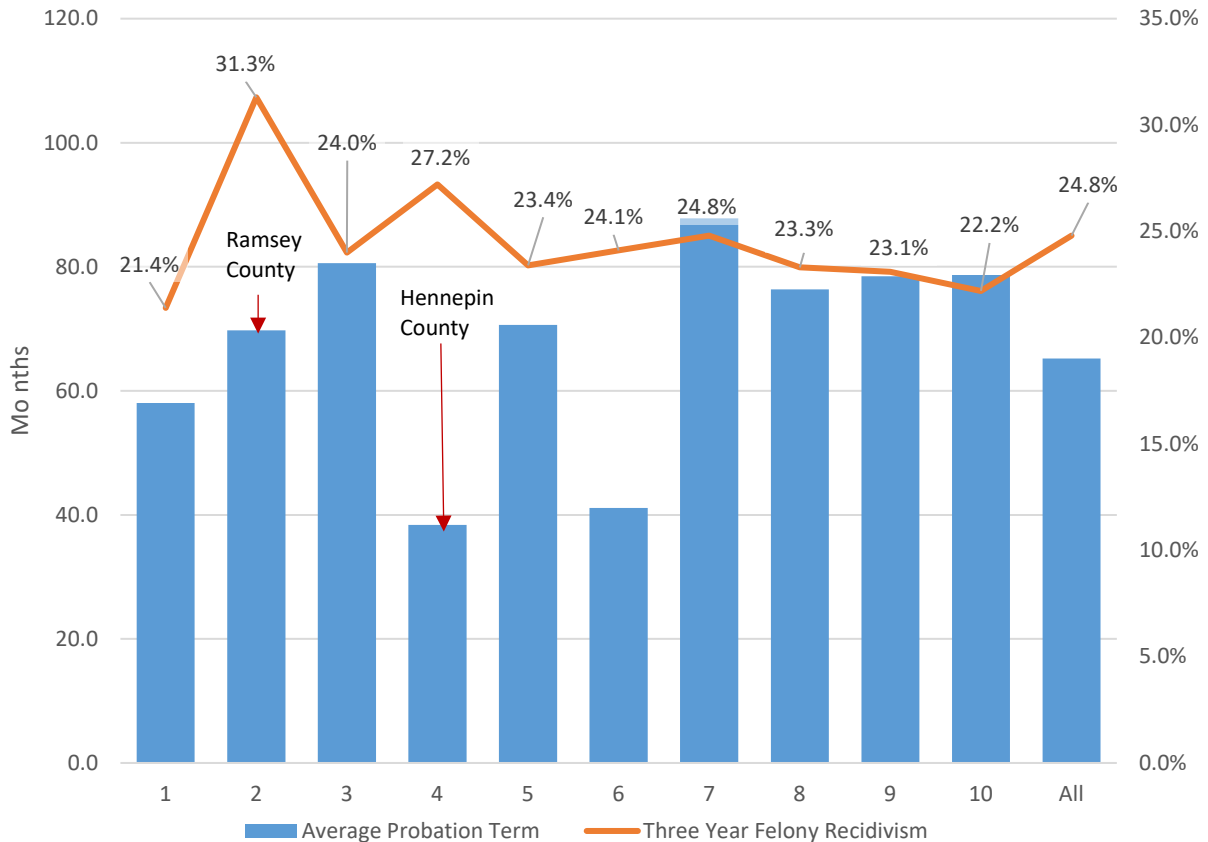
⁹ Minnesota is divided into ten judicial districts as follows:

- 1st South Central Minnesota
- 2nd Ramsey County
- 3rd Southeast Minnesota
- 4th Hennepin County
- 5th Southwest Minnesota
- 6th Northeast Minnesota
- 7th West Minnesota (North)
- 8th West Minnesota (South)
- 9th Northwest Minnesota
- 10th East Central Minnesota

¹⁰ Recidivism is defined in this case as a conviction for a new felony with an offense date within three years of the initial conviction.

figure shows remarkably little difference in recidivism based on probation term.

Fig. 4: Average Probation Terms and Three Year Felony Recidivism by District, Felony Cases Sentenced in 2013 - 14



Sources: Minnesota Sentencing Guidelines Commission Data, Hennepin County's Minnesota Criminal Event Database

Of particular interest is the comparison of the Second District (Ramsey County) and the Fourth (Hennepin County). These two districts contain much of the Twin Cities metropolitan area and the two urban cores. While there are many differences between the two jurisdictions, they have more in common with each other than they do with other judicial districts. Both are almost completely urban and suburban, have little undeveloped land, and have high concentrations of poverty and significant minority communities. One would expect their recidivism rates to be similar. However, the Second District had both longer probation terms and higher recidivism than the Fourth. Similarly, probation terms in the Sixth District (which comprises the Northeast part of Minnesota) are second lowest in

the state, yet recidivism rates are comparable to other Greater Minnesota districts.

The Impact of Longer Probationary Terms

Longer probation terms appear to have little impact on recidivism. Most standard reports of recidivism stop following people after three years. This is because most research indicates that recidivism tends to happen early in a course of probation. A review of research indicates that most recidivism occurs within the first three years of conviction, with the rate of new recidivists dropping markedly after that time. One study found that even high risk offenders' likelihood of reoffending fell to the level of a non-offender after eight years without a new offense.¹¹

Someone who has remained free of new criminal activity at the three year mark is highly unlikely to reoffend. Thus, a probation sentence much longer than 36 months is unlikely to cause an offender to avoid further criminal behavior.

Longer terms are also not necessary for treatment intervention. The interventions that we know through research to be effective don't take a long time to complete: for example, a proven cognitive-behavioral criminal thinking intervention program can be completed in three months of twice-weekly group sessions. Even repeated spells of drug treatment (more common than a single successful treatment intervention) are unlikely to last a year or more.¹² Sex offender treatment can take longer periods,¹³ but this is relevant for a very small group of probationers.

Even though there are few positive effects of long probation terms, the negative effects persist. These include the continued cost of supervision (even low-level supervision has costs) and the continued disenfranchisement and separation from full societal participation of the

¹¹ Fiore, A.W., Holsinger, A.M., Lowenkamp C.T. & Cohen, T.H., "Time-free effects in predicting recidivism using both fixed and variable follow-up periods," *Criminal Justice and Behavior* 44(1) 12-137 (2017)

¹² Chemical Dependency treatment usually lasts from 30 to 120 days, plus an aftercare period, based on the severity of the problem.

¹³ For example, residential sex offender treatment at Alpha Human Services can take four years or more, counting both residential and post-residential phases.

probationer. Perhaps most important is the continued possibility of technical violations after the time when future criminal behavior is likely.

The New York Experience

There's evidence that reducing probation populations can actually enhance public safety. A case in point is New York City.

New York City has reduced its use of probation by nearly 70% from 1996 to 2014 (from 68,000 to 21,400). This reduction came from several initiatives, including reducing the number of probationary sentences by using alternative sanctions, reducing terms of probation, focusing personnel resources to high risk caseloads, and aggressively seeking early discharge for probationers who were showing successful compliance. Reducing the probation population allows more resources to be devoted to higher risk probationers who are more likely to benefit from correctional interventions and can do so in a short period of time.

These changes did not appear to have a negative effect on public safety. During the same period the violent crime rate fell by 57% and the city's jail and prison incarceration rate fell by 55%.¹⁴

This is in line with evidence-based practices in corrections. Research has shown that focusing efforts on high risk probationers, while doing as little as possible with low risk clients reduces the recidivism rates of both. Continuing to serve low risk clients with traditional probation models for long probation terms can actually increase recidivism.

The result of these policy changes is illuminating: New York City probation was supervising 21,000 offenders in 2014 – fewer than Hennepin County is supervising in 2018. This despite a population seven times higher than Hennepin (8.5 million vs 1.2 million), and New York City's poverty rate (20.3%) being nearly twice Hennepin's rate of 10.9%.¹⁵

¹⁴ Jacobson, Michael P., Schiraldi, Vincent Daly, Reagan, Hotez, Emily "Less is More: How Reducing Probation Populations Can Improve Outcomes," *Papers from the Executive Session on Community Corrections*, Harvard Kennedy School, 2017.

¹⁵ US Census *Quick Facts* retrieved March 23, 2018 from <https://www.census.gov/quickfacts/fact/table/hennepincountyminnesota,newyorkcitynewyork/IPE120216>

Conclusion

While Minnesota has justly been proud of its low use of prison as a sanction, it has accomplished this by putting more and more people under correctional control in the community. Minnesota uses probation at a much higher rate than over 80% of other states.

The long and disparate probationary terms seen in different Minnesota jurisdictions are troubling. A more parsimonious use of probation can be achieved by creating uniformity in probation terms.

Shorter probation terms are shown by research and experience to promote public safety. Comparing recidivism rates shows no relation between longer probation terms and lesser recidivism. Furthermore, longer probation leads to higher costs because of supervising offenders more intensively for longer than necessary.

Reducing the length of probation terms is a necessary first step in achieving more uniformity across the state. Shorter probation terms, combined with an increase in intervention resources for higher-risk offenders, will benefit Minnesotans better than the current practice.