that the purpose of the reform scheme was that all cases covered by the literal terms of the rule be handled in a manner consistent with the rule.

(3) The effect on crime rates. The extent to which crime and criminality are affected, particularly any reduction or redirection, as a result of deterrence, incapacitation, or rehabilitation.

(4) Work group behavioral and attitudinal reactions. What precisely did judges, lawyers, and defendants do under the new scheme that was different from their behavior under the preexisting law; what are their reactions to the new scheme; what changes, if any, do they believe have resulted; do they approve or disapprove of the new regime and why.

(5) Sanctioning rates and distributions. What effect has the new scheme had on the distribution of sanctions--did more people go to prison for shorter or longer terms, did different people go to prison, etc.

(6) Case flow. Was the flow of cases through the system changed; did guilty plea rates, trial rates, dismissal rates, charging rates, and indictment rates change, in what directions, and for what categories of offenders and charged offenses.

(7) Public attitudes/opinions/morale. Did public attitudes about the legitimacy or effectiveness of the punishment process specifically, or the criminal process generally, change, and if so in what ways.

We are here primarily concerned with the effectiveness of sentencing reforms as means to reduce disparities, to increase or decrease sentence severity, and to systematize decision making by reducing discretion. Our analysis thus concentrates on how innovations have affected what happens to defendants and how judges and lawyers have changed their behavior. These concerns relate primarily to the impact criteria listed as numbers 2, 4, 5, and 6 above. The literature on crime rate impact through deterrence and incapacitation as well as rehabilitative effects has been reviewed elsewhere (e.g., Blumstein et al., 1978 and Sechrest et al., 1979). Relatively little effort has been made in impact evaluations to measure the congruence between proponents' goals and system effects (but see Casper et al., 1981). Similarly, we are aware of no useful body of literature

that assesses the impacts of sentencing innovations on public attitudes or opinions.

Innovations Considered

The broadest continuum of decisions that affect criminal punishment begins at one pole with the victim or witness who elects whether to report an apparent crime to the police and terminates at its opposite pole with officials who decide whether to revoke the parole status of an uncooperative parolee. Recent reform efforts attend to a shorter continuum ranging from prosecutorial charging and bargaining decisions through initial parole release. From a civil liberties perspective this narrower focus may not be too unfortunate. "Wrong" decisions not to report, record, or charge are a windfall to the suspect, who certainly has no basis for complaint. "Wrong" decisions to complain or initiate charges are unfortunate, but they are reviewed by prosecutors and judges. The reform movement's failure to address parole revocation procedures and standards may be more troublesome: Those proceedings afford parolees only rudimentary procedural safeguards, are of low visibility, and are not subject to judicial review on their substantive merits.

This review is thus concerned with reforms and evaluations of reforms directed at the actions and decisions of prosecutors, judges, and parole authorities. Often one reform scheme affects more than one actor and causal relationships are difficult to isolate. For organizational purposes only, this review somewhat artifically isolates reform efforts, beginning with the prosecutor and ending with parole.

ABOLITION OF PLEA BARGAINING

Plea bargaining has long been subject to criticism. Calls for its abolition have been frequent. For many years, it was a dirty secret and required that defendants be thespians who would affirm in court, before lawyers and judges who knew better, that guilty pleas were wholly voluntary, the consequence of contrition, and not induced by assurances of leniency.

Plea bargaining has now been legitimated by the Supreme Court and has become overt. The Supreme Court

has established that the defendant is entitled to the bargain that has induced a plea and that the judge must accept the arrangement or permit the defendant to reconsider whether to plead guilty (Santobello v. New York, 404 U.S. 25 7 [1971]). The Supreme Court has also held that the prosecutor's charging and threat tactics before and during plea bargaining are not subject to review by the courts; virtually anything goes (Bordenkircher v. Hayes, 434 U.S. 357 [1978]). These developments and the advent of sentencing schemes that specify criteria for sentencing give the prosecutor immense influence over the applicable sentence through charging and dismissal decisions; the courts can do little about it.

General antipathy for plea bargaining and the realization that prosecutors can manipulate determinate sentencing laws have led to a number of efforts to "abolish" plea bargaining in full or in part. Some of these efforts are directed principally at plea bargaining. The attorney general of Alaska in 1975 forbade plea bargaining (Rubinstein et al., 1980). The prosecutor of one county in Michigan abolished charge bargaining in drug trafficking cases (Iowa Law Review, 1975; Church, 1976). Other plea bargaining bans have been associated with other major reforms. The Wayne County (Detroit) prosecutor, for example, forbade bargaining over firearms charges carrying a mandatory two-year sentence (Heumann and Loftin, 1979). Restrictions were also placed on negotiated charge reductions in New York's mandatory sentencing law for drug offenses (Joint Committee, 1977).
Only the first three of these plea bargaining bans have been studied in any detail; these impact evaluations are reviewed in this section.

The broadest generalization that derives from these evaluations is that plea bargaining can be substantially controlled when the chief prosecutor wishes to do so and establishes internal reviews and management systems that effectively monitor the behavior of assistant prosecutors. Conversely, if controls are not established, there is a strong tendency for judges and lawyers to establish alternative bargaining systems.

Subsidiary generalizations supported by the studies reviewed are that increased numbers of defendants are diverted from the system at screening or by dismissal, that assistant prosecutors generally prefer working in a system having little or reduced plea bargaining, and that defense lawyers generally dislike the new systems.

Plea Bargaining Ban in Alaska

Alaska is the only state to attempt to eliminate plea bargaining statewide in all its variant forms. On July 3, effective August 15, 1975, the attorney general of Alaska ordered Alaskan prosecutors to desist from plea bargaining and sentence recommendations. There was early ambiguity about the legitimacy of charge bargaining, but the policy was soon clarified: Charge dismissals or reductions as inducements to guilty pleas were forbidden; unilateral charge dismissals for good faith professional reasons were permitted.

The Alaska Judicial Council evaluated the impact of the abolition in Anchorage, Fairbanks, and Juneau (Rubinstein et al., 1980). The evaluation involved statistical analyses of case processing for the 12-month periods preceding and following implementation of the ban and a series of structured and open-ended interviews with police, lawyers, and judges. The statistical analyses included tabular presentations of disposition data and a multiple regression analysis to investigate factors influencing outcomes. Nearly every judge, prosecutor, assistant public defender, and active private defense lawyer in the three cities was interviewed, many of them several times.

There were, in the mid-1970s, stark differences in legal culture in the three cities. Prosecutors and defense lawyers were highly adversarial in Fairbanks, and judges were "relatively tough and unsentimental." Counsel in Juneau prided themselves on their harmonious relations, and judges had reputations for leniency. Styles in Anchorage were more varied and fell somewhere in between (Rubinstein et al., 1980:45). The interviews indicated that local legal culture affected implementation of the ban. Plea bargaining was greatly diminished in all three cities, but it appears that there were greater flexibility and accommodation in collegial Juneau than in legalistic Fairbanks.

Because the Alaska plea bargaining ban is the most ambitious effort of its type, and because the evaluation appears to be the most comprehensive, we describe it in considerable detail below.

Many observers expected either widespread circumvention of the ban or, if plea bargains were truly eliminated, a slowdown in case processing with resulting backlogs, many more trial demands, and longer disposition times. None of these occurred. The Rubinstein et al.

(1980) evaluation concluded that during the first 12 months after the ban took effect:

(1) Plea bargaining was effectively curtailed and was not replaced by covert or implicit substitutes;
(2) Defendants continued to plead guilty at about the same rates as before;
(3) The trial rate increased, but the absolute number of trials remained small;
(4) Sentence severity generally did not increase, except for drug offenses and less serious offenses committed by offenders with modest criminal records; and
(5) Conviction rates changed little.

These conclusions, however, must be viewed in the light of several methodological shortcomings. First and foremost, we are skeptical in the extreme about the credibility of the statistical analyses and conclusions deriving from them. For reasons not made clear, the unit of analysis in the statistical analyses of case processing is separate charges. These are referred to as "cases," defined as "a single charge against a single defendant" (Rubinstein et al., 1980:135). Using this approach, multiple charges against a single defendant appear as several cases in the data.

These "cases" may be seriously misleading. Table 7-1 shows the breakdown of "cases" and defendants, by year when possible. The only information provided about defendants is that there were 2,283 defendants in the 2-year period, of whom 56 percent (1,278) were charged with only one felony charge (Rubinstein et al., 1980:134). Apparently screening eliminated 137 single-charge defendants (Table V-4), leaving a total of 1,141 single-charge defendants. It is impossible to determine how many multiple-charge defendants were screened out of the system or how many defendants were charged with specific offenses, either in specific years or in specific cities.

All the statistical analyses of screening, dispositions, and sanctions are based on cases (i.e., charges), not defendants. This approach seems to us unsatisfactory. If it is true that sentence bargaining was prevalent before the ban took effect (Rubinstein et al., 1980:1-11), the number of separate charges, that is, "cases," would usually have been irrelevant. The central issue is the sentence for the defendant; whether, for

TABLE 7-1 Description of Data Available for "Cases" and Defendants in Evaluation of Alaska Plea-Bargaining Ban

A. Number of "Cases" and Defendants

Years	Number of "Cases"	Number of Defendants
Both Years	3,586	2,283
Arrests	3,483	N/A
Information/Indictments	103	N/A
Year 1	1,815	N/A
Arrests	1,776	N/A
Information/Indictments	39	N/A
Year 2	1,771	N/A
Arrests	1,707	N/A
Information/Indictments	64	N/A

B. Defendants by Number of Charges

Years	One Charge	More Than One Charge	Total Defendants
Both Years	1,278	1,005 (2,308 charges)	2,283
Screened Out	137	N/A	137+
Prosecuted	1,141	N/A	Fewer than 2,146
Year 1	N/A	N/A	N/A
Year 2	N/A	N/A	N/A

NOTE: Breakdowns by offense and by city were not available.

example, a three-year sentence was for one charge, with two others dismissed, or one year for each of three charges served consecutively, or three years for each of three charges served concurrently would often have been immaterial. These alternative configurations would nevertheless appear to be quite different when outcomes on the separate charges were examined. There is thus every reason to suspect that the "case" is not a meaningful unit for characterizing case processing before the ban. If sentence and charge bargaining did substantially disappear after the ban, the judges' sentencing decisions would appear no more inherently related to the number of charges, or cases, than before.

Many of the findings based on comparison of dispositions in different cities, years, and offense types may be artifactual. If "cases" are not a meaningful operational unit, analyses based on comparison of "cases" are likely to reveal case-processing patterns, although they may not accurately reflect processing of defendants. Many of the "case" analyses show substantial dispositional stability over time. Why that should be, we cannot say. Prosecutors' charging patterns and judicial sentencing patterns for defendants might remain relatively consistent or change during the two years, and the "case" analyses could remain consistent.[1] Whatever the reason for the "case" approach, we believe it substantially diminishes the integrity and credibility of the resulting statistical analyses.

There are other problems as well. First, the study considered developments only in the years immediately before and after August 15, 1975; apparent changes during those two years may reflect long-term trends that the research design fails to identify.

Second, offenses are divided into six ad hoc vertical classes (murder and kidnapping; other violent felonies; burglary, larceny, and receiving; fradulent property offenses; drug felonies; and "morals" felonies). Primary reliance on those classes for year-to-year comparisons may mask changing patterns within a class. Crimes charged as aggravated assaults in year one, for example, may be charged as simple assaults in year two. The maximum authorized sentences would be affected and judges might react differently to the different offense labels. The classification scheme is insensitive to changes of that type.

Third, the study looks only at felony prosecutions in either year. If the ban caused prosecutors to file misdemeanor charges in year two when they would have filed felony charges in year one (or vice versa), the study design will miss that change. There are other, lesser limitations to the design that we mention below as they become pertinent.

Because of these methodological problems, the statistical analyses should be regarded with skepticism, if they are not disregarded altogether. Fortunately, most of the study's major conclusions derive from extensive interviews. In our discussion we draw heavily on the interview data and use the statistical data as supplementary information.

Prosecutorial Involvement in Sentence Bargaining

Although sentence bargaining was routinely practiced before the ban took effect, the study concluded that "plea bargaining as an institution was clearly curtailed" (Rubinstein et al., 1980:31, emphasis in original). Sentence bargaining and prosecutorial sentence recommendations declined abruptly in all three cities, with the greatest drop in Fairbanks.

Table 7-2 shows the patterns of sentence recommendations in guilty plea cases before and after August 15, 1975. Here and elsewhere, periods 1 and 2 refer to the two six-month periods preceding the ban and periods 3 and 4 refer to the two six-month periods immediately after the ban. Before the ban, Anchorage prosecutors made sentence recommendations in half the guilty plea "cases" (i.e., charges); afterward in about 16 percent. In Fairbanks, sentence recommendations declined from a third of guilty plea charges to 6 percent. In Juneau sentence recommendations declined the least, from over half of guilty plea charges before the ban to 25 percent afterward.[2] Interview respondents "agreed with the statistical finding that sentence bargaining had been essentially terminated" (Rubinstein et al., 1980:93). The report contains numerous references to statements by judges, prosecutors, and defense counsel who believed that the ban was observed and, often, especially among defense counsel and in Juneau, that substantive justice had suffered as a result.

TABLE 7-2 Sentence Recommendations in Alaska Guilty Plea Cases Before and After the Ban on Plea Bargaining

Jurisdiction and Time	Percentage of No Recommendations	Percentage of Specific Sentence Length	Percentage of Other Recommendations	N
Anchorage				
Period 1	49.0	25.2	25.7	210
Period 2	53.9	21.2	24.9	193
Period 3	87.4	6.3	6.3	175
Period 4	78.8	8.9	12.3	146
Fairbanks				
Period 1	66.3	15.1	18.6	86
Period 2	72.7	20.7	6.6	121
Period 3	94.9	4.3	0.9	117
Period 4	93.0	2.0	5.0	100
Juneau				
Period 1	21.4	28.6	50.0	14
Period 2	51.2	31.7	17.1	41
Period 3	79.2	4.2	16.7	24
Period 4	68.8	12.5	18.8	16

NOTE: Periods 1 and 2 refer to the two six-month periods prior to the plea bargaining ban; periods 3 and 4 are the two six-month periods immediately following the ban.

SOURCE: Rubinstein et al. (1980:Table II-1).

Charge Bargaining and Other Circumvention

Lawyers and judges have personal and bureaucratic nterests that may be served by the expeditious isposition of cases. Private defense lawyers often perate high-volume practices in which fees per case are ow. Public defenders often have large case loads. egotiated pleas involve less work for everyone.

Prosecutors are often concerned about keeping conviction rates high and backlogs low. Judges also typically want to keep backlogs low. In the face of an effective sentence bargain ban, one might expect to see overt or covert charge bargaining or implicit sentence bargaining.

An early evaluation of a charge bargaining ban in Michigan found that court participants quickly shifted to a system of sentence bargaining (Iowa Law Review, 1975; Church, 1976). In Alaska, sentence bargaining was the predominant method of disposition before the ban. Since the attorney general's directive was ambiguous in its references to charge bargaining,[3] and it is difficult to distinguish unilateral charge dismissals from bargained dismissals, one might have expected the reverse shift in Alaska, from sentence bargaining to charge bargaining. There was interview evidence that charge bargaining was "rampant" in Fairbanks, "to fill the gap" left by the prohibition of sentence bargaining. This continued for eight months after the ban took effect, until the Fairbanks district attorney himself prohibited it (Rubinstein et al., 1980:235). The statistical evidence on this episode is mixed: There was a temporary increase in the percentage of guilty pleas to substantially reduced charges (Table V-1), but there was no surge in the number of charges originally filed per defendant. There was no statistical basis for believing that charge bargaining increased, and the study concluded that overall charge bargaining did not replace sentence bargaining (pp. 233-36).

Consequences of the Ban on Case Processing

The conventional wisdom about plea bargaining and the processing of criminal cases is that negotiated guilty plea "discounts" are imperative if the flow of cases is to be maintained, if backlogs are not to accumulate, and if the courts are not be be overwhelmed by trials. The commonsense premise is that defendants will not give up tactically valuable trial rights for nothing. If the premise is correct, one might expect a successful plea bargaining ban to decrease guilty plea rates and to increase case-processing time and the incidence of trials. Finally, one might expect to see a tendency for earlier disposition of cases other than on the merits. In order to reduce case pressure and to avoid harsh sentences for defendants for whom lenient sentence

bargains would have been arranged, prosecutors might reject more arrests at screening or effect postscreening dismissals, or acquiesce in judicial dismissals.[4]

Case processing changed very little. There was a slight tendency to screen out more cases. A slight tendency was also found toward earlier dismissal of cases, but dismissal rates overall were unchanged. Sentencing severity seemed little changed except for cases involving minor offenses by inexperienced offenders (they received harsher treatment than before the ban). Guilty plea rates changed little. Trial rates increased, but the absolute number of trials remained low. The average case-processing time declined.

Screening Table 7-3 shows screening rates expressed as percentages of felony arrests during the 12 months before and the 12 months after August 15, 1975, in criminal courts in Anchorage, Fairbanks, and Juneau. Because the plea bargaining ban made disposition of minor cases more difficult, one might have expected that more cases would be screened out at the very beginning of the process. Indeed, the attorney general emphasized tighter screening as an integral part of the policy against plea bargaining (Rubinstein et al., 1980:73). As the first section of Table 7-3 indicates, the percentage of cases screened out in the year after August 15, 1975, increased to 12.9 percent from the 10.0 percent screening rate of the preceding year. The increase was relatively small in Anchorage but more substantial in Fairbanks and Juneau.

The screening rejection percentages are low in both periods, probably because court rules predispose prosecutors to pro forma screening decisions. Alaska court rules required that defendants' first court appearances take place no later than 24 hours after they are taken into custody; otherwise, the judge or magistrate must discharge the defendant immediately. Assistant prosecutors thus had only a few hours within which to make charging decisions and had generally to base them on the police report alone. As cases can always be dismissed later, these timing and information constraints probably created a conservative screening policy.

Rubinstein et al. (1980) conducted a statistical analysis of factors associated with changes in screening outcome by offense class and various case and processing factors. The only striking changes found were that

TABLE 7-3 Case Screening by Prosecutor and Dismissals in Court in Alaska Before and After the Ban on Plea Bargaining

	Combined Cities		Anchorage		Fairbanks		Juneau	
	Year 1	Year 2	Year 1	Year 2	Year 1	Year 2	Year 1	Year 2
"Cases" dismissed by prosecutor at screening as percentage of felony arrests[a]	10.0	12.9	13.1	14.7	3.7	8.9	8.9	13.9
District court dismissals as percentage of "cases" disposed after screening[b]	21.9	24.8	18.8	27.8	27.1	18.7	25.2	28.7
Superior court dismissals as percentage of "cases" disposed after screening[b]	30.4	27.9	37.6	31.5	17.8	31.5	25.2	25.5
All court dismissals as percentage of "cases" disposed after screening[b]	52.3	52.7	56.4	59.3	44.9	40.7	50.4	54.2

[a]Murder and kidnapping charges are omitted. Data are from Rubinstein et al. (1980:Table IV-1).

[b]Data are from Rubinstein et al. (1980:Table V-1).

screening rejections of drug felonies increased in all cities and that there was a substantial increase in screening out "morals" felonies in Anchorage--from 6.5 percent to 40.9 percent (pp. 140-146). The report concludes (p. 146):

> On balance, then, the increases in screening that did occur suggest that rather than an increase in the systematic evaluation of evidence and aggravating factors in preparation for trial, there was a deliberate prosecutorial decision that some kinds of cases were expendable.

There is one other form of early case diversion that the report does not discuss: felony arrests that were prosecuted as felonies before the ban and as misdemeanors afterward. Prosecutors who do not want to expose a defendant to the risk of a prison sentence could approve a misdemeanor charge. The report discusses only screening and disposition of felony charges. Whether screening "rejections" included cases processed as misdemeanors is not stated, but, if not, a charging drift for some kinds of cases from felonies before the ban to misdemeanors after might evidence greater screening than the report indicates. The annual number of felony arrests declined after the ban, as the figures below indicate:

City	Number of Felony Arrests Subject to Screening	
	Year 1	Year 2
Anchorage	1,124	1,080 (- 4%)
Fairbanks	517	526 (+ 2%)
Juneau	135	101 (-25%)
Total	1,776	1,707 (- 4%)

Assuming that the 4 percent decline in arrests represents misdemeanors formerly prosecuted as felonies, the extent of "diversion" caused by the ban may be greater than the screening rejection figures indicate. The decline in felony prosecutions over all three jurisdictions would then be 6.4 percent--a shift whose composition would be worth knowing.[5]

Dismissals of Cases Concern was expressed by defense counsel and, to a lesser extent, prosecutors that minor cases were treated more severely after the abolition than before (Rubinstein et al., 1980:32-34, 50). If cases were not being diverted at screening, one might have expected a significant increase in outright dismissals as a means to avoid severe sentences for minor offenses. Once the formal complaint is filed, there is ample time for the prosecutor to assess facts and entertain appeals from defense counsel, and, if appropriate, dismiss charges. Most charge dismissals in both years were at the initiative of the prosecutor. As Table 7-3 indicates, once a case reached court there was some shifting of dismissals between courts, but the overall dismissal rate in court was essentially unchanged (from 52.3 percent to 52.7 percent). The differences in individual cities were only slightly greater.

Method of Disposition The interviews did not evidence any general belief among court participants that sentence bargaining was replaced by charge bargaining. Statistical analyses confirmed that conclusion. Table 7-4 sets out year-to-year comparisons of felony charge dispositions among those arrests that survived screening. The percentage of guilty pleas to reduced charges declined from 17.4 percent to 15.2 percent. (If the interviews in the evaluation are to be believed, most of this residual consisted of cases in which the prosecutor independently reduced charges.) There was a slight contrary tendency in Fairbanks, which was consistent with the interview data indicating that Fairbanks experienced a flurry of charge bargaining after the ban took effect (Rubinstein et al., 1980:235). Guilty pleas without charge reductions also declined only slightly. Acquittals at trial were essentially unchanged, while trial convictions increased by 69 percent from 4.2 percent of disposed cases before the ban to 7.1 percent after the ban. Thus, those defendants who refused to plead guilty and waive trial rights without inducements to do so appear to have been convicted at trial.

Despite an abolition of plea bargaining that prosecutors appear substantially to have honored and despite the increase in trials, "guilty pleas continued to flow in at nearly undiminished rates (and) most defendants pled guilty even when the state offered them

TABLE 7-4 Percentage Disposition of Cases on the Merits in Alaska

Disposition	Combined Cities Year 1	Combined Cities Year 2	Anchorage Year 1	Anchorage Year 2	Fairbanks Year 1	Fairbanks Year 2	Juneau Year 1	Juneau Year 2
Guilty Plea/ Reduced Charge[a]	17.4	15.2	17.6	12.6	16.6	19.1	18.9	18.1
Guilty Plea/ No Reduction	23.6	22.5	23.0	21.9	24.4	22.9	24.4	24.5
Trial Acquittal	2.5	2.5	1.1	1.7	4.5	4.2	5.5	1.1
Trial Conviction	4.2	7.1	1.8	4.4	9.6	13.0	0.8	1.1

NOTE: The sum of dispositions does not total 100 percent. Dismissals in court are not included here; they are reported in Table 7-3.

[a]A guilty plea to a charge different from that originally charged was considered meaningfully reduced only if the statutory maximum sentence for the conviction charge was less than 75 percent of the statutory maximum sentence for the original charge.

SOURCE: Rubinstein et al. (1980:Table V-1).

nothing in exchange for their cooperation" (Rubinstein et al., 1980:80). Why would defendants plead guilty who were offered no inducement to do so? Rubinstein et al. suggest several reasons. The first is that "human nature does not want to engage in fruitless acts" (p. 81). In many cases the defendant's role in the criminal act is incontrovertible. The authors observe: "whether there was a plea or a trial depended more on the nature of the case and on the client than on whether plea bargaining was permitted" (p. 83). A second reason is that "no lawyer likes to make a fool of himself in public" (p. 87). Several of the interview respondents expressed the view that an unwinnable case is an unwinnable case and little benefit would accrue to the defendant or to the lawyer who had to argue it (pp. 87-89). Third, while the patterns varied between offense types, defendants may have responded to "a large trial/plea sentencing differential" (pp. 88-90). Whatever the reasons, the guilty plea rate changed very little when plea bargaining substantially disappeared.

This conclusion, however, must be viewed cautiously. The "cases" used in the analyses were limited to "cases" initiated in the 12 months before or 12 months after the plea bargaining ban went into effect (from August 1974 to

August 1976) and finally disposed in court by the end of 1977. Of the cases initiated in the 24-month period 81 were excluded from the analysis: Files were unavailable for 47 cases that were the subjects of appeals, and 34 cases had not been finally resolved at the trial court level. Since trials take more time to dispose than guilty pleas and the follow-up period was shorter for the postban sample, the excluded cases are more likely to be trial cases initiated after the plea bargaining ban. These additional cases would increase even further the postban trial rate. Unfortunately, no information is provided on the sample year, jurisdiction, or disposition type for the excluded cases in order to assess the extent of that impact.[6]

Sanctions Policies Sentencing outcomes apparently changed little. Because of our skepticism about the credibility of inferences drawn from charge-based as opposed to offender-based analyses, we do not examine the disposition data closely. Table 7-5 shows sentencing

TABLE 7-5 Sentence Severity--All Cities

Offense Type	Percentage of All Original Felony "Cases" Resulting in Conviction and Sentence of 30 days or more		Mean Active Sentence, in Months	
	Year 1	Year 2	Year 1	Year 2
Murder and Kidnapping	50.0 (24)	52.6 (19)	171.2	238.8
Other Violent Felonies	21.9 (547)	22.3 (497)	24.8	22.7
Burglary, Larceny Receiving	12.9 (534)	18.1 (497)	6.8	4.3
Fraud, Forgery, Embezzlement, Bad Checks	16.8 (298)	14.3 (252)	9.5	6.2
Drug Felonies	14.8 (352)	16.7 (360)	8.0	25.4
"Morals" Felonies	16.7 (60)	20.0 (45)	25.5	16.6
All offenses	17.2 (1,815)	18.9 (1,771)	Not available	

SOURCE: Rubinstein et al. (1980:Tables VI-1, VII-1).

patterns by offense class. The measures of sentencing severity used were the likelihood of conviction and imprisonment for at least 30 days and mean active prison sentence. There were few marked changes in sentence severity. Closer analyses, not shown on Table 7-5, led the evaluators to conclude that there were some important changes in sanction severity. Sentences did not become more severe if the original charge was a violent felony, "high risk" larceny, or receiving stolen property ("high risk" and "low risk" characterizations were based on indicators of persistent criminality). Drug cases, however, experienced the greatest increase in sentence severity (Rubinstein et al., 1980:113). The other conspicuous change was a substantial increase in sentence severity in "low risk" burglary, larceny, and receiving stolen property cases (p. 113):

> Thus where the prosecutor's power to recommend sentences was sharply curtailed by the plea bargaining ban, defendants in nonviolent, low-risk cases tended to lose the advantage they had formerly enjoyed, and received more severe sentences.

Disposition Time Given the conventional view that plea bargaining lubricates the machinery of justice and keeps it operating efficiently, one might have expected a widespread refusal by defendants to plead guilty with resulting processing delays. Rubinstein et al. conclude that this did not happen. As Table 7-6 indicates, the evaluation reported a dramatic decrease in case-processing time after the ban took effect. They conclude that "the curtailment of plea bargaining did not in any way impede court efficiency--and it may have had the reverse effect" (Rubinstein et al., 1980:103). The qualified conclusion was necessary because administrative changes taking place in Anchorage are partly responsible for the reduction in processing time. The court switched to a master calendar system under the control of a presiding judge, and at the same time a new presiding judge was appointed who was reputed to be a "tough administrator"; he made a special effort to control and discourage continuance motions. However, while those changes may have affected case disposition times in Anchorage, they do not explain the decreases in the other two cities. The plea bargaining ban was most strictly enforced in Fairbanks and the trial rate there rose

TABLE 7-6 Mean Court Disposition Times for All Felonies that Went to Court (in days)

	Year 1		Year 2	
	Period 1 (8/15/74-2/14/75)	Period 2 (2/15/75-8/14/75)	Period 2 (8/15/75-2/14/76)	Period 2 (2/15/76-8/14/76)
Anchorage	192.1	153.8	125.3	39.5
Fairbanks	164.6	129.9	134.1	120.4
Juneau	105.7	102.5	92.1	85.1

SOURCE: Rubinstein et al. (1980:Table II-2).

substantially (see Table 7-4), yet disposition times in the Fairbanks sample also decreased substantially.

This decrease in disposition times reported in the evaluation is overstated. All cases in the evaluation sample, regardless of when they were initiated, had to be disposed by the end of 1977 in order to enter the sample. The 34 cases not disposed of in court by that time, and the 47 cases on appeal for which case files were unavailable were eliminated from the data. If data were available on the 34 cases not disposed, average case-processing times would increase. By definition these cases were pending for considerable periods. Since most of these cases were probably initiated in periods 3 and 4, data on them would increase disposition time for those periods and reduce the apparent decline in disposition times. We lack adequate data to calculate whether the effect of including these cases would reduce, eliminate, or reverse the apparent decline in case processing times.

Conclusion

What should be made of all this? The writers of the Alaska evaluation are ambivalent. They were surprised that the system adapted so readily to so dramatic a change. Three interrelated questions seem to us to require discussion. First, what did the courtroom participants think of the change? Second, was the ban

good thing? Third, what are the implications of the Alaska evaluation for thinking about the prospects for plea bargaining abolition in other jurisdictions?

Participants' Reactions Many prosecutors liked the new system, and many defense lawyers did not. Under the new system, prosecutors "could achieve the same results . . . but with less time spent on routine cases, and with less responsibility for the outcome" (Rubinstein et al., 1980:221). Some prosecutors had valued their prior freedom to make specific sentence recommendations in order to individualize justice; these people chafed under the ban, although it appears that they approved the ban for the majority of cases. Other prosecutors appear to have accepted the attorney general's proposition that sentencing is a judicial function. Some prosecutors appear to have enjoyed their work more under the new regime, even though they sometimes had to work harder at case preparation. One, represented to be typical, observed (p. 46):

> I find practice to be preferable . . . much less time is spent haggling . . . bargaining is probably inherently inconsistent with the job . . . I was spending one-third of my time arguing with defense attorneys . . . I am a trial attorney and that's what I am supposed to do. The haggling . . . [had] much to do with sentencing--what I thought a person should get. The judge should do that.

The ban had differential impact on public defenders, private counsel paid through a union legal services program, and the rest of the defense bar. The public defenders felt disadvantaged because they were unlikely to receive favorable dispositions in isolated cases; previously, prosecutors were presumed to be loath to act in a way that could be used as precedent against them in later cases by other defenders. Public defenders felt obliged to prepare seriously to defend persons charged with serious crimes or who were likely to receive long sentences; resources spread only so far and the low-severity, minor-record defendant may have suffered in consequence. Before the ban, such cases could be resolved expeditiously by means of a sentence bargain to a nonincarcerative sentence. After the ban, public defenders simply lacked the resources to defend minor offenders vigorously (Rubinstein et al., 1980:36-37).

The private defense bar also suffered from the disappearance of routine sentence bargains that required little effort. Lawyers could no longer easily demonstrate to clients that their efforts had produced a benefit; yet the economics of private defense practice require high-volume turnover of cases and make it difficult to file motions, prepare for trial, and vigorously represent all clients in all cases (Rubinstein et al., 1980:38-40).

Lawyers paid by the union legal services program and their clients may have benefited. These lawyers, who represent 6-10 percent of defendants, are paid on an hourly basis at prevailing market rates and thus could devote as much time to a case as the case required and could gain clients some advantage from full defense (Rubinstein et al., 1980:42-44).

The evaluation does not discuss the reactions of judges to the ban in detail, merely noting that some judges complained about "unnecessary" trials (Rubinstein et al., 1980:241-42).

Was the Ban a Good Thing? The traditional arguments against plea bargaining are powerful. It creates a demeaning, street market atmosphere. It fosters the possibility, and no doubt occasionally the reality, that innocent defendants are pressured by circumstances to plead guilty. It diverts the primary focus from the questions of guilt and adjudication to the questions of pricing and sentence. It shifts the locus of sentencing power from the judge, where it is theoretically most appropriately lodged, to counsel.

Given the conclusion that the ban succeeded, one might expect the evaluators to praise its implementation. Instead they express ambivalence as to whether plea bargaining was such a bad thing after all. Under a sentence bargaining system like that of Alaska before the ban, they argue, the negotiation sessions allowed relatively full discussion of the issues and the defendant's circumstances. The need for judicial acquiescence brought an impartial third person to the process and thereby ensured that three professionals were involved in the final decision. The attorney general's new rule, however, "reduced the number of individual viewpoints informing the final disposition. . . . In this sense it impoverished the sentencing process" (Rubinstein et al., 1980:242). The evaluation concludes (p. 243):

The Attorney-General proved that it was possible to make large and significant state-wide changes in an institutionalized plea bargaining system, that this could be done rather quickly and without spending a lot of money and that the curtailment of plea bargaining would not necessarily bring about breakdown in the administration of justice. He did not prove, however, that plea bargaining was the "least just aspect of the criminal justice system" as he said it was; and it is far from clear that his successful prohibition brought about the "better kind of sentencing" that the Attorney-General was looking for.

Implications of the Alaska Experience The Alaska experience is evidence that individual prosecutors who wish to abolish plea bargaining should, under opportune circumstances, be able to do so. This conclusion, readers will note, is hedged. There are many respects in which Alaska's criminal justice system is atypical. First, public prosecution is centrally organized on a statewide basis under the attorney general; although each office has its own district attorney, each is institutionally subject to the policies and procedures of the attorney general.

Second, Alaska is thinly populated, and the volume of felony prosecutions is small. Only 2,283 defendants were charged with felonies over a 2-year period in the three main cities studied. Fewer than 800 felony charges result in convictions each year. The courts in all three cities disposed of only 1,551 cases initiated in the year after the ban took effect: Anchorage, 934; Fairbanks, 523; Juneau, 94. The report does not indicate the numbers of judges and prosecutors in the three cities, but the numbers cannot be large. Anonymity is unlikely to shelter noncompliance with rules in a jurisdiction in which the number of principals in any one city is small.

Third, the evaluation may have influenced implementation: It began soon after the rule took effect, and the presence of researchers may have made lawyers more self-aware. Fourth, the ban attracted considerable media attention, both locally and nationally. It may have appeared that the public eye was fixed on Alaska more than before.

Fifth, two other features of Alaska practice may have facilitated the abolition. Decisions of the Alaska supreme court prohibited judges from direct dealings with

defense counsel that could have permitted sentence discussions. In addition, Alaska is a leader in judicial technology, and all presentence hearings are recorded on videotape. The last is important because Alaska Criminal Procedure Rule 11 requires the judge to inquire about negotiated guilty pleas. The combined effect of these rules and the technology may have been to heighten the appearance of public accountability. For all these reasons, Alaska appears to have been a more congenial site for an attempt to abolish plea bargaining than many other jurisdictions would have been.

Having said all that, it remains the case that Alaska accomplished what many thought was impossible: substantial abolition of plea bargaining without gross disruption of the processes of the criminal courts. If Alaska could do it, albeit with some facilitative demographic, governmental, and structural advantages, it should be possible for a well-managed prosecutor's office to do likewise. If rules are sufficiently clear, if internal management processes are used to monitor day-to-day decisions, and if prosecutors can withstand the complaints of defense counsel, the Alaska experience ought to be replicable.

The "Hampton" County Charge Bargaining Ban

In January 1973, after an antidrug law and order election campaign, a newly elected prosecutor in "Hampton" County, Michigan,[7] instituted a strict policy forbidding bargained charge reductions in drug sale cases. Prior to his initiative, most drug cases in the jurisdiction were resolved by charge bargains: "In drug cases . . . a charge of delivery of a controlled substance could nearly always be reduced to attempted sale or possession in exchange for a guilty plea" (Church, 1976:379). At the time the ban took effect, the prosecutor also substantially tightened the standards by which drug prosecutions were authorized: No drug warrant would be issued unless there had been a "controlled buy" by a police undercover agent. This resulted in a 30 percent decline in the number of drug sale warrants issued.

Church collected information on drug sale warrants and dispositions for the two 12-month periods before and after January 1, 1973. The data were not subjected to sophisticated statistical analyses but were presented in tabular form. Although an effort was made to collect data on all drug sale cases warranted in 1972 and 1973, the

numbers are small (321 warrants in 1972; 224 in 1973) and dispositional data could be obtained in only 71 percent of those cases. Church notes: "Several passes through various files of the prosecutor, circuit, and district courts, however, produced reasonably complete and (I believe) accurate information" (p. 381). No reason is given for that conclusion. We have no special reason to reject it, but the fugitive nature of the missing 30 percent of cases may indicate that they are in some systematic respects not ordinary. Church also conducted a series of interviews with judges, defense counsel, prosecutors, and the court administrator.

Church concludes that charge bargaining effectively disappeared but that it was quickly replaced by sentence bargaining involving the judge and the defense lawyers. As Table 7-7 indicates, 81 percent of drug sale cases warranted and disposed in 1972 (all under the previous prosecuting attorney) involved guilty pleas to reduced charges. By 1974, for cases warranted in 1973 (all under the new prosecutor) there were no guilty pleas to reduced charges. The small number of guilty pleas to reduced charges in 1973 result, says Church, from confusion and errors by assistant prosecutors in the early days of the ban. Also, the trial rate increased, but the absolute number of trials remained small.

TABLE 7-7 Trial and Plea Rates in 1972 and 1973 Drug Sale Cases in Hampton County, Michigan

	1972 Warrants		1973 Warrants	
Disposition	1972 Disposition	1973 or Later Disposition	1973 Disposition	1974 or Later Disposition
Guilty Plea to Reduced Charge	88 (81%)	5 (10%)	5 (10%)	0
Guilty Plea to Original Charge[a]	19 (17%)	29 (62%)	39 (75%)	37 (90%)
Total Guilty Pleas	107 (98%)	34 (72%)	44 (85%)	37 (90%)
Trials	2 (2%)	13 (28%)	8 (15%)	4 (10%)
Total Dispositions[b]	109 (100%)	47 (100%)	52 (100%)	41 (100%)

[a]Includes those defendants convicted as youthful trainees (see Church, 1976:Table 2).
[b]Excludes dismissals and nolle prosses (see Church, 1976:Table 2).

SOURCE: Church (1976:Table 1).

Church found that the system adapted to the ban in ways which permitted business as usual. First, sentence bargaining filled the charge bargaining void: "Roughly half the bench would make some form of pre-plea sentence commitment in [plea-bargaining ban] policy cases--a sizable shift given former practices and strong system norms against judicial participation in plea bargaining" (Church, 1976:387). Second, there was an increase in the rate at which cases were dismissed outright. Because of the relative inflexibility of the new system, "some drug sale cases that would have been prime candidates for reduced charge convictions in 1972 found their way out of the system altogether in 1973" (p. 390).

Screening

All cases in the sample had been warranted. Consequently no information is available on changes in screening outcomes over time. Recall that heightened screening of cases reduced the number of drug sale warrants by 30 percent.

Dismissals

Table 7-8 shows the disposition of drug cases from 1972 to 1974. Nolle prosequi rates declined slightly from 15 percent before the ban to 10 percent after the ban, while judicial dismissal rates increased from 19 percent for 1972 warrants to 28 percent after the ban, as did "youthful trainee" convictions from 3 percent to 17 percent. (Youthful trainee convictions permit sentences to probation under circumstances that may result in no record of conviction.) The nolle statistics, Church claims, understate prosecutorial participation in case disposition because assistant prosecutors often tacitly assented to judicial dismissals and youthful trainee convictions.

Sanctions

Despite the reputed shift to sentence bargaining, no systematic information is provided on sentences imposed. Table 7-8 reveals a slight decline in total conviction rates in 1973 but a return to the 1972 rate in 1974.

TABLE 7-8 Disposition of 1972 and 1973 Drug Sale Cases in Hampton County, Michigan

Disposition	1972 Warrant		1973 Warrant	
	1972 Disposition	1973 Disposition	1973 Disposition	1974 Disposition
Plea of Guilty to Original Charge	15 (10%)	25 (31%)	24 (27%)	27 (43%)
Plea of Guilty to Reduced Charge	88 (56%)	5 (6%)	5 (6%)	0
Convicted as Youthful Trainee	4 (3%)	4 (5%)	15 (17%)	10 (16%)
Convicted at Trial	2 (1%)	7 (9%)	8 (9%)	3 (5%)
Total Convictions	109 (69%)	41 (51%)	52 (59%)	40 (63%)
Dismissal (Judge)	26 (17%)	19 (24%)	30 (34%)	13 (21%)
Nolle Prosse (Prosecutor)	22 (14%)	14 (18%)	6 (7%)	9 (14%)
Acquittal (Trial)	0	6 (8%)	0	1 (2%)
Total Cases	157 (100%)	80 (101%)	88 (100%)	63 (100%)

SOURCE: Church (1976:Table 2).

Without information on prewarrant screening and subsequent sentences imposed, it is difficult to infer anything from the conviction rate changes. The decreased-to-stable conviction rates could obscure a real decline in severity. Because the more stringent "controlled buy" requirement reduced the number of drug sale warrants by 30 percent, a stable conviction rate for these presumably stronger cases should perhaps be seen as a decline in the likelihood of conviction.

On the basis of his research, Church was pessimistic about the practicality of a plea bargaining ban (Church, 1976:450):

> Given equally "resourceful" attorneys, prosecutors, and judges everywhere, it is unclear how any fundamental shift away from bargain justice could occur without even a more fundamental change in the incentive structure of the participants.

'ractitioners' Reactions

Vhile the basic conclusions of the Hampton County and laska evaluations are opposite--the ban apparently

worked in Alaska but was circumvented in Hampton County--there are striking similarities in the ways lawyers reacted to the two reforms.

The general reaction by prosecutors was favorable: Under the new regime, prosecutors were prosecuting, not sentencing, and sentencing was placed in judicial hands, where it belongs. Furthermore, "a uniform reaction of those assistant prosecutors interviewed was that 'the policy makes my job a lot easier'" (Church, 1976:388). As in Alaska, mild resentment was expressed by several assistants that diminished flexibility for handling troublesome cases might be contributing to occasional injustices.

Defense lawyers were generally dissatisfied with the new system and, as in Alaska, the bases of dissatisfaction varied with the nature of defense practice. Most defense lawyers stressed the importance of plea bargaining as a tool for obtaining substantive justice by means of sentences tailored to fit the circumstances of individual cases. However, "when pressed, attorneys generally conceded that a fundamental source of their distaste was indeed the difficulties it caused them in dealing with clients" (Church, 1976:392). Under the new prosecutor, drug sale cases were warranted only when there was a controlled buy, the likelihood of an acquittal at trial was small, and, without charge reductions, defense lawyers had difficulty demonstrating to their clients that their representation had gained anything for the client except a legal fee. Although judges became willing participants in sentence negotiations, defense lawyers found sentence bargaining frustrating. It required that they invest considerable effort in learning about their clients and their clients' cases. Moreover "the kinds of assurances possible in sentence bargaining were usually vague, ephemeral, and dependent on unpredictable contingencies, such as the probation report" (Church, 1976:394).

The primary inconvenience to retained counsel was that plea bargaining became somewhat more ambiguous and it was more difficult to convince the defendant who was pleading guilty that he or she would receive something of value for the lawyer's fee. Court-appointed counsel had a more difficult time (Hampton County has no public defender). The fees paid to appointed counsel were small and "most attorneys agreed that economic incentives work strongly toward disposing of a case as soon as possible through a plea since little additional income could be obtained to

offset the considerable time and effort needed for a trial" (Church, 1976:394). Appointed counsel, like that in most jurisdictions, tended to be mistrusted by their clients and, because sentence bargaining requires considerable background information about the offense and the defendant and requires both attorney effort and client confidence, the job of the defense lawyer became more arduous and more frustrating (Church, 1976:395).

Conclusion

The Hampton County study supports the argument that under some circumstances criminal court practitioners will circumvent controls on their discretion by revising their behavior to achieve their traditional ends in new ways. Sentence bargaining did replace charge bargaining; however, without more information on screening outcomes and sanctions imposed, it is unclear whether the charge bargaining ban had significant substantive consequences.

Michigan

The third major study that involved an assessment of the abolition of plea bargaining also involved Michigan (Heumann and Loftin, 1979). Effective January 1, 1977, the Michigan Felony Firearm Statute mandated a prison sentence for any defendant who possessed a firearm while engaging in a felony. In addition to the sentence for the primary felony, the law required imposition of a two-year sentence that cannot be suspended or shortened by parole release. Although the law did not prohibit plea bargaining, the Wayne County (Detroit) prosecutor forbade dismissal of firearms charges pursuant to plea bargains. Since the charge determined the incremental mandatory sentence, prohibition of charge bargaining also accomplished a prohibition of sentence bargaining.

Because both the plea bargaining abolition and mandatory sentencing laws were involved, we discuss this study here and in the next section. Here the emphasis is mostly on adaptive reactions and some statistical data on dispositions.

The research consisted of 23 formal interviews with judges, prosecutors, and defense counsel (and numerous informal discussions) and a statistical analysis of data from the Detroit PROMIS system, the computerized court

information system, and the prosecutor's paper files (including arrest reports). The evaluation compares case processing in the 6-month periods before and after January 1, 1977.

Although there were numerous opportunities for assistant prosecutors to circumvent the plea bargaining ban, Heumann and Loftin conclude that "the interview and quantitative data lend qualified support to a conclusion that in fact the Prosecutor was successful in obtaining the compliance of his subordinates" (Heumann and Loftin, 1979:402). There were familiar objections from defense counsel that assistant prosecutors inflexibly refused to bargain, even in exceptional cases, and the familiar ambivalent expressions of support from assistant prosecutors, who approved the ban in general but would have permitted some exceptions. Unlike the Alaska attorney general, but like the Hampton County prosecutor, the Wayne County prosecutor used management supervisory methods to ensure that assistant prosecutors followed the policy. It appears that prosecutors adhered to the rule except possibly for warranting prosecutors who simply failed to charge or record firearms involvement in some cases. "Interviews, however, suggested some slippage at this stage, though the consensus seemed to be that exceptions were relatively infrequent and made only in borderline cases" (p. 405).

To test the extent of underwarranting, Heumann and Loftin examined all armed robberies, felonious assaults, and other assaults involving firearms that were prosecuted and disposed during the first six months after the new law took effect. The gun law charge had been made in 95 percent of those cases, suggesting that underwarranting was not widespread (Heumann and Loftin, 1979:407).

To assess the combined impact of the mandatory sentencing law and the prohibition of plea bargaining, Heumann and Loftin compared data on dispositions and sentences in cases originally charged as felonious assault, other assault, or armed robbery in which a gun was used. The "before" sample consisted of offenses committed any time before January 1, 1977, and disposed of between July 1, 1976, and June 30, 1977. The "after" sample consisted of all offenses committed and disposed in the first six months after the law took effect on January 1, 1977. Like the Hampton County study, the statistical analysis consists of inferences from a tabular presentation of information on dispositions from pretrial dismissal through sentencing.

For a number of reasons, the data can be no more than suggestive and they will not be discussed at length here. First, although Heumann and Loftin looked at all of the cases within their categories during the time periods involved, the numbers of cases in their samples, especially the "after" samples, are small. Moreover, while they do not suggest any reason to be concerned that the different composition of cases comprising the two samples reduces their comparability (Heumann and Loftin, 1979:409), we are somewhat less sanguine about that. Table 7-9, showing sample sizes and median case-processing times, suggests that the cases constituting the before and after samples may have been significantly different. The before sample required almost three times longer for disposition and generated samples four times larger than the after samples. It is not unreasonable to speculate that the before sample is more heterogeneous than the after sample: It includes cases that required very long processing times as well as open-and-shut cases that were dispatched in a few days or weeks. The after sample contains no cases, by definition, that required more than six months for disposition and is probably heavily skewed toward easily disposed cases that may be systematically different from cases that take longer to resolve. Virtually any case that can be disposed within a few weeks that was filed

TABLE 7-9 Sample Size and Case Processing Time for Wayne County, Michigan

	Felonious Assault		Other Assault		Armed Robbery	
	Before[a]	After[b]	Before	After	Before	After
Sample Size	145	39	240	53	471	136
Median Processing Time (Days)	150	54	212	50	164	57

[a]Offense committed before January 1, 1977, and case disposed between July 1, 1976, and June 30, 1977.
[b]Offense committed and case disposed between January 1, 1977, and June 30, 1977.

SOURCE: Heumann and Loftin (1979:Table 3 and p. 409, n. 31).

TABLE 7-10 Disposition of Original Charges in Wayne County, Michigan, by Offense Type and Time Period

	N	Dismissed at/Before Pretrial (%)	Dismissed or or Acquitted After Pretrial (%)	Convicted/ No Prison (%)	Some Prison (%)	Total[a] (%)
Felonious Assault						
Before[b]	145	24	31	31	14	100
After[c]	39	26	26	31	18	101
Other Assault						
Before	240	12	24	28	37	101
After	53	26	24	9	41	102
Armed Robbery						
Before	471	13	19	4	64	100
After	136	22	17	2	60	101

[a]The totals do not always sum to 100 percent because of rounding.
[b]Offense committed before January 1, 1977, and case disposed between July 1, 1976, and June 30, 1977.
[c]Offense committed and case disposed between January 1, 1977, and June 30, 1977.

SOURCE: Heumann and Loftin (1979:Table 3).

within the six-month study period is included in the sample. However, if we assume that cases requiring the median disposition times of 150, 212, and 164 days continued to require comparable disposition times, few of them would be included in the after sample.

We do not know whether the two samples are so non-comparable as to make comparisons suspect. We shall accordingly, somewhat uneasily, accept Heumann and Loftin's assurances that they see no reason to doubt comparability (in fairness they do many times suggest that their findings are tentative) and report their findings.

Dispositions

Overall it did not appear that there was a substantial impact on sentences for defendants processed in court (including those dismissed and acquitted). The proportion of all defendants receiving incarcerative sentences did not increase.

Many armed robbery defendants--more than a third in each sample--avoided prison sentences altogether, primarily through dismissal or acquittal (see Table 7-10). There were, however, some increases in the severity of prison terms imposed. The proportion of armed robbery defendants who received sentences of five years or more increased from 34 to 41 percent. The proportion of defendants receiving sentences equalling or exceeding the two-year minimum increased by 50 percent or more for other assaults (from 22 to 33 percent of defendants) and felonious assaults (from 4 to 13 percent of defendants).

Taking the conventional view that sentencing concessions are required to induce guilty pleas and that their denial will result in more trials, Heumann and Loftin compared modes of disposition during the two periods. The number of trials overall is small, but their data suggested that bench trials increased for felonious and other assault cases but not for armed robberies and that jury trials increased for felonious assault cases but not for other assaults and armed robberies (see Table 7-11). They also found that trials were associated with relatively light sanctions.

Concerning the combined impact of the mandatory law and the plea bargaining abolition, Heumann and Loftin conclude overall (pp. 415-416):

TABLE 7-11 Mode of Disposition of Cases Not Dismissed At or Before Pretrial Conference in Wayne County, Michigan, by Offense Type and Observation Period

Offense	Observation Period	N	Percent No Trial	Percent Trial	Percent Bench Trial	Percent Jury Trial
Felonious Assault	Before[a]	110	84	16	9	7
	After[b]	29	59	41	21	21
Other Assault	Before	212	67	33	15	18
	After	39	72	28	20	8
Armed Robbery	Before	411	70	30	9	21
	After	106	76	24	8	16

[a]Offense committed before January 1, 1977, and case disposed between July 1, 1976, and June 30, 1977.
[b]Offense committed and case disposed between January 1, 1977, and June 30, 1977.

SOURCE: Heumann and Loftin (1979:Table 4).

In sum, the experience with cases completed during the six months after the intervention of the gun law indicates that there has been only a slight upward shift in the average sentence. Clearly there has been no massive increase in the number of cases that receive a sentence of two years or more. Furthermore, the only increase in the proportion of cases that go to trial is in felonious assaults and these trials are associated with light sentence.

Adaptive Responses

If prosecutors consistently filed gun law charges and refused to bargain them away, why did sentence severity not increase dramatically? Heumann and Loftin offer several answers.

First, especially for felonious assault cases, "waiver" trials were used to avoid the mandatory two-year sentence. Judges and lawyers openly acknowledged that the waiver trial was a mechanism for avoiding the impact of the mandatory sentence law. In one form of waiver

trial judges gave explicit prior indications that they would dismiss the gun charge at trial, often with the prosecutor's acquiescence. In a second form of waiver trial there was no explicit understanding between the defense lawyer and the judge, but "these judges concede that they would consider every possible defense and require evidence of every element of the charge such as the presence of an operable firearm; but when the case is technically indisputable they feel trapped by the law and left with no option but to apply it" (Heumann and Loftin, 1979:419). One judge had managed in every case over two years to find justifiable reason to reduce the felony charge to a misdemeanor (thus making the mandatory sentence inapplicable) or to dismiss the gun charge, but he expressed apprehension that some day he would not be able to find a good faith reason to circumvent the mandatory sentence (pp. 419-420).

Finally, interviews led Heumann and Loftin to conclude that judges routinely nullified the mandatory two year add-on by reducing the sentence imposed on the primary felony by an offsetting two years (Heumann and Loftin, 1979:422):

> Essentially, the respondents agreed that the gun law would not lead to a substantial increase in the "going rates." Most respondents claimed that judges adjusted their prior going rate to take into account the two years added by the new law.

This observation is not inconsistent with the statistical data that showed an insubstantial increase in sentence severity. As in Alaska, it appears that the primary effects of the Michigan law were on marginal defendants. In cases in which it was relatively clear that some prison sentence would be imposed, prisoners who might otherwise have received a one-year sentence could not benefit from the judges' new math (Heumann and Loftin, 1979:423):

> In particular some [respondents] felt that in the "less serious of the serious" armed robberies and assaults, the Gun Law marginally increased the sentence. For example, a defendant convicted of armed robbery in Segment I could receive as little as one year from some judges, two from others. In Segment II the minimum would be three years (one year for the armed robbery, two for the Gun Law.

Heumann and Loftin's policy conclusions resemble those of Church. They endorse a static notion of the disposition process in which the courtroom community will co-opt formal changes so that things may go on as before (Heumann and Loftin, 1979:426):

> The system managed to digest the two policy innovations without a radical alteration in its disposition patterns. Court personnel suspected as much: time and again in their interviews they indicated that somehow the system would accommodate itself, that things would work themselves out without any major departures from past practice.

And later the authors conclude (p. 429): "We are therefore pessimistic about effecting radical changes in the criminal justice system."

MANDATORY SENTENCING LAWS

Polemically and politically speaking, mandatory sentencing laws have much to offer. As a means of gun control they sidestep the gun lobby. They are simple and easy to understand. They sound severe. It makes intuitive sense that crime will abate if miscreants are inexorably convicted and imprisoned. Practically speaking, the case for mandatory sentencing is more ambiguous. Prosecutors can always and everywhere elect whether to file charges bearing mandatory minimum sentences or some other charge, and whether to dismiss charges. As under any severe but rigid rule, sympathetic cases cause decision makers to seek ways to avoid the rule. Juries, judges, and lawyers have routinely evaded mandatory sentencing laws for 300 years (Hay et al., 1975:Chapter 1; Michael and Wechsler, 1940). Finally, if literally applied, mandatory sentence cases would engorge the prisons.

Numerous mandatory sentencing laws have been passed in recent years. Impact evaluations of three of them have been published and are reviewed here (Beha, 1977; Joint Committee, 1977; Heumann and Loftin, 1979; Loftin and McDowall, 1981).

First, however, a few words might usefully be devoted to considering the criteria by which the success of a mandatory sentencing law should be appraised. Mandatory laws can be seen as only political theater: The purposes

are rhetorical and are achieved at the moment of passage. This is not so cynical a position as it may appear. The lawyers and legislators who preside over the enactment of such laws surely appreciate the ambivalence with which they will be administered and the financial costs and incidental injustices that would result if every person who did X received a three-year prison sentence. With this possibility in mind, we review findings of the impact of such laws on case processing and dispositions.

We note one caveat: The studies considered here were largely concerned with the deterrent effects of the laws studied. Case processing and dispositions received subsidiary attention and, accordingly, the quality of the data adduced is sometimes unsatisfying. To assess the impact of a mandatory sentence law on case processing, one needs to know about patterns of arrest, charging, indictment, dismissal, plea bargaining, conviction, and sentencing over time. Unfortunately, none of these studies provides all that information in adequate detail, and therefore much of our effort to draw conclusions from these works involves the drawing of weak inferences, commonsense speculations, and the like.

Michigan

The Michigan Felony Firearm Statute is described above in some detail. It created a new offense of possessing a firearm while engaging in a felony and mandated a two-year prison sentence that could not be suspended or shortened by release on parole and that must be served consecutively to the sentence imposed for the underlying felony. The gun possession charge had to be separately charged; its applicability thus depended on the decisions of Michigan prosecutors. The law took effect on January 1, 1977, and was supplemented by the Wayne County prosecutor's ban on charge bargaining in firearms cases.

Two evaluations of Michigan are available. The first (Heumann and Loftin, 1979) consists of a statistical analysis of case processing and dispositions for the six-month periods before and after January 1, 1977, and a series of 23 interviews with judges, lawyers, and prosecutors. The second (Loftin and McDowall, 1981), analyzed dispositions for 8,414 cases originally charged with a violent felony[8] and disposed of in court during 1976, 1977, and 1978. While the second study covers a

longer time period and includes considerably more cases, no descriptive statistics on case dispositions or distributions are provided. The description of case processing that follows is drawn entirely from the more limited six-month samples in Heumann and Loftin (1979).

Arrest and Case Screening

Arrest information is not germane because the firearms charge is dependent on the underlying felony charge. The primary data for the study available from PROMIS were inadequate to examine early case screening; the data begin with cases already warranted for prosecution. Separate analysis of case files to determine whether the firearms charge was in fact warranted when supported by the facts found that "in the overwhelming majority of cases, the prosecutor did indeed charge the gun count" (Heumann and Loftin, 1979:407).

Dismissal and Conviction Rates

One conventional prediction concerning mandatory sentencing laws is that lawyers and judges will dismiss charges and acquit defendants in order to avoid imposition of sentences they believe are unduly harsh. Table 7-10 shows Heumann and Loftin's data on case dispositions for felonious assault, other assault, and armed robbery.[9] Felonious assaults typically "grow out of disputes among acquaintances or relatives and are, by conventional standards, less predatory than armed robberies (Heumann and Loftin, 1979:412). "Other assaults" were an intermediate category including a variety of "assault with intent to commit . . . " charges.

Table 7-10 reveals little change in disposition patterns for felonious assault: Just under half of the persons charged were convicted but fewer than 20 percent received a prison sentence in either period. Armed robbery processing changed little, although there was a tendency toward increased early dismissal of charges, which rose from 13 percent of persons charged to 22 percent, with slight declines at each critical juncture thereafter. "Other assault" shows a marked tendency toward increased early dismissal, rising from 12 percent to 26 percent, and an offsetting decline in the percentage of convictions, even though the likelihood of

incarceration, given warranting, increased. This combination of findings is consistent with a hypothesis that efforts were made to ensure that sympathetic defendants would not be vulnerable to imprisonment. The "other assault" cases were the middle category, in which the greatest ambiguities were likely to exist, and they exhibit the greatest changes in dispositions.

Sanctioning Rates

Overall, the percentage of defendants who were incarcerated did not change markedly in Wayne County. However, the likelihood of incarceration after conviction did change significantly, from 57 to 82 percent, for offenders convicted of "other assault." This increase in imprisonment more than offset the increased number of early dismissals.

There was also an increase in the length of sentences for imprisoned offenders after the new law took effect. While the sample sizes involved are small and suggest caution in accepting the findings derived from them, there did appear to be increased sentence severity for individual offense categories. Of offenders imprisoned for felonious assault, the proportion sentenced to terms of two years or more increased from 30 to 71 percent. For imprisoned "other assault" offenders, the portion receiving at least two-year terms rose from 59 to 81 percent after the law. There was little increase in the use of the minimum two-year term for armed robbery (from 87 to 93 percent).

Loftin and McDowall (1981) report similar effects on a considerably expanded data set. Using modified multiple regression analysis,[10] they find no effect of the gun law on the expected time served for offenders charged with murder or armed robbery. The expected sentences for felonious assault and other assaults, however, did increase more for cases involving guns. Similar results were found for the probability of prison among charged offenders.

Trial Rates

Table 7-11 shows mode of disposition by offense type and time period. The only substantial change shown is the trebled rate of felonious assault cases resolved at

trial. Even this increase, from 16 to 41 percent, probably understates the shift: The after period includes only cases initiated and resolved within the six-month study period for a maximum follow-up of six months; the before period, by contrast, includes cases for offenses committed any time before January 1, 1977, but disposed of between July 1, 1976, and June 30, 1977, for a minimum follow-up of six months. The shorter follow-up in the after period is likely to disproportionately exclude unresolved trial cases for felonious assault.[11] The large increase in the bench trial rate observed is mainly due to judges' use of the "waiver" trial as a mechanism to circumvent both the mandatory gun law and the prosecutor's ban on charge bargaining.

To summarize: There was a significant increase in dismissals of "other assault" and robbery cases, effecting for "other assault" a significant decrease in the percentage of cases convicted at trial but without imprisonment. The likelihood of imprisonment once charged remained the same for all three categories of crime. The likelihood of imprisonment after conviction increased for "other assault.". There was a discernible increase in sentence severity for those imprisoned. And the trial rate trebled for felonious assault cases but decreased slightly for the other two offense categories.

Massachusetts

Massachusetts's Bartley-Fox Amendment required imposition of a one-year mandatory minimum prison sentence, without suspension, furlough, or parole, for anyone convicted of carrying an unlicensed firearm. Unlike the Michigan law, Bartley-Fox did not require that the defendant be charged or convicted for another offense. The law took effect on April 1, 1975.

To assess the law's impact on case processing and sanctioning, Beha (1977) collected data on all prosecutions for firearms crimes in the six months after the law took effect and for the corresponding six months of the preceding year. All complaints relating to the illegal use, possession, or carrying of a firearm were included in the samples, comprising 467 cases in 1975 and 615 in 1974. Some defense lawyers were interviewed, but no judges or prosecutors.

The Massachusetts study was designed to test a number of specific hypotheses about police, prosecutorial, and

judicial adaptations to a law that practitioners generally disliked. We summarize some of Beha's findings below, but first want to suggest several reasons why the findings of this study are inherently more ambiguous than those of other studies discussed in this review. First, the Boston district courts that were studied serve as preliminary hearing courts for the Massachusetts superior court in Boston: Some cases are simply bound over, and any district court conviction can be appealed to the superior court for a trial de novo. Thus a conviction or sentence in the district court need not mean that the defendant will ultimately be convicted or receive that sentence. Second, prosecutors and judges were not interviewed; the analysis draws almost entirely on statistical data. It is not impossible that judges and prosecutors could explain ambiguous or perplexing statistical findings. For example, Michigan lawyers explained the threefold increase in trials for felonious assault in Michigan as a way to get around the prosecutor's plea bargaining ban. Third, unlike that of Michigan, the Massachusetts law did not require an incremental sentence, and thus firearms carrying charges were of marginal importance to prosecutions for violent crimes, for which an incarcerative sentence was likely in any event.

Arrests and Prosecutorial Screening

Illegal possession of a firearm is a misdemeanor that does not require imposition of a prison sentence. Consequently, one might expect police to substitute "possession" charges for "carrying" charges when sympathetic defendants are involved. Similarly, one might expect prosecutors to screen out carrying charges or reduce them to possession. Beha concluded that neither adaptation occurred. Firearms arrests did decline by 31 percent from the 1974 period to the 1975 period. Both carrying and possession arrests declined, as did arrests for carrying a firearm in a nongun felony (by 49 percent). These developments and others "are strong evidence for the argument that the (decline) . . . was due primarily o increased citizen compliance" with Massachusetts's gun egistration law (Beha, 1977:135). Furthermore, on the asis of a case-by-case analysis of police files in irearm possession cases, Beha concludes, "Police evasion f the mandatory penalty by this route (downgrading to ossession) simply did not occur" (p. 135).

Nor according to Beha was there prosecutorial circumvention. As a practical matter, police initiate complaints in the district court, and there is little plea bargaining. There is considerable plea bargaining in the superior court. Beha found only a few cases in which carrying charges were dropped to possession, and they were all plausibly explained on the basis of case circumstances: "Prosecutorial discretion . . . has been exercised in favor of the Bartley-Fox defendants in our Boston sample rarely or not at all" (Beha, 1977:137).

Dismissal and Conviction

The effects of the carrying law on the district courts were to increase the incidence of acquittals, to increase greatly the rate of appeals to the superior court, to eliminate the use of several nonadjudicative dispositions, and to increase the rate of absconding (i.e., jumping bail).

Table 7-12 shows district court dispositions for the before and after periods. The dispositions "continued for dismissal" and "guilty, filed" were equivalent to stays of judgment and were expressly forbidden by the

TABLE 7-12 Disposition of Carrying Firearms Charges in Boston District Courts by Most Serious Accompanying Charge

	Percent Each Charge							
	Robbery		Assault with a Deadly Weapon		Nongun Felony		Firearms Only	
Disposed Cases	1974 (N=16)	1975 (N=14)	1974 (N=27)	1975 (N=19)	1974 (N=36)	1975 (N=25)	1974 (N=145)	1975 (N=107)
Dismissed	19	8	36	6	3	6	12	15
Continued for Dismissal	6	0	4	0	9	0	9	0
Not Guilty	6	31	8	12	25	11	16	36
Guilty, filed	0	0	0	0	0	0	2	0
Guilty, penalty	0	8	36	24	38	6	40	1
Guilty, appeal	0	8	0	47	9	61	12	38
Bound Over	64	46	16	12	16	11	9	6
Indicted	6	0	0	0	0	6	1	3
All Dispositions[a]	101	101	100	101	100	101	101	99

[a]The totals do not always sum to 100 percent because of rounding.

SOURCE: Adapted from Beha (1977:Table II).

statute. Their use ceased. More important, there was a general increase in acquittals, especially for defendants also charged with robbery and those charged only with the firearms violation. An additional one-fifth (36 percent less 16 percent) of the defendants charged only with a firearms offense who might have been convicted under the former law were acquitted under the new law.

On the basis of several inquiries--including interviews with defense attorneys and comparisons of presentence reports of acquitted and nonacquitted defendants--Beha concluded that part of the acquittal increase reflects greater efforts by attorneys because the stakes had been raised and that part of the increase reflects a greater receptivity by judges to technical defenses. However, he found no evidence of wanton evasion and "as a usual matter, judges did not change their approach to deciding cases merely to avoid the mandatory sentence" (Beha, 1977:143).

Beha indicates that "all defendants found guilty of the carrying violation in the district court were sentenced to the mandatory one year of imprisonment" (Beha, 1977:127). Looking at the line "guilty, appeal" in Table 7-12, the incidence of appeal to the trial de novo in superior court tripled for firearms carrying charges by themselves; the increase in appeals was even greater for assault with a deadly weapon and nongun felonies. Patently, judges were imposing the minimum sentences and defendants did not like it. Unfortunately, the cases were not followed into the superior court to determine final dispositions.

The increase in appeals is more striking in Table 7-13. Excluding robbery, the percentage of total cases that proceeded to the superior court increased from less than one-fifth to more than half. But as Table 7-13 shows, the percentage of defendants absconding also increased, especially for robbery and other nongun felonies.

Sanctions and Delay

Unfortunately, nothing can be said about either sanctions or delay. Implicitly the appeals increase suggests that the imposition of prison sentences increased substantially in district courts, but whether these sentences survived superior court processing is unknown. Similarly, the increased rate of appeals suggests that average court processing times increased.

TABLE 7-13 Summary of Dispositions for Carrying Firearms Charges in Boston District Courts by Most Serious Accompanying Charge

	Percent Each Charge							
	Robbery		Assault with a Deadly Weapon		Nonqun Felony		Firearms Only	
Total Cases	1974	1975	1974	1975	1974	1975	1974	1975
Default/Pending	0	7	7	11	11	28	12	12
To Superior Court	75	50	15	53	22	56	19	42

SOURCE: Adapted from Beha (1977:Table II).

To sum up: Adaptation is evident in the substantial increase in acquittals for defendants charged only under the carrying statute and those also charged with robbery; appeals to the superior court increased enormously, suggesting that the minimum sentence was being imposed at district courts; and the absconding rate increased.

New York

The Rockefeller Drug Law took effect on September 1, 1973. It prescribed severe and mandatory prison sentences for narcotics offenses at all levels and included selective statutory limits on plea bargaining. The statute divided heroin dealers into three groups based on the quantities sold or held for sale:

Category	Quantity	Minimum Sentence
A-I	sell 1 oz. or possess more than 2 oz.	15-25 years
A-II	sell 1/8 oz. or more; possess 1-2 oz.	6-8 1/3 years
A-III	sell less than 1/8 oz; possess less than 1 oz.	1-8 1/3 years

The law permitted plea bargaining within the A felony class but forbade bargained dismissals that would reduce the offense of conviction below Class A-III (there were exceptions for informants and for offenders ages 16-18).

The impact evaluation of the Joint Committee on New York Drug Law Evaluation was primarily interested in the deterrent effects of the new law in diminishing drug trafficking and use and in reducing drug-related crime. There was no evidence that any of these goals were accomplished, although publicity about the law may have caused a short-term suppression effect in some areas (Joint Committee, 1977:7-11).

The case processing evaluation primarily involved aggregate state-level data; less attention was paid to some data from New York City and five other counties. With the exception of two small projects intended to measure the use of a related provision that required that a prison sentence be ordered for any defendant previously convicted of a felony, the case-processing analysis depended on statistics routinely compiled by operating agencies. Case processing was not examined closely; some interviews were conducted with judges and lawyers, but they were not systematic and apparently focused on general reactions to the law and not on the details of case processing.

Unfortunately, the parts of the evaluation that deal with case processing do not shed much useful light on the questions with which we are concerned. The statewide data simply do not permit detailed analysis of why judges and lawyers did what and when. Summarizing the results from 1972 to 1976: Drug felony arrests, indictment rates, and conviction rates all declined; imprisonment rates among convictions increased steadily; and the likelihood of imprisonment given arrest for a drug felony remained the same, at approximately 11 percent.

Table 7-14 shows state-level drug felony disposition figures for the period January 1, 1972, through June 30, 1976. Some caveats may be in order about the numbers it contains. First, the data are aggregates that include all drug felony charges, including marijuana offenses and other than Class A drug felonies. Public attitudes and drug law enforcement patterns were in considerable flux during the period 1972-1976 and felonies other than Class A were subject to mandatory sentences but not to the plea bargaining abolition. Unless the data are disaggregated, only weak inferences can be drawn from them about Class A felony processing. Second, the number

TABLE 7-14 Drug Felony Processing in New York State

	1972	1973[a]	1974	1975	1976 (Jan.-June)
Arrests	19,269	15,594	17,670	15,941	8,166
Indictments	7,528	5,969	5,791	4,283	2,073
(% of Arrests)	(39.1)	(38.3)	(32.8)	(26.9)	(25.4)
Indictments disposed	6,911	5,580	3,939	3,989	2,173
Convictions	6,033	4,739	3,085	3,147	1,724
(% of dispositions)	(87.3)	(84.9)	(78.3)	(78.9)	(79.3)
Prison and jail sentences	2,039	1,555	1,074	1,369	945
(% of Convictions)	(33.8)	(32.8)	(34.8)	(43.5)	(54.8)
(% of Arrests)	(10.6)	(10.0)	(6.1)	(8.6)	(11.6)

[a]The new drug law went into effect September 1, 1973.

SOURCE: Joint Committee (1977:Tables 19, 24, 27, 29).

of drug felony arrests declined after 1972, suggesting major changes in police policies. (The evaluation indicates that New York City police did adopt a restrictive arrest policy [Joint Committee, 1977:90-91].) Third, the data are statewide aggregates. Inferences derived from them are subject to an ecological fallacy; statewide trends do not necessarily parallel local trends anywhere. Indeed, there is evidence in the report that arrest and prosecution trends varied substantially among different counties over the five-year period (pp. 123-145). Fourth, some jurisdictions implemented more stringent screening standards for drug cases, thus reducing the numbers but increasing the "convictability" of defendants arrested (pp. 123-124).

Given the smaller number of (possibly higher-quality) arrests, it is not surprising that the percentage of convictions resulting in incarceration increased (from 33.8 percent to 54.8 percent). It is initially surprising, however, that the percentage of indictments resulting in convictions declined, from 87.3 percent in 1972 to 79.3 percent in the first half of 1976. On one hand, this could reflect increased dismissals after

indictment to avoid the mandatory prison sentences. Data for New York City showed a marked increase in the percentage of drug felony indictments resulting in dismissals: 1972--6.8 percent; 1973--6.9 percent; 1974--16.7 percent; 1975--21.3 percent (Joint Committee, 1977:Table 28). Or the decline could be the product of processing delays resulting from implementation of the new law that slowed final disposition for convictions. On the other hand, the apparent decline in the conviction rate may understate a real decline. Because drug felony case disposition times doubled in New York City between 1973 (172 days) and the first half of 1975 (351 days), convictions in each succeeding year relate to increasing numbers of arrests made in earlier years. The arrest numbers in those earlier years were substantially greater than in 1975 and 1976, and it may be that the percentages of those earlier cases resulting in convictions are much lower than the figures shown in Table 7-14.

No serious effort to study case processing was made, and it is difficult for us to say much about it or about the implications of the aggregate disposition data presented in Table 7-14. We do make several points below.

Dismissal

The numbers of arrests and indictments for drug felony offenses in New York City declined greatly. Arrests dropped from 26,378 in 1970 to 7,498 in 1975, while indictments declined from 4,388 in 1972 to 2,250 in 1975. For felony heroin cases, arrests went from 22,301 in 1970 to 3,937 in 1975 (Joint Committee, 1977:Tables 20 and 21).

Incarceration Rates

The risk of incarceration for the small numbers of defendants who were convicted increased significantly. However, the steady decline in the number of drug felony convictions from 1972 to 1976 offset the increased probability of incarceration given conviction, to yield a fairly stable probability of incarceration given arrest. Overall and statewide, the proportion of drug felony prisoners in the state prisons was essentially unchanged from 1972 (10.7 percent) to 1975 (10.8 percent) (Joint Committee, 1977:Table 17). However, in 1976 prison commitments for drug offenses rose substantially, increasing 35 percent over the number in 1975 (Table 18).

Similar results on increased incarceration rates emerge in an analysis of the impact of a related law, requiring imposition of prison sentences on any person convicted of a felony who had a previous felony conviction. For these second felony offenders, the probability of imprisonment, given conviction, rose from 70 percent to 92 percent (Table 8).

Severity of Prison Sentences

The severity of prison terms imposed on sentenced drug offenders increased markedly. Under the old law, between 1972 and 1974 only 3 percent of sentenced drug felons received minimum sentences of more than three years. Under the new law, the use of long minimums increased to 22 percent. Between September 1973 and June 1976, an astonishing 1,777 offenders were sentenced to indeterminate lifetime prison terms, a sentence rarely imposed before the new drug law (Joint Committee, 1977:99-103).

Trial Rates

Probably because the drug law forbade plea-bargained charge dismissals below a Class A-III offense, the trial rate as a percentage of dispositions in New York City rose from 6 percent in 1972 to 17 percent in the first six months of 1976 (Joint Committee, 1977:104). During the period January 1, 1974, to June 30, 1976, 23.4 percent of all Class A dispositions involved trials; for all Class A-II dispositions the trial rate was 34.6 percent (Table 35).

Delays in Court

Presumably because of the increased trial rates (in New York City in 1974 it "took between ten and fifteen times as much court time to dispose of a case by trial as by plea" [Joint Committee, 1977:105]), average case processing times in New York City increased steadily:

Sept-Dec 1973	172 days
1974	239 days
1975	265 days
Jan-June 1976	351 days

Not surprisingly, and notwithstanding the addition of 31 new criminal courts in New York City, the drug case backlog increased by 2,205 cases from September 1, 1973, to June 30, 1976, representing 85 percent of the rise in backlog over that period (Tables 33 and 34).

The substantial delay in case processing has implications for the impact assessment. The first six months' experience in 1976--some two and one-half years after the drug law took effect--were the last observations before implementation of major amendments to the law. The experiences in the first half of 1976 reflected sharp increases in prison commitments as well as increases in both the number of disposed indictments and convictions over the previous two years' performance. This suggests that, because of the delays in case processing, it might not have been until 1976 or later that the impact of the law in generating more severe case outcomes was beginning to be fully realized. Unfortunately, from the perspective of our knowledge of the impact process, the mid-1976 changes in the law to permit expanded plea bargaining will confound any conclusions from subsequent observations.

Conclusion

For the reasons stated above, we are skeptical about the meaning of the New York dispositional data. The probability of incarceration given conviction presumably increased steadily, but whether that signifies harsher sentences in general, or simply that less serious offenders were increasingly filtered out before conviction, is unclear. It is clear that trial rates and court delays increased dramatically. Both trends contributed to the 1976 repeal of the plea bargaining restrictions.

The different reactions to radical changes in sentencing procedures in Alaska and New York may reflect no more than differences between the two states. Alaska's courts processed a total of only 2,283 defendants in two years. New York has a much higher volume of high-severity crime. The stakes are higher for more defendants, and the critical mass of high-stakes defendants, may be too large for any system to fully absorb.

DETERMINATE SENTENCING IN CALIFORNIA

The most extensively studied sentencing reform is the California Uniform Determinate Sentencing Law (DSL),

which went into effect July 1, 1977. Many factors contributed to the widespread interest in the impact of this law. A primary consideration was the comprehensiveness of the change that affected sentencing to prison for all felonies. The new sentencing law also represented a substantial departure from the rehabilitative philosophy that had pervaded sentencing in California for 60 years. Determinate sentencing, with fixed prison terms set by the judge, replaced indeterminate sentencing (ISL), in which judges merely sentenced offenders to the statutory maximum with the release time being set by the Adult Authority. The California criminal justice system has also long been regarded as a preferred one for research purposes because of its integrated and automated records system and its accessibility to outside researchers.

At least seven major research projects have examined the impact of determinate sentencing in California. As summarized in Table 7-15, these studies vary considerably in the relative strengths and weaknesses of their evaluation designs. Different studies focus on different jurisdictional levels and different stages in case processing. While most are limited to statistical analyses of statewide data, three studies (Hubay, 1979; Casper et al., 1981; Utz, 1981) include greater controls for jurisdictional differences in case mix and in case processing by focusing on individual counties. Several of the studies are limited primarily to consideration of impact on sentence outcomes, particularly the proportion sentenced to prison after conviction and the length of prison terms imposed and served. Lipson and Peterson (1980) and to a much greater extent Casper et al. (1981) and Utz (1981) explicitly examine changes in charging practices and plea bargaining associated with DSL in addition to impacts on sentence outcomes. Such studies are intended to capture changes in the intervening processes leading to conviction and thus in the mix of cases actually available for sentencing as well as changes in sentences imposed.

The studies also vary in the degree of control for variations in case seriousness and for preexisting trends in case processing. With the exception of Utz (1981), the studies include minimal controls for case seriousness using legally defined crime type categories. Utz (1981), by contrast, employs elaborate controls including weapon use, use of threat or force, presence of victim, harm to victim, value of property taken, degree of criminal sophistication displayed, and whether the offender was

implicated in multiple offense incidents. While the Utz study is strongest on controls for case seriousness, it is weakest on time controls, using only two points for comparisons of pre- and post-DSL changes. Two points do not permit adequate controls for preexisting trends in case processing. The other studies are better on this dimension because they involve multiple observations (at least in the preperiod) in most ISL/DSL comparisons. While the various studies are each individually flawed, combined they provide a fairly rich picture of impact at a variety of levels for determinate sentencing in California.

A procedural change as fundamental and complex as DSL has potential for widespread impact on the processing of criminal cases. In actual practice, however, we found relatively few changes that might be attributed to DSL:

- Judges largely complied with the requirements of the law when sentencing convicted defendants; the considerable discretion of the prosecutor in initial charging and later dismissal practices was not affected.
- There is no evidence of substantial changes in initial charging practices, at least for cases finally disposed of in superior court.
- Explicit bargaining over the length of prison terms was limited to those jurisdictions already engaged in extensive sentence bargaining.
- Enhancements and probation ineligibility provisions represented important bargaining chips for the prosecutor; these allegations were frequently dropped in return for defense agreements to prison terms.
- While there were no substantial changes in aggregate guilty plea rates, there is some evidence that early guilty pleas did increase after DSL.
- Prison use definitely increased after DSL; this increase was accompanied by apparent increasing imprisonment of less serious, marginal offenders. These increases in prison use, however, are best viewed as continuations of preexisting trends toward increased prison use in California and not as effects of DSL.
- Also consistent with preexisting trends, both mean and median prison terms to be served continued to decrease after DSL. There are also some indications of a decline in variation of sentences for

TABLE 7-15 Variations in Impact Evaluation Design: California Determinate Sentencing Law

Characteristics of Evaluations	Sparks (1981)	Hubay (1979)[a]	Brewer et al. (1980)	Lipson and Peterson (1980)	Ku (1980)	Casper et al. (1981)	Utz (1981)
Jurisdiction studied	Statewide	County	Statewide	Statewide	Statewide	Counties	Counties
Stages of case processing studied		n.a.					
Charging						yes	yes
Plea bargaining				yes		yes	yes
Sentence outcomes in superior court	yes		yes	yes	yes	yes	yes
Controls for variations in case seriousness		n.a.					
Limited to control for crime types (legal categories)	yes		yes	yes	yes	yes	
Consideration of wide variety of factors, in addition to crime type, contributing to case seriousness							yes
Time frame studied		n.a.					
Simple two-point pre/post design							yes
Multiple observations in pre/post design	yes		yes	yes	yes	yes	

[a]The final report of Hubay (1979) was not available at this writing. Many of the details of the study design were therefore not available (n.a.).

the same convicted offense, although the range of sentences observed under DSL remains broad.

- The Adult Authority exercised an important role in controlling the size of prison populations through their administrative releasing function; without some similar "safety valve" release mechanism, California's prison population can be expected to increase dramatically as a result of increasing prison commitments and only marginal decreases in time served, particularly in view of legislative increases in prison terms.

Description of the California Uniform Determinate Sentencing Law

The original determinate sentencing law (SB42 as amended by AB476) took effect July 1, 1977. The bill was subsequently amended in 1978 by SB709 and SB1057 to increase the severity of penalties for offenses committed after January 1, 1979, especially for violent offenses.

In contrast to the indeterminate prison sentences previously imposed by judges, under DSL judges are charged to set a fixed term of sentence for each offender sentenced to prison. This term is to be selected from the set of three base terms determined by the legislature for each offense type (e.g., for robbery the terms are 2, 3, and 5 years). The middle term is the presumptive sentence to be imposed except in cases with mitigating or aggravating circumstances that warrant use of the lower or upper base terms.

In cases involving conviction for multiple charges the judge may impose separate terms on each charge to be served consecutively or concurrently. The law also provides for enhancements that further increase prison terms in cases involving weapon use, great bodily injury to the victim, excessive property loss, or prior prison terms. These enhancements provide an opportunity for assessing differences in the gravity of offenses within a conviction category. Enhancements must be formally charged by the prosecutor and then pled or proved in court. Once proven the judge may impose the addition to the base sentence or stay its imposition. The legislation also includes provisions for mandatory probation ineligibility for certain violent felonies, certain heroin trafficking offenses, defendants convicted of specified felonies who were twice convicted of designated felonies

in the preceding 10 years, and defendants personally using a firearm in the commission of any of 10 enumerated crimes. The 1978 amendments further extended mandatory prison terms to defendants convicted of various sex offenses or who inflicted great bodily injury during commission of designated serious felonies.

DSL created a new Board of Prison Terms, whose main function is to review all prison sentences imposed for disparity and, in cases of apparently disparate sentences, to recommend resentencing to the sentencing judge. Under DSL all inmates are subject to parole supervision upon release for a time in addition to their prison term (originally for one year for most prisoners, and later increased to three years by the 1978 amendments). The new law also provided "good-time" credits of up to 3 months off every year of sentence for good behavior and another month off for program participation. Good-time credits vest at the end of each eight months and once vested they cannot be taken away. Upon implementation the sentence provisions of DSL were applied retroactively to all persons serving indeterminate sentences, except dangerous offenders deemed eligible for extended terms.

The statutory changes were generally expected to reduce disparity in sentences and to increase the severity of punishment. The reductions in disparity were expected to follow directly from increases in uniformity in sentences. The increases in severity of punishment through expanded use of prison for convicted felons were expected to result from judges' increased willingness to impose prison sentences of more certain duration and from the extended probation ineligibility provisions.[12]

Formal Compliance With DSL

In this section we review the available evidence on formal compliance with the procedural requirements of DSL. These include use of the middle base term as the presumptive sentence in most cases, charging and imposition of enhancements when warranted by the facts, and enforcement of the probation ineligibility provisions.

Selection of Base Terms

Available evidence for 1977-1978 and 1979 indicates that most offenders sentenced to prison in those years

received the presumptive middle base term, but that a shift toward greater imposition of the lower base term occurred in 1979. The shift appears to have resulted from the 1978 amendments to DSL that increased the middle and upper terms for many offenses.

Table 7-16 shows the distribution of base sentences, by offense type, for prisoners received by the California Department of Corrections in fiscal 1977-1978 and calendar 1979. The middle base term was imposed in 61 percent of cases received in 1977-1978;[13] in 1979 the rate declined to 54 percent. The data on 1979 receptions indicate general changes in the distribution of base sentences, including declines in use of middle and/or upper terms and increases in use of lower terms across offense types. As in 1977-1978, however, despite changes in magnitude, upper terms remained more likely than lower terms for most crimes against persons and lower terms were more common for property and drug offenses.

One factor potentially contributing to this tendency to impose the lower base terms in 1979 was implementation in 1979 of the amendments to DSL in SB709, which increased the length of middle and upper base terms for certain offenses committed after January 1, 1979.[14] To the extent that these new longer terms were regarded as too severe by court participants, one would expect a decrease in use of middle and upper terms. Consistent with this expectation, the largest decreases in the use of upper terms combined with the greatest increases in the use of lower terms shown in Table 7-16 were found in just those offenses directly affected by SB709. Most of the other offenses also experienced decreases in the use of middle terms and increases in the use of lower terms, but in contrast to the SB709 offenses, they experienced increases in the use of upper terms.

The Board of Prison Terms study (1981:Table VI) directly compares cases sentenced before and after the SB709 changes. This comparison indicates definite decreases in the use of the longer middle and upper terms for cases sentenced under SB709. This decrease, however, extends well beyond the offenses directly affected by SB709 to include offenses for which the base terms did not change. While the overall shift to increased use of lower terms may reflect a generalization of a direct response to the increased sentences mandated by SB709, these results are potentially confounded by the possibility of seasonal variations in sentences. Cases sentenced in the second half of the year, which includes the Thanksgiving and Christmas holiday seasons when

TABLE 7-16 Use of Base Term Options for Offenders Received by the California Department of Corrections on a Single Count Conviction: Fiscal 1977-1978 and Calendar 1979

Offense Type	Year	% Cases with Each Base Term Option			% Single Count Convictions Among Total
		Lower	Middle	Upper	
All Offenses	1977-1978[a]	20.1	61.3	18.5	73.0
	1979[b]	27.1	54.0	18.9	69.8
Persons Offenses	1977-1978	20.5	57.2	22.3	69.1
	1979	24.8	54.3	20.9	63.4
2nd Degree Murder	1977-1978	18.4	57.9	23.7	82.6
	1979	22.8	45.5	31.7	71.1
*Voluntary Manslaughter	1977-1978	18.3	63.4	18.3	90.3[c]
	1979	21.7	53.0	25.3	89.0[c]
*Robbery	1977-1978	22.1	55.5	22.4	64.9
	1979	24.2	58.0	17.8	62.0
Assault	1977-1978	20.0	60.0	20.0	74.3
	1979	24.5	50.3	25.2	73.5
*Rape	1977-1978	17.0	53.2	29.8	54.7
	1979	33.6	50.4	16.0	33.5
*Crimes Against Children	1977-1978	12.9	37.5	50.0	61.8
	1979	22.2	42.9	34.9	67.0
*Oral Copulation	1977-1978	4.8	61.9	33.3	52.4
	1979	30.4	39.1	30.4	46.9
Property Offenses	1977-1978	18.3	67.1	14.6	76.5
	1979	27.4	55.2	17.4	74.0
*Burglary 1	1977-1978	19.7	59.1	21.0	65.3
	1979	31.1	52.3	16.4	61.1
Burglary 2	1977-1978	19.8	66.4	13.8	78.7
	1979	27.1	56.0	17.0	75.9
Grand Theft	1977-1978	19.2	70.7	10.1	82.8
	1979	29.4	53.2	17.4	80.4
Auto Theft	1977-1978	18.1	72.3	9.6	83.0
	1979	26.4	56.1	17.5	79.5
Forgery	1977-1978	12.5	70.8	16.7	61.5
	1979	30.8	47.4	21.8	53.0
Receiving Stolen Property	1977-1978	11.6	65.2	23.2	84.1
	1979	23.0	59.4	17.7	77.3
Drug Offenses	1977-1978	22.1	62.1	15.7	75.7
	1979	35.7	51.3	13.0	75.7

*Crime types with increased base terms in 1979.

[a]Derived from Brewer et al. (1980:Tables 9, 10).
[b]Derived from Board of Prison Terms (1981:Tables IV, VI).
[c]The portion of single count convictions for all manslaughter cases is reported here.

sentences might tend to be more lenient, were found predominantly among post-SB709 cases. Such a holiday effect would tend to decrease the severity of post-SB709 sentences relative to pre-SB709 sentences in this sample. A longer follow-up in both the pre and post samples, including data for comparable portions of the year, is needed to rule out a seasonal effect.

The general increase in the use of lower base terms from fiscal 1977-78 to calendar 1979 might also reflect a trend toward increased use of prison for less serious cases--an outcome anticipated by many at the time of DSL's passage. Under ISL, a judge who thought a defendant warranted a short state prison term, say two years, might hesitate to impose such a sentence because the defendant could be held by the Adult Authority for much longer. Under DSL, defendants could be sentenced to short determinate prison sentences, and it was widely expected that these marginal prison cases would then shift from local jails or probation to prison.

If expanded prison use were occurring through shifts from probation or jail to prison, the greatest changes would be expected among the less serious crime types, which are most likely to include marginal prison cases. The results in Table 7-16 are generally consistent with this hypothesis; the greatest increases in the use of lower base sentences were found in property and drug offenses. Indeed, aside from the offense types directly affected by SB709, the greatest shifts toward shorter sentences were for the less serious offenses of forgery, receiving stolen property, and drug offenses.

Despite the definite shift away from longer terms in 1979 for offenses directly affected by SB709 (Table 7-16), these offenses still experienced increases in the mean and median sentence length imposed between 1977-1978 and 1979.[15] The mean sentence for robbery, for example, increased from 51.8 to 56.9 months; for first-degree burglary the mean increased from 45.3 to 47.6 months, while the median went from 36 to 48 months. Thus, the decline in the use of upper and middle terms for these offenses was not sufficient in the aggregate to offset the increases in the length of their base terms.

Enhancements

Even when warranted by the facts of a case, enhancements tend to be used sparingly. Low charging rates combined

TABLE 7-17 Use of Enhancements Among Cases Received by California Department of Corrections in 1979

Enhancement and Offense Type	% Eligible Cases (Number Eligible)	% with Enhancement Charged Among Eligible Cases	% with Enhancement Pled or Proved Among Charged Cases	% with Enhancement Imposed Among Pled or Proved Cases	% with Enhancement Imposed Among Eligible Cases
Firearms					
All offenses	22.8 (n=2,365)	84.6	69.6	85.9	50.6
Burglary 1	6.7 (n=24)	83.3	60.0	83.4	41.7
Burglary 2	2.1 (n=37)	62.2	39.1	88.9	21.6
Robbery	56.4 (n=1,249)	90.1	73.7	87.0	57.8
Injury to victim	Minor / Major				
All offenses	9.1 (n=948) / 8.8 (n=917)	31.7	44.7	81.9	11.6
Burglary 1	8.9 (n=32) / 3.6 (n=13)	28.9	53.9	85.7	13.3
Burglary 2	1.8 (n=32) / 0.3 (n=6)	7.9	(1 of 3)	(1 of 1)	2.6
Robbery	14.0 (n=310) / 8.7 (n=192)	36.7	50.5	86.1	15.9
Violent prior prison terms					
All offenses	2.5 (n=262)	40.5	52.8	91.1	19.5
Burglary 1	2.8 (n=10)	50.0	40.0	(1 of 2)	10.0
Burglary 2	1.0 (n=18)	27.8	20.1	(0 of 1)	(0.0)
Robbery	2.0 (n=43)	67.4	41.4	91.8	25.6
Nonviolent prior prison terms					
All offenses	37.6 (n=3,907)	44.2	53.6	89.5	21.2
Burglary 1	37.6 (n=175)	57.8	68.0	88.5	34.8
Burglary 2	44.0 (n=786)	46.6	50.2	92.3	21.6
Robbery	33.5 (n=742)	55.4	60.2	86.2	28.8

SOURCE: Derived from Board of Prison Terms (1981:Tables VII to IX).

with substantial dismissal rates for various enhancements indicate considerable prosecutor discretion in actively pursuing enhancements. Some evidence suggests that enhancements may be used selectively for just those defendants most likely to go to prison. Once the applicability of an enhancement is established, however, judges routinely impose the add-on to the base term.

Both Judicial Council data on sentenced cases (Lipson and Peterson, 1980:Table 11) and Department of Corrections data on commitments to prison (Brewer et al., 1980:Tables 9, 10; Board of Prison Terms, 1981:Tables VII-IX) indicate that, statewide, the use of enhancements tended to be limited to weapon or firearm use, especially in robbery cases (Table 7-17). Among persons committed to prison, victim injury and prior prison enhancements were charged and established in court in less than one-quarter of eligible cases.

Data are also available on the use of enhancements in superior court cases for individual counties in Casper et al. (1981) and Utz (1981). For burglary cases finally disposed in superior court, Utz (1981) found weapons allegations in 59.7 percent of cases with a weapon in the offense in Alameda and Sacramento counties, compared with 70.5 percent charging of the firearms enhancement among burglary cases received in prison statewide. Likewise for robbery cases finally disposed of in superior court in San Bernardino, San Francisco, and Santa Clara counties, Casper et al. (1981) report that about 30 percent of all robbery cases in those counties had the firearms enhancement alleged (without controlling for eligibility of the cases). The corresponding figure among statewide prison receptions for robbery was 50.8 percent charged with firearms use. In both cases charging of enhancements was more likely among statewide prison cases than among court cases in individual counties.

Similarly, Utz (1981) found that for burglary cases in Alameda and Sacramento superior courts, less than 25 percent of those charged with either weapons or injury enhancements were pled or proved, compared with 48.8 percent proved for firearms and 50 percent proved for injury among prison receptions statewide for burglary. Among robbery cases in the three county superior courts, Casper et al. (1981) found that the firearms enhancement was struck in about 40 percent of cases, while the injury enhancement was struck in 65-70 percent of cases. Failure to prove these allegations was much lower

statewide among prison receptions for robbery, at 26 percent for firearms and 49 percent for injury allegations. As with charging, proving enhancements once charged was considerably higher among statewide prison receptions than among superior court cases in individual counties. While it is possible that the counties were different from the state as a whole, the evidence is also consis- tent with a selection effect by which prosecutors were more likely to pursue enhancements in cases that are more likely to end up in prison.

The generally low rates of charging and proving enhancements evident in Table 7-17 reflects the sizable discretion in initially charging and then dismissing these charges available to the prosecutor under DSL. One of the issues that could be further explored is the degree to which this is a manifestation of the plea bargaining process, in which one would expect dismissals of charged enhancements to be more prevalent in pled cases than in those that go to trial. None of the studies reviewed here provides data useful to examining this issue. In contrast to the evident wide prosecutor discretion, the rate of actually imposing sentence enhancements when the allegations are pled or proved is quite high, indicating considerable compliance by judges with the formal requirements of DSL.

Probation Ineligibility

There is relatively little separate attention in these California studies to the use of probation ineligibility provisions. When established in court these provisions provide for mandatory incarceration, effectively limiting judicial discretion in that decision. Casper et al. (1981) found that these mandatory prison provisions were invoked relatively rarely in the robbery and burglary cases they examined in three California counties (Table 7-18); only Santa Clara county made any appreciable use of these provisions.

To some degree their use was restricted by the rarity of cases that meet the charging criteria. This was especially likely to be true for the prior convictions and injury to the elderly provisions. This was less likely to be true of the firearms provision. As shown in Table 7-19, even when cases were eligible for charging, as indicated by the presence of a firearms enhancement allegation, the probation ineligibility provisions were rarely invoked, except in Santa Clara.

TABLE 7-18 Allegation and Disposition of Probation Ineligibility Provisions

Probation Ineligibility Provision	San Bernardino	San Francisco	Santa Clara
Two Prior Convictions:			
% robbery cases in which alleged	0.0 (n=173)	1.4 (n=289)	6.9 (n=232)
% allegations struck	--	*	25.0 (n=16)
% burglary cases in which alleged	1.0 (n=300)	1.0 (n=293)	10.4 (n=346)
% allegations struck	*	*	47.3 (n=36)
Personal Use of Gun			
% robbery cases in which alleged	0.0 (n=232)	10.0 (n=289)	22.0 (n=232)
% allegations struck	--	37.9 (n=29)	35.3 (n=51)
Crime Against Elderly or Disabled			
% robbery cases in which alleged	0.0 (n=232)	2.8 (n=289)	0.0 (n=232)
% allegations struck	--	*	--

*Percent not calculated for n less than 10.

SOURCE: Casper et al. (1981:Table 7-1).

Charging

Prosecutors in the counties studied adhered to an explicit policy of full initial charging; screening on the merits of the case was permitted but was not to involve consideration of possible sentences. Various administrative procedures, typically involving supervisor approval before dropping charges, were employed to ensure compliance by assistant prosecutors. The observation and interview data as well as the statistical analysis found little evidence of any major changes in initial charging, at least for cases finally disposed of in superior court.

TABLE 7-19 Comparison of Charging Enhancement and Probation Ineligibility in Cases Involving Firearms Use

	% Robbery Cases with Allegation		
	San Bernardino (n=173)	San Francisco (n=289)	Santa Clara (n=232)
Enhancement	31.8	27.3	30.6
Probation ineligibility	0.0	10.0	22.0

SOURCE: Casper et al. (1981:Tables 7-1 and 7-2).

Table 7-20 reports the average number of initial charges and the average seriousness of those charges under ISL and DSL. With the exception of San Francisco and to a lesser extent San Bernardino, cases disposed in superior court involved about the same number of charges of the same seriousness before and after DSL. In San Francisco and San Bernardino, the number of charges at initial filing increased, especially in robbery cases. These charging differences, however, apparently did not affect prison outcomes. Casper et al. (1981:5-19 to 5-20) reports the same changes in prison use in these counties for multiple- and single-charge defendants.

Furthermore, in a multivariate analysis of changes in initial charging for burglary cases in Alameda and Sacramento, Utz (1981) found that controlling for other attributes of the case, initial charging was not affected by DSL. In this analysis, the dependent variable combines both number and types of initial charges in a score representing the maximum possible DSL prison term for all charges, including allegations of enhancements. Using multiple regression, a difference in jurisdictions was found with "like" cases being charged less severely in Sacramento.[16] No difference was found between the two periods. The other significant variables all related to the seriousness of the offense and contributed positively to the charge score: vulnerable victim,

TABLE 7-20 Changes in Initial Offense Charging in California: ISL versus DSL

Jurisdiction and Offense	Mean Number of Charges Filed		Average Serious Score of Initial Charges[a]	
	ISL 1976	DSL 1978	ISL 1976	DSL 1978
Alameda[b]				
Burglary	2.4	2.5	not available	
Sacramento[b]				
Burglary	2.7	2.6	not available	
San Bernardino[c]				
Robbery	2.0	2.6	33.5	36.2
Burglary	1.8	2.2	29.4	30.1
San Francisco[c]				
Robbery	2.3	3.2	33.7	40.0
Burglary	1.6	2.2	25.3	28.1
Santa Clara[c]				
Robbery	2.5	2.6	37.6	35.9
Burglary	2.6	2.3	32.8	31.7

[a]The average seriousness score is estimated from the inverse of the "hierarchy score" assigned to different offense types by the Bureau of Criminal Statistics. In cases with multiple charges, the scores for each charge are totaled.
[b]Utz (1981:216-217).
[c]Casper et al. (1981:Table 5.1).

weapon use, physical harm to victim, sophistication in committing the offense, and defendant implicated in multiple-offense incidents.

Unfortunately, all the analyses of charging are limited to cases that are finally disposed of in superior court. No evidence is available on the way these charges merge. One effective way to circumvent the determinate sentence provisions would be to charge cases initially as

misdemeanors rather than as felonies, so they do not appear in superior court at all. Such changes would not be evident in the data analyzed.

Plea Bargaining After DSL

In all California counties, criminal matters are handled in municipal and superior courts. The municipal court is the lower court handling preliminary filings and final disposition of misdemeanor charges. After filing, the superior court has final jurisdiction over all felony charges.

Any formal plea bargaining held under the auspices of the superior court usually occurred in a pretrial conference held some time before the case was scheduled for trial. This plea bargaining process was studied in five separate California counties in Casper et al. (1981) and Utz (1981). In all counties both Casper and Utz observed heavy emphasis in bargaining discussions on the facts of the offense and the defendant characteristics as a basis for determining culpability and hence "case worth" in terms of the most appropriate sentence. Both researchers concluded that prior record is a key factor in the decision to imprison or not (Utz, 1981:75; Casper et al., 1981:5-19).

The character of plea bargaining varied considerably among California jurisdictions, even though all operated within the same statutory limits and court structure. Only those jurisdictions already engaged in substantial sentence bargaining before DSL incorporated explicit agreements on the length of prison terms into their bargaining practices after DSL. There was also almost no change in the overall rate of guilty pleas after DSL; although there were definite indications that early guilty pleas (e.g., at initial court appearance) did increase. The provisions for enhancements and probation ineligibility allegations appeared to function as important bargaining chips for the prosecutor, who frequently dropped these charges in exchange for agreements to prison sentences.

Patterns and Trends in Plea Bargaining

Table 7-21 summarizes the major distinguishing features of plea bargaining under DSL identified in each county.

Despite the common structure and shared laws and rules of procedures governing the processing of criminal cases in all California jurisdictions, the form of bargaining varied substantially among counties. Two counties, Sacramento and San Bernardino, made only limited use of pretrial conferences. Both these counties made considerably greater use of "certifications," in which guilty pleas to felony charges were accepted in municipal court and the case was then certified to superior court for sentencing. Certifications represented about one-third of all convictions in superior court in these two counties, compared with less than one-tenth in the other three counties. The pattern in these two counties was to bargain early and to restrict bargaining primarily to consideration of charges.

By contrast, the two heavy-case load, predominantly urban counties--Alameda and San Francisco--made extensive use of pretrial conferences that were highly centralized, rarely involving more than one or two judges in each court. Pretrial conferences in both jurisdictions involved detailed bargaining over the sentence, including explicit agreements on the length of prison terms. They differed mainly in the role of the judge in the bargaining process. In San Francisco the judge took an active role in actually setting the terms of the bargain. In Alameda County the judge rarely became involved until after a bargain was struck.

Despite the opportunity for extensive bargaining over the specific details of sentence outcomes, Alameda County was plagued by inefficiency at pretrial conferences, reflected in the low rates of agreement reached at these scheduled pretrial conferences. Utz (1981) attributes this to the limited role of the judge in bargaining. Judges in the county once took a more active role, but more recently they rarely became involved until after a bargain was struck. This judicial retreat has eliminated the pressure on the parties to reach agreement in a timely fashion. Defense attorneys appeared at pretrial conferences unprepared to negotiate, seeking postponements of the case in hopes of getting a more favorable offer later (pp. 92-97).

Another equally plausible reason for the breakdown in bargaining was suggested by the frequent practice of defense attorneys of bypassing the prosecutor altogether and pleading as originally charged, with indications, and sometimes "promises," from the court about an acceptable sentence (Utz, 1981:97). This suggests a lack of

TABLE 7-21 Features of Pretrial Bargaining in California Jurisdictions After Implementation of the Uniform Determinate Sentencing Law

County	Major Use of Pretrial Conferences	Conferences Centralized	Dominant Actor	Focus of Bargain
Alameda[a]	Yes	Yes	Prosecutor	Sentence Length
Sacramento[a]	No	No	Prosecutor	Charges and Sentence Type
San Bernardino[b]	No	No	Prosecutor	Charges
San Francisco[b]	Yes	Yes	Judge	Sentence Length
Santa Clara[b]	Yes	No	Prosecutor	Sentence Type

[a]See Utz (1981) for detailed description of these counties.
[b]See Casper et al. (1981) for detailed description of these counties.

agreement between judge and prosecutor on the appropriate sentence outcome, the prosecutor being more severe than the judge. When faced with a rigid and unacceptable offer from the prosecutor, the defense often rightly perceived that a better deal could be obtained from the judge. The breakdown in effective bargaining seems to stem more from the judge's unwillingness to enforce the prosecutor's offers. Rather than accept these offers, the judge was sentencing independently.

Further supporting the crucial role of judge-prosecutor consensus on appropriate sentences, Utz (1981:94) reports that many more pretrial agreements were reached in Alameda when pretrials were conducted before judges who were less lenient and thus more likely to be in accord with sentence offers of the prosecutor than when judges were more lenient. These other judges also took a more active role in the negotiations, actively pressing the parties to reach agreement.

Santa Clara fell between the two extremes represented by limited charge bargaining on one end and detailed sentence bargaining on the other. Considerable sentence bargaining occurred in Santa Clara, but it was restricted to discussions of sentence type, especially the prison/no prison option. Bargaining was also decentralized, with pretrial conferences scheduled before all criminal court judges.

Guilty Plea Rates

In Table 7-22 we see that controlling for crime type there were no marked changes after DSL in the already-high proportion of guilty pleas among convictions found in all five counties and for the state as a whole. Likewise there were only marginal increases in trial rates (Table 7-23). There were, however, some differences of note across counties and case seriousness. Regardless of which law was in effect, heavy-case load, urban courts (Alameda and San Francisco) had the highest guilty plea rates (Table 7-22), while lower-case load counties (Sacramento) had slightly higher trial rates (Table 7-23). This greater inclination to go to trial was especially pronounced for cases that were presumably more vulnerable to long sentences, as in cases involving more serious offenses in Alameda (Table 7-24) and for offenders with prior criminal records in

TABLE 7-22 Changes in Guilty Plea Rates in Superior Court in California

Jurisdiction	% Guilty Pleas Among Convictions in Superior Court: Burglary	Robbery	All Convictions	% Guilty Pleas Among All Dispositions in Superior Court
Alameda[a]				
ISL-1976	96.1	n.a.	94.2	80.9
DSL-1978	93.6	n.a.	96.1	79.3
(1979)[b]	(99.6)	(99.1)	(98.3)	(85.5)
Sacramento[a]				
ISL-1976	90.4	n.a.	84.0	63.6
DSL-1978	91.1	n.a.	86.1	67.8
(1979)	(93.8)	(87.4)	(91.9)	(78.3)
San Bernardino[c]				
ISL-1974	93	85	91	84.3
1975	95	86	92	80.6
1976	87	75	86	74.5
DSL-1977	91	83	84	73.0
1978	89	81	87	78.0
(1979)	(94)	(88)	(87)	(81.6)
San Francisco[c]				
ISL-1974	96	90	93	83.2
1975	95	90	93	77.8
1976	90	83	86	73.6
DSL-1977	93	83	91	78.7
1978	93	84	89	72.9
(1979)	(96)	(91)	(94)	(78.0)
Santa Clara[c]				
ISL-1974	95	93	87	83.2
1975	93	91	84	82.9
1976	95	92	84	82.3
DSL-1977	n.a.	n.a.	n.a.	n.a.
1978	97	94	91	83.9
(1979)	(98)	(91)	(95)	(85.9)
Statewide[d]				
ISL-1975	n.a.	n.a.	87	72
1976	n.a.	n.a.	87	74
DSL-1977	n.a.	n.a.	n.a.	75[c]
1978	n.a.	n.a.	88	76
(1979)	(93)	(88)	(90)	(80)

n.a. Data not available

[a]Utz (1981). The results for burglary cases are derived from Tables 13A and 28. The results for all convictions and all dispositions are derived from data in Appendix F.

[b]Numbers for 1979, available from California Department of Justice (1980), are reported in parentheses throughout the table.

[c]Casper et al. (1981). The numbers reported here are taken from Figures 6-1 to 6-3 on pages 6-6 to 6-9.

[d]Lipson and Peterson (1980:Table 3).

TABLE 7-23 Trial Rates Among California Superior Court Dispositions for Samples of Defendants Originally Charged with Burglary (in percent)

	Alameda	Sacramento
ISL-1976	4.44	9.28
DSL-1978	6.15	10.08

SOURCE: Utz (1981:Tables 13A and 28).

TABLE 7-24 Trial Rates Among Convictions in California Superior Courts for Samples of Defendants Originally Charged with Burglary, Controlling for Offense Seriousness (in percent)

	Low and Moderate Seriousness[a]	High Seriousness[a]
Alameda		
ISL	2.72	6.02
DSL	1.61	12.77
Sacramento		
ISL	10.00	8.97
DSL	9.63	7.35

[a]Offense seriousness was scored on the basis of the attributes of the offense, including whether the offense was burglary of a residence, whether there was confrontation with a victim, whether threat or force was used, whether the victim was harmed, the value of the property taken, whether the offense displayed special criminal sophistication, and whether the defendant was implicated in multiple-offense incidents.

SOURCE: Utz (1981:Tables 2, 13A, 28 and 29).

Sacramento (Table 7-25). Furthermore, in Alameda County the trial rates for the high-seriousness cases increased from ISL to DSL (Table 24). Unfortunately, the data on trial rates for offenders with prior records were not available for the DSL period, and trial rate comparisons before and under DSL could not be made.

Timing of Guilty Pleas

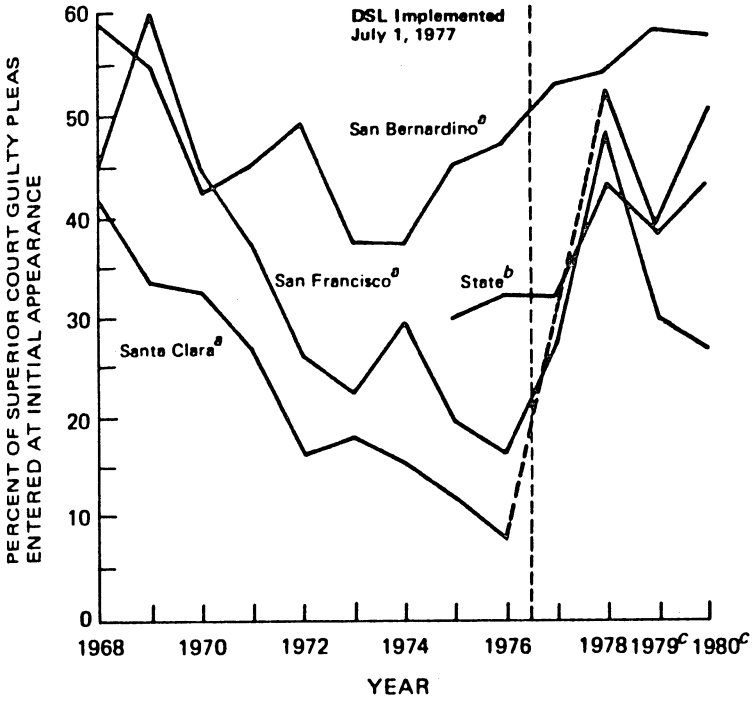
Under ISL the actual time to be served on a prison sentence was uncertain: There were strong incentives for the defense to delay dispositions in hopes of receiving a nonprison sentence or outright dismissal as the prosecution's case strength deteriorated. Because of the greater certainty about prison sentence outcomes under DSL, there was a widespread expectation that more defendants would be willing to plead guilty early. As indicated in Figure 7-1, without controlling for any variations in crime type mix over time, a simple two-point comparison of ISL in 1976 with DSL in 1978 shows sharp increases in the proportion of early pleas entered at initial appearance among all guilty pleas in

TABLE 7-25 Trial Rates Among Convictions in California Superior Courts for Samples of Defendants Originally Charged with Burglary, Controlling for Offender Prior Criminal Record (in percent)

	ISL Period Only	
	Alameda	Sacramento
Any Prior Felony Convictions	4.44	14.55
No Prior Felony Convictions	3.02	4.67
Thievery Repeaters[a]	4.62	12.38
Non-Repeaters	3.75	4.21

[a]Thievery repeaters had prior convictions (felony or misdemeanor) for burglary, robbery, or other theft-type offenses.

SOURCE: Utz (1981:Tables 4 and 6).



[a]Casper et al. (1981: Figure 6-7).
[b]Derived from Lipson and Peterson (1980: Table 3).
[c]The rates for 1979 and 1980 are derived from data reported in California Department of Justice (1979, 1980).

FIGURE 7-1 Trends in the Timing of Guilty Pleas in California: Percent of All Superior Court Guilty Pleas Entered at Initial Appearance

superior court. Considering a longer time period before DSL implementation, however, there was a long-term decline in the rate of early pleas from the late 1960s to 1976. The increases in the early guilty plea rate after DSL represent a return to the higher rates prevailing in the late 1960s.

Without a better sense of the factors contributing to the long-term pre-DSL decline in early guilty pleas and a longer follow-up after DSL, it is difficult to sort out whether the post-DSL increase represents a real effect of DSL on early guilty pleas or merely a random fluctuation

in a cyclic phenomenon. That the effects of DSL are ambiguous is essentially the conclusion drawn by Casper et al. (1981).

Several factors, however, suggest the possibility of some real effect of DSL on rates of early guilty pleas. First, a 1969 law authorized prosecutors to file certain complaints previously dealt with exclusively as felonies as either a felony or a misdemeanor (Penal Code 17b(4)) and authorized judges to sentence such cases as misdemeanors even if filed as felonies (Penal Code 17b(5)). To the extent that such misdemeanor filings were more likely for the less serious cases, which because of the milder sanction risks were also more likely to plead guilty early, this change in the penal code should have resulted in a shift of many early plea felony cases from among superior court guilty pleas to misdemeanor early pleas handled in municipal court.[17] Such a scenario is consistent with the decreases in early guilty pleas observed in superior court through 1976.

San Bernardino was the only county among the three compared that did not exhibit sharp declines in early guilty pleas (Figure 7-1). It was also the only county among the three to make extensive use of certifications whereby guilty pleas to felonies were accepted in municipal court and the case was then certified to superior court for sentencing on the felony conviction. This extensive use of certifications would account for a more stable rate of early pleas in San Bernardino.

The combination of increased reliance on optional misdemeanor filings and limited use of certifications suggests that the dramatic declines in early guilty pleas observed in San Francisco and Santa Clara between 1969 and 1976 may have been the result of real changes in charging policies and not just random fluctuations. The sharp increase after DSL would then more likely be a real effect of DSL on early guilty plea rates rather than a random fluctuation. When 1979 and 1980 data are added to Figure 7-1, the generally higher level of early guilty pleas found in 1978 is maintained in all cases except San Francisco. This further supports a real change in the early guilty plea rate after DSL.

Variations in Plea Bargaining Practices

Table 7-26 highlights the major changes in the nature of sentence agreements in the five counties studied by Utz

TABLE 7-26 Changes in Sentence Agreements from ISL to DSL in California

Jurisdiction	Type of Sentence Agreement: No Promises	State Commitment or Prison	No Prison/ Jail/ Probation and Jail/ No Jail
Alameda[a] (Burglary Sample)			
ISL-1976	21.7%	11.3%	67.0%
DSL-1978	4.4%	40.7%	54.9%
Sacramento[a] (Burglary Sample)			
ISL-1976	42.6%	2.5%	54.8%
DSL-1978	39.3%	4.4%	56.3%
San Bernardino[b] DSL	Substantial "open pleas" (predominantly charge bargaining)		
San Francisco[b] DSL		Substantial (with length of term specified)	
Santa Clara[b] DSL		Many "conditional pleas" (direct discussion of sentence type)	

[a]Utz (1981).
[b]Casper et al. (1981).

and Casper et al. after DSL. The two counties in which charge bargaining was prevalent, Sacramento and San Bernardino, showed little change in bargaining practices, relying heavily on "open pleas" with no commitments on sentence outcomes both before and after DSL. Where extensive sentence bargaining occurred before DSL--in Alameda and San Francisco--there was substantial use after DSL of agreements not only specifying state prison sentences but also specifying the length of prison terms. After DSL in Alameda County, for example, 83 percent of the prison agreements had the length of term specified. The more involved a jurisdiction was in detailed sentence bargaining before DSL, the more likely that jurisdiction was to move the next logical step provided by DSL and bargain directly over prison terms. If sentence bargaining was not the practice before DSL, then the opportunities to negotiate directly about the length of prison terms provided by DSL were not likely to alter past bargaining practices.

Despite explicit prosecution policies in all five counties of "full enforcement" of enhancement and probation ineligibility provisions, both Casper et al. (1981) and Utz (1981) report that the opportunities for prosecutors to drop these allegations played a significant part in plea negotiations. These allegations represent important bargaining chips for the prosecution, often being used to gain defense agreement to prison sentences. The general view was that sufficient prison time could usually be obtained with conviction for the basic offense charge, and allegations were often dropped as part of a prison plea. This is evident in the generally low rates of proving charged allegations found in Table 7-19.

Both Casper et al. (1981) and Utz (1981) report that participants in jurisdictions characterized by particular plea bargaining practices expressed surprise at, and sometimes disapproval of, the operations of plea bargaining in other jurisdictions. The different forms of plea bargaining observed across counties reflect differences in the role definitions of participants and in the nature of incentives to bargaining. With respect to role definitions, the main difference appears to be whether the court participants adhered to traditional conceptions of adversary roles. In a traditional court the prosecution and defense viewed themselves as partisan adversaries, each pursuing a one-sided consideration of

the issues. The judge struck the balance between the two parties, weighing the facts as presented by the opposing parties and coming to a fair resolution of the matter. These traditional roles appear to be maintained in lower-case load courts, as exemplified by Sacramento, San Bernardino, and Santa Clara, and abandoned in heavy volume courts like Alameda and San Francisco. In nontraditional courts it was the aim of all parties to achieve agreement on the facts and on an appropriate sentence, the judge often serving as a mediator in a process of arriving at consensual agreements.[18]

The differences across jurisdictions also reflect the variety of incentives to behavior. In the jurisdictions studied, the incentives to plea bargaining were highly system-dependent; what motivated agreement in one system would not necessarily result in agreement in another. Participants in San Francisco, whose experience included explicit resolution of the details of a bargain before it was concluded, found the absence of specific terms in agreements in Santa Clara totally foreign. Without explicit negotiation on terms, San Francisco participants saw no basis for reaching agreement and wondered what the incentives to plead guilty were in Santa Clara (Casper et al., 1981:56).

Participants in Santa Clara, for their part, found the explicit involvement of San Francisco judges in detailed bargaining over sentences unseemly. In Santa Clara the outcome and incentives surrounding the dispositions of criminal cases were not overt parts of the bargaining process or the agreement reached. Rather they were tacit, embodied in expectations about outcomes that were shaped and reshaped by the participants' experiences in the system and with one another.

Sacramento was a traditional court much like Santa Clara. Utz (1981:126) reports confronting one judge there with the apparent conflict between judicial resistance to overt sentence bargaining and the attorneys' need for some certainty about likely outcomes. The judge responded that sentence bargaining was not the only way to achieve such "certainty." In a small court the attorneys developed a pretty good feel for likely outcomes, relying on their knowledge of the track record of the judge and their ability to read indirect signals from the judge. In this setting most cases were routine and predictable for the parties and they reached agreement based on their expectations of likely sentence outcomes.

In view of these differences among jurisdictions, participants from one system would not be immediately interchangeable with those from another. If participants in San Francisco were to function effectively in Santa Clara or Sacramento, or vice versa, they would have to learn anew what counts as a bargain and how to go about bargaining. Attempts to model the plea bargaining process must be sensitive to these differences across systems in fundamental aspects of the process.

Impact on Prison Use

Trends in Prison Use

Prison use definitely increased after DSL, whether measured by the commitment rate to prison (commitments/population) or the likelihood of a prison sentence after conviction in superior court. This increase, however, is best viewed as a continuation of preexisting trends toward increased prison use in California and not as an effect of DSL. The increasing use of prison was accompanied by increasing imprisonment of less serious, marginal offenders; this trend is reflected in changes in the crime type mix. There was increased representation of less serious offenses among persons received in prison and increased use of prison relative to jail. Several factors are potentially important in accounting for the trend toward greater prison use in California:

(1) The changing role of probation subsidies to local jurisdictions;
(2) Increased punitiveness;
(3) The commission of increasingly more serious offenses;
(4) Increased early filtering of cases, resulting in a greater concentration of more serious cases in superior court; and
(5) Demographic shifts in the population toward increasing representation of older offenders who are more vulnerable to prison sentences.

Because of the greater certainty about lengths of prison terms, it was generally anticipated that prison use would increase as a result of DSL. Consistent with this expectation, most of the studies reviewed found a

definite increase in prison use, measured both by commitments per population and by the proportion sentenced to prison among convictions in superior court.

As indicated in Table 7-27, the commitment rate for all offenses increased between 1976 and 1978 for the state as a whole and for individual jurisdictions within the state. Similar increases were generally found in Table 7-28 for the proportion sentenced to prison among convictions in superior court, both across jurisdictions and for different offense types. The principal exception

TABLE 7-27 California Adult Prison Commitment Rate (Commitments/100,000 Residents)

Jurisdiction	Commitment Rate 1976 Before DSL	1978 After DSL
Males Only[a]		
State total	30.0	39.3
Counties		
Southern California	25.1	37.6
Los Angeles	27.9	39.1
9 other counties	22.5	35.9
San Francisco Bay	29.3	39.4
Alameda	25.0	46.0
San Francisco	50.2	83.7
7 other counties	26.5	37.1
Rest of state	37.8	44.8
10 Sacramento Valley counties	40.9	43.3
7 San Joaquin Valley counties	37.5	51.4
22 other counties	34.3	37.1
All Adults[b]		
State Total	32.1	41.8

[a]Lipson and Peterson (1980:Table 12). The reported rates represent the number of males committed to state prisons per 100,000 total resident population (males and females).
[b]Brewer et al. (1980:Table 5). The rates are total adult commitments (male and female) to state prisons per 100,000 total resident population.

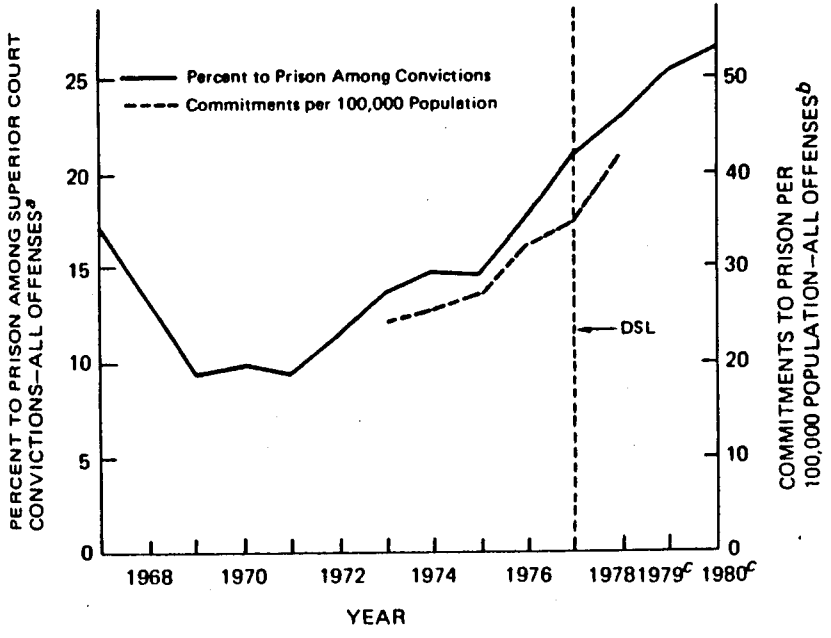
TABLE 7-28 Proportion Sentenced to Prison Among Convictions in California Superior Courts

Jurisdiction	% to Prison Among Conviction 1976 Before DSL	1978 After DSL
All Offenses		
State total	17.8	23.0
Counties		
Alameda[b]	14.2	23.2
Sacramento[b]	25.4	26.9
San Bernardino[c]	29.5	38.5
San Francisco[c]	25.0	31.5
Santa Clara[c]	25.0	16.5
Burglary		
Alameda[d]	17.8	42.5
Sacramento[d]	23.0	21.3
San Bernardino[e]	29.5	38.5
San Francisco[e]	24.5	32.0
Santa Clara[e]	24.5	16.0
Robbery		
San Bernardino[e]	65.0	63.0
San Francisco[e]	44.0	49.5
Santa Clara[e]	59.5	57.0

[a]These data from the California Bureau of Criminal Statistics are reported in Lipson and Peterson (1980) and Brewer et al. (1980).
[b]Derived from Utz (1981:Appendix F).
[c]Casper et al. (1981:Figure 5.5).
[d]Utz (1981:Table 39).
[e]Casper et al. (1981:Figures 5-6 and 5-7).

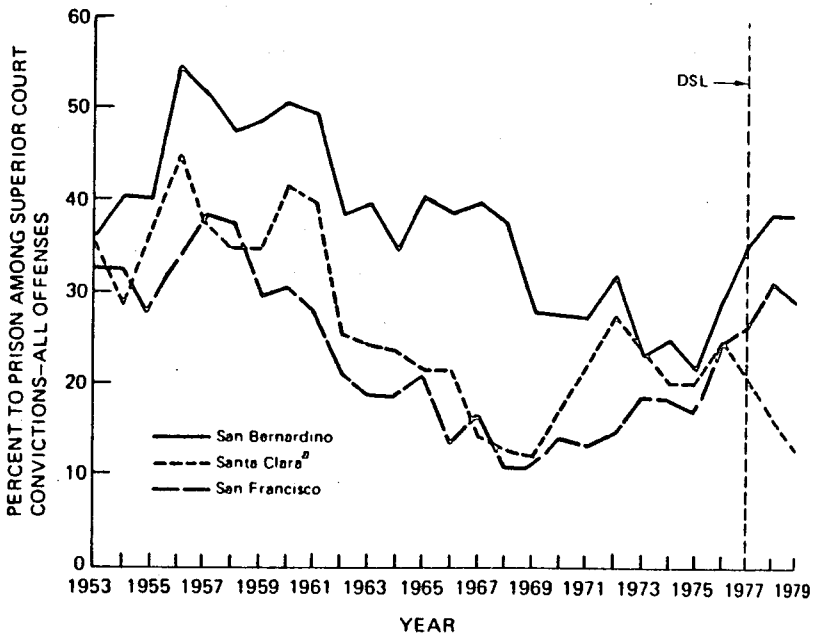
is Santa Clara County, where the rate of prison sentences among convictions decreased for all offenses and for defendants charged with burglary and robbery.

When the observation period was extended to include multiple observations, several studies concluded that the increase in prison use after DSL was best viewed as a continuation of a preexisting trend toward increased prison use in California (Brewer et al., 1980; Lipson and Peterson, 1980; Ku, 1980; Casper et al., 1981). This was true especially for all offenses for the state as a whole (see Figure 7-2) and in the individual counties of San Bernardino and San Francisco (Figure 7-3). Santa Clara, by contrast, appeared to be returning to previous low rates of prison use after a brief period of increased use of prison sentences for offenders convicted in superior court. The increase in prison use also predated DSL implementation for offenders originally charged with



[a]Lipson and Peterson (1980: Figure 2) and Brewer et al. (1980: Table 5).
[b]Brewer et al. (1980: Table 5).
[c]California Department of Justice (1979, 1980).

FIGURE 7-2 Prison Use in California



[a]No data were available in 1977 for Santa Clara.

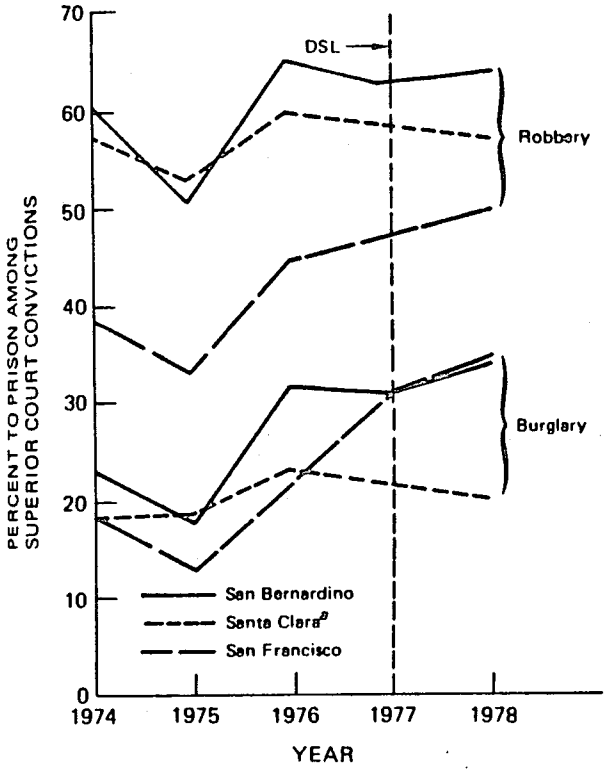
SOURCE: Casper et al. (1981:Figure 5-5).

FIGURE 7-3 Prison Use in California Counties--All Offenses

robbery and burglary in San Bernardino and San Francisco, while rates of prison use for these crime types appeared relatively stable in Santa Clara (Figure 7-4).

Factors Contributing to Increased Prison Use

Changes in Probation Subsidies While the general increase in prison use in California in recent years may simply reflect a trend toward increasing punitiveness, a number of other factors have been cited to account for this rise. First, Brewer et al. (1980) note the contributing role of changes in the probation subsidy program to counties. This program, which began in 1965, was intended to provide economic incentives for local

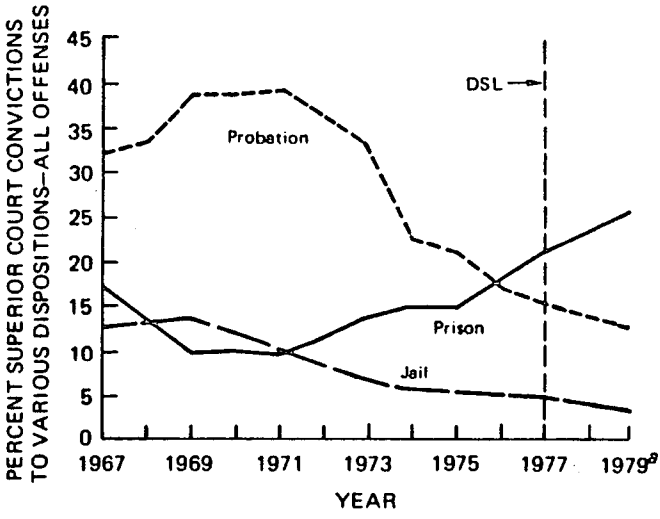


[a]No data were available for 1977 in Santa Clara.

SOURCE: Casper et al. (1981:Figures 5-6 and 5-7).

FIGURE 7-4 Prison Use in California Counties for Burglary and Robbery Cases Disposed of in Superior Court

jurisdictions to keep offenders under local supervision within their own communities. As is evident in Figure 7-5, the program appeared to be achieving just this end; the use of probation increased while prison use declined through the early 1970s. By the early 1970s, however, because of dissatisfaction with local programs and rising costs, prison commitments began to increase again. Under the structure of the subsidy program, any increase in prison commitments in a jurisdiction resulted in decreases in probation subsidies, which served to encourage further



[a]Data for 1979 were obtained from California Department of Justice (1979).

SOURCE: California Bureau of Criminal Statistics as reported in Lipson and Peterson (1980:Figure 2).

FIGURE 7-5 Sentences in California Superior Courts

increases in prison commitments. This declining role of probation combined with increases in prison commitments beginning in the early 1970s is also evident in Figure 7-5.

Changes in Case Seriousness Another factor in the increased use of prison is increases in the seriousness of cases sentenced in superior court. Utz (1981) included elaborate controls for the seriousness of burglary cases disposed in superior court in Alameda and Sacramento Counties pre-DSL in 1976 and post-DSL in 1978. Based on the weight of the many variables compared, Utz (1981:22-27) concluded that ISL cases in Alameda were more serious than those in Sacramento and that case seriousness was relatively stable across the two time periods in Alameda County.

Contrary to Utz's findings, there were some indications of increasing case seriousness in Alameda

between 1976 and 1978. In particular, the proportion of burglaries involving stranger-to-stranger altercations increased from 60.4 to 71.4 percent of cases; cases involving harm to victim(s) increased from 30.7 to 36.5 percent; the incidence of nighttime burglaries increased from 48.7 to 55.3 percent; and the proportion of cases of high seriousness disposed of in superior court increased from 36.1 to 44.3 percent. (The indicators of high seriousness are listed in Table 7-24.)

In Sacramento the changes in case seriousness were more general, reflecting shifts to defendants with less serious prior records, but to more serious offense incidents. On the whole, DSL cases in Sacramento became more like those in Alameda. Burglary cases under DSL were more likely to involve a victim (30.7 versus 23.6 percent) and to result in harm to the victim (39.7 versus 23.2 percent). There were also increases in assaults involving strangers (68.4 versus 52.0 percent) and in weapon use (13.0 versus 5.5 percent). With only minimal controls for case seriousness, Casper et al. (1981:5-19) observed a slight increase in the percent of burglary and robbery defendants who had served prior prison terms in San Bernardino and San Francisco.

To the extent that prison use is positively correlated with case seriousness, any increases in the seriousness of cases convicted in superior court would result in increases in prison use upon conviction, as was observed in Alameda, San Bernardino, and San Francisco counties. The principal exception to this pattern is Sacramento, where, despite the increasing seriousness of offense incidents, the rate of prison use among convictions was relatively stable. In this case, however, the effect of increases in seriousness of offense incidents may have been offset by the simultaneous decreases in the seriousness of defendants' prior records noted above.

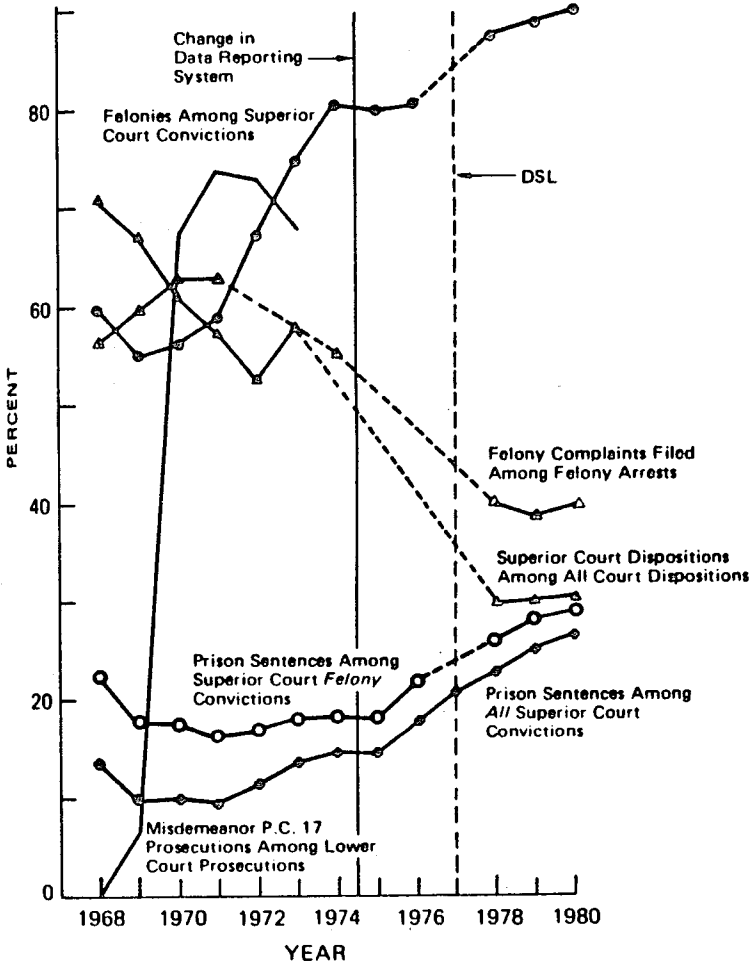
Changes in Case Filtering Related to the changes in case seriousness are indications that the increases in prison use among superior court convictions resulted from changes in the pretrial filtering process affecting the case mix in superior court. In particular, a shift of less serious cases to municipal court for final disposition would leave the superior courts with increasing proportions of more serious prison-eligible cases. In this event the increase in prison use in superior courts would be more apparent than real, as the

cases sentenced to prison remain essentially unchanged, but many less serious cases are eliminated from the available pool of convictions. (Note: This would not explain the increases in the prison commitment rate per population.)

Figure 7-6 indicates that major changes have in fact occurred in the distribution of cases between superior and municipal courts. The proportion of total court dispositions handled in superior courts dropped dramatically, from 70.7 percent in 1968 to 30.9 percent in 1980. This decline in dispositions in superior courts followed legislative changes that permitted prosecutors to file either as felonies or misdemeanors certain complaints previously handled exclusively as felonies (California Penal Code 17b(4)). This same legislation similarly permitted judges to sentence certain cases as misdemeanors even if they were filed as felonies (California Penal Code 17b(5)).[19] In response to this legislation the representation of felonies among superior court convictions increased from 54.7 percent in 1969 to 80.4 percent in 1974, while misdemeanor prosecutions under section P.C. 17 increased from 6.4 percent of total municipal court prosecutions in 1969 to 68.1 percent in 1973.[20] With this shift of less serious cases from superior court to municipal court, superior court was left with increasing proportions of prison-eligible cases among the convictions that remain. In this situation the changes in prison rates among convictions could reflect changes in the mix of convictions available for sentencing in superior court, and not any change in sentencing policy for prison-eligible cases.

This situation highlights the vital importance of monitoring and controlling for changes in case filtering before sentencing that could affect the character of cases available for sentencing. Without these controls, changes in the ways cases are filtered, which may or may not be directly associated with a sentencing reform, could be mistakenly interpreted as changes in sentencing policy for "like" cases.

One way of controlling for the impact of changes in presentence filtering is to include data on a wide range of variables reflecting important aspects of the character of cases--i.e., attributes that identify "like" cases for sentencing purposes. These control variables increase the likelihood of distinguishing sentence changes due to differences in the character of cases



SOURCE: Derived from data reported in California Department of Justice (1980, 1981).

FIGURE 7-6 Changes in Filtering Cases Through California Criminal Justice System

TABLE 7-29 Use of Prison Among Convictions in California Superior Courts Resulting from Burglary Charges in Alameda and Sacramento Counties

Offense Attributes	% Prison Sentences Among Superior Court Convictions					
	Alameda			Sacramento		
All Cases						
ISL: 1976	17.83			23.04		
DSL: 1978	42.45			21.29		
Weapon Use[a]	No Weapon	Weapon		No Weapon	Weapon	
ISL: 1976	29.50	45.80		29.20	66.00	
DSL: 1978	43.50	68.00		27.20	37.10	
Victim Harm[a]	No Harm	Harm		No Harm	Harm	
ISL: 1976	23.91	69.57		27.91	46.15	
DSL: 1978	40.82	87.50		39.02	39.13	
Aggregate Measure of Seriousness	Low	Moderate	High	Low	Moderate	High
ISL: 1976	7.50	12.15	30.12	18.92	21.36	27.27
DSL: 1978	31.25	26.74	60.64	24.32	17.35	25.37
Offender's Prior Conviction Record	Murder-Violence	Theft	Drugs or None	Murder-Violence	Theft	Drugs or None
ISL: 1976	25.00	20.77	11.25	38.89	38.46	3.16
DSL: 1978	63.64	55.75	16.88	42.86	39.73	4.63

[a]These offense attributes include other state commitments in addition to prison sentences.

SOURCE: Utz (1981:Tables 39, 40, 42, 44, 45, 48, 49).

available for sentencing from sentence changes due to real shifts in the sentencing policy for "like" cases.

The Utz (1981) study is the only one to employ any extensive controls for case mix changes among sentenced cases. As indicated in Table 7-29, with no controls for case mix, or controlling for only one case attribute at a time, Sacramento exhibited a consistent pattern of little change in prison use from pre-DSL to post-DSL implementation. In Alameda, by contrast, prison use consistently increased across all seriousness levels compared.

When multivariate controls simultaneously controlling a variety of case attributes were introduced in a simple linear model of choice among sentence types, Utz found that cases of the same level of seriousness at sentencing were more likely to result in prison sentences in Sacramento than in Alameda. This difference between counties increased after DSL implementation.[21]

Based on these results, the dramatic increases in prison use from ISL to DSL in Alameda evident in Table 7-29 were due to greater increases in the seriousness of cases available for sentencing in Alameda than found in Sacramento. Some indirect evidence of this shift to more serious cases at sentencing in superior court is available from the data in Utz (1981:Appendix F) on case dispositions for all offenses in Alameda and Sacramento Counties.

As indicated in Table 7-30, Alameda exhibited a dramatic shift of both dispositions and convictions from superior court to municipal court, while use of lower courts decreased slightly in Sacramento. The shift of less serious convictions out of superior court in Alameda was associated with an increase in prison sentences among the remaining superior court convictions. This contrasts with relatively stable prison use in Sacramento. When prison use was examined for all convictions regardless of court type, however, the greater ISL to DSL increases in prison use for Sacramento found in the multivariate analysis become evident.

Some other differences between the counties evident in Table 7-30 are worth noting. Sacramento made considerably greater use of felony complaints for felony arrests with less screening of cases at the charging stage. This lack of early screening was compensated for later in higher dismissal and acquittal rates, especially in superior courts. Sacramento also had higher trial rates in superior court than Alameda. The failure to

TABLE 7-30 Disposition of Felony Arrests Brought to California Prosecutors in Alameda and Sacramento Counties--All Offenses

Disposition	% Each Outcome			
	Alameda		Sacramento	
	ISL 1976	DSL 1978	ISL 1976	DSL 1978
Of Felonies Brought to Prosecutor	(n=9,714)	(n=7,663)	(n=4,671)	(n=5,335)
DA rejects	13.47	18.60	8.84	8.58
Misdemeanor complaint filed	40.01	38.03	28.64	27.74
Felony complaint filed	46.52	43.38	62.51	63.60
Of All Felony Complaints	(n=4,519)	(n=3,324)	(n=2,920)	(n=3,397)
Lower Court Dispositions (including certifications)	59.64	72.35	72.19	65.56
Dismissals	37.74	33.64	38.95	44.50
Guilty pleas (including certifications)	59.37	65.11	60.44	55.28
Trial convictions	2.37	0.96	0.28	0.13
Upper Court Dispositions	40.36	27.65	27.81	34.44
Dismissals	12.72	16.32	21.55	18.97
Acquittals	1.26	1.09	2.83	2.22
Guilty pleas/nollo contenderes (excluding certifications)	80.92	79.33	63.55	67.78
Trial convictions	5.00	3.26	12.07	10.94
Other	0.10	--	--	--

Convictions Among All Felony Complaints	71.50	70.64	64.86	63.44
Lower court convictions Among all convictions	51.50	67.67	67.58	57.26
	(n=1,602)	(n=873)	(n=916)	(n=1,271)
Of Superior Court Sentences				
Prison	13.85	20.16	22.49	24.78
Other state commitments	7.54	6.42	10.70	7.78
Probation	20.54	18.10	10.48	11.96
Probation and jail	55.43	50.86	49.02	50.12
Jail	2.43	4.24	7.21	4.80
Fine	0.12	0.23	0.11	0.55
Other	0.06	--	--	--
Prison Among Felony Complaints	4.91	5.29	7.05	9.27
Prison Among Conviction Any Court	6.87	7.50	10.88	14.62

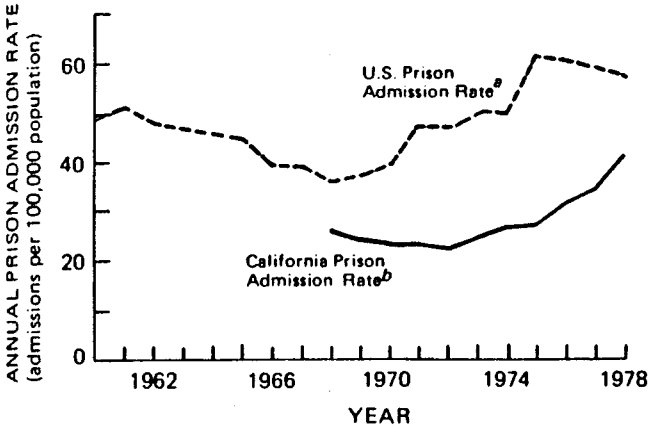
SOURCE: Utz (1981:Appendix F).

screen out weak cases early and the greater use of trials are both luxuries of a relatively low-case load court. The pressures of heavy-case loads in Alameda, by contrast, encouraged more efficient allocation of limited resources.

It is also important to remember that all the results in Table 7-30 refer to all offense types disposed of in each county. Thus the differences observed might be confounded by differences in crime type mix between counties and over time within a county. In view of this, controls for case mix are essential. Minimally, they would include controls by crime type. Unfortunately, however, the Utz study does not report comparable data for burglary cases--the crime type of main interest in that study. Nevertheless, the overall consistency of the results for all offenses in Table 7-30 with those found by Utz using various levels of control for the seriousness of burglary cases suggests that differences in case mix are not a serious problem in interpreting the results in Table 7-30.

Demographic Changes Another factor potentially contributing to the recent rise of prison use in California not mentioned in any of the studies is the role of general demographic shifts in the population. Figure 7-7 compares annual prison admissions rates (admissions per 100,000 general population) in California and the United States. The pattern in California of a decline in the admission rate through the early 1970s followed by an upturn in the rest of the decade mirrors a similar pattern found in the United States generally.

Contrary to commonsense expectations, the decline in U.S. prison admissions through the 1960s occurred during a period of rapidly rising crime, while the increase of admissions in the 1970s accompanies much slower increases in crime.[22] Based only on the incidence of crimes and related arrests, the opposite relationship would have been expected. Decreasing prison populations during a period of rapidly rising crime, however, can be attributed to the changing demographic composition of the population. In particular, as the post-war baby boom generation was moving into the high-crime ages in the 1960s--hence causing substantially more crime--they were still juveniles or "first offender" adults and were not likely to go to prison even if convicted. Only when a sizable portion of these offenders became old enough to



[a]The U.S. rate from 1960 to 1970 is available in U.S. Bureau of Census (1976). The rate for 1971 to 1977 is available in U.S. Bureau of Census (1979). The 1978 rate was obtained from U.S. Bureau of Census (1980).

In addition to new commitments from court, the published rates for 1972 and 1973 also include parole and other conditional violators returned and escapees returned under old sentence. Based on the distribution of new commitments among this total in 1974 to 1978, the rates of new commitments alone for 1972 and 1973 presented here were estimated as 81.5 percent of the total.

[b]The California rate for males only from 1968 to 1972 is derived from Lipson and Peterson (1980: Figure 1). The total rate for 1973 to 1978 is available in Brewer et al. (1980:Table 5). To make the two periods comparable, an annual admission rate of 2.5 for females was added to the male rates for 1968 to 1972.

FIGURE 7-7 Prison Admission Rate in the United States and California--New Commitments Received From Court During the Year Per 100,000 Population

have developed adult criminal records in the 1970s was there any significant increase in prison commitments. Furthermore, even if crime itself starts to decline in the future because of the continued aging of the baby boom generation and the considerably smaller birth cohorts that followed it, the prison population is likely to continue to increase for a time, since prison-prone ages are older than high-crime ages.

Analysis of Pennsylvania, a state with an aging population, suggests that total arrests in Pennsylvania will increase to the year 1980 and then begin to decline. The increases in prison commitments will continue to about 1985, and prison populations will not decline until after 1990 (Blumstein et al., 1980). In addressing the question of projections of future prison

populations in California, Lipson and Peterson (1980:39) indicate that population projections for California show continued high in-migration to the state of persons ages 18-29. This is likely to delay any substantial decreases in the population of the state of ages 18-35 and also delay any reversal of the upward trend in prison commitments and prison populations. A generally younger adult population in California than found in the United States as a whole would also explain the observed delay in California's upturn in the prison admissions rate beginning in 1972 compared with that of the United States, which began in 1968 (Figure 7-7).

Increases in Punitiveness It is also possible that the increases in prison use in California reflect a real shift toward increased punitiveness. One would expect such an increase in punitiveness to be reflected in changes in the crime-type mix of persons committed to prison and in time served, especially for less serious crimes.[23]

Ku (1980) addresses the crime-type mix issue, reporting that robberies exceeded burglaries among prison commitments in every year from 1969 to 1977. In particular, robberies represented 23 and 25 percent of commitments in 1974 and 1975, while burglaries accounted for 17 percent of commitments in both years. For the spring quarter of 1978, by contrast, the State Judicial Council reports that only 10 percent of prison sentences were for robbery, while 22 percent were for burglary. Ku takes this as evidence of the emergence of a new lower threshold of seriousness for prison use following DSL. Other evidence suggests a less dramatic shift to less serious crimes. Table 7-31 presents data for new commitments received by the Department of Corrections in 1975, 1976, and fiscal year 1977-1978. These are supplemented by court-based Bureau of Criminal Statistics data on prison sentences for 1979. In these data the post-DSL years are generally compatible with pre-DSL years; robbery commitments exceeded burglary commitments. Nevertheless, consistent with the possibility of increases in punitiveness, there was a trend toward increased representation of the less serious offense of burglary, although it is nothing like the dramatic shift suggested by the quarterly state Judicial Council data.

Apparently this increase in burglaries among prison commitments cannot be accounted for by a shift to more

TABLE 7-31 Crime Type Mix Among Prison Commitments

Year	% Robberies	% Burglaries
ISL		
1975[a]	27.0	18.5
1976[a]	24.7	20.4
DSL		
1977-1978[a]	27.7	23.9
1979[b]	24.2	22.3

[a]Brewer et al. (1980:Tables 3 and 4). In calculating crime type percentages, commitments for homicide and parole violators returned with new terms are excluded.
[b]California Department of Justice (1980:84). To be compatible with Department of Corrections data, sentences for homicide have been excluded. The status of parole violators returned with new terms is unclear in the Department of Justice data.

serious, and thus more prison-prone, types of burglaries by offenders. Using finer controls for case attributes, Utz (1981) examined the composition of burglary offenders sentenced to prison by offense seriousness. As indicated in Table 7-32 there was very little change in the seriousness mix of offenses for offenders sentenced to prison after original charges for burglary. If anything there was a slight increase in the representation of less serious offenses, especially in Sacramento.

It has been suggested that any increases in prison use as a result of DSL are most likely to come from those marginal prison cases previously sentenced to local jails or probation. Casper et al. (1981) explicitly addresses this question through consideration of the ratio of prison sentences to all incarceration sentences (prison and jail). Casper found little evidence of any shift from jail to prison in individual counties either for all offenses (see Figure 7-8), or for robbery or burglary (Casper et al., 1981:5-21 to 5-22). Only San Francisco

TABLE 7-32 Offense Seriousness Among Offenders Sentenced to Prison After Originally Charged With Burglary

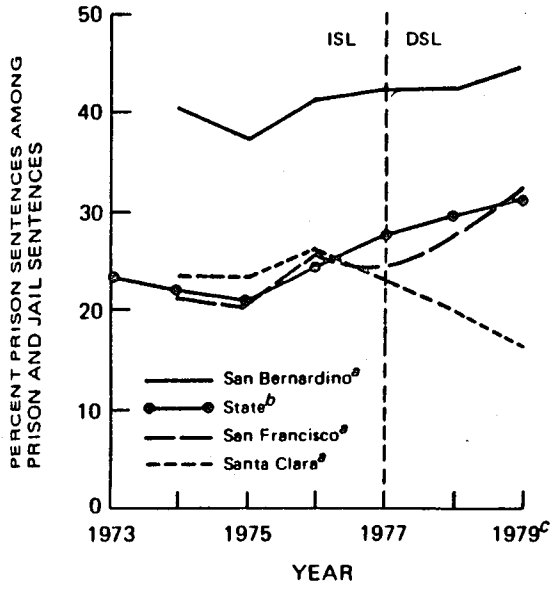
Jurisdiction and Period	Number to Prison	Percent of Cases Sentenced to Prison by Seriousness[a]		
		Low	Moderate	High
Alameda				
ISL-1976	41	7.32	31.71	60.98
DSL-1978	90	11.11	25.56	63.33
Sacramento				
ISL-1976	50	14.00	44.00	42.00
DSL-1978	43	20.93	39.53	39.53

[a]Offense seriousness was scored on the basis of the attributes of the offense, including whether the offense was a burglary of a residence, whether there was confrontation with a victim, whether threat of force was used, whether the victim was harmed, the value of the property taken, whether the offense displayed special criminal sophistication, and whether the offender was implicated in multiple offense incidents.

SOURCE: Derived from data in Utz (1981:Tables 44 and 45).

and San Bernardino showed slight increases in prison use relative to jail, but the increases there predate DSL. Extending Casper's data to 1979, the increases in San Francisco and San Bernardino continued. Using data on sentence outcomes reported in Brewer et al. (1980:Table 5), the same general pattern was observed statewide for all offenses (also displayed in Figure 7-8). There was a definite increase in prison use relative to jail, but the increase predated DSL implementation, continuing a trend that began in 1975.

In another analysis, Sparks (1981) examined the changes in prison use after conviction in superior court by crime type, prior criminal record, and legal status at the time of the offense. In each instance, the greatest



[a]Casper et al. (1981: Figures 5-8 to 5-10).
[b]Brewer et al. (1980: Table 5).
[c]The data for 1979 were obtained from California Department of Justice (1979).

FIGURE 7-8 Percent Prison Sentences Among Prison and Jail Sentences for California Superior Court Dispositions--All Offenses

increases in use of prison occur for less serious offenders. Between 1976 and 1978, the proportion sentenced to prison increased by more than 50 percent among convictions for fraud, forgery, auto theft, and larceny, while prison use increased by only 15 percent for robbery convictions. Similarly, prison use increased most for offenders with no prior imprisonments or only one prior imprisonment, and for those who were under no commitment or on probation at the time of their offense. These changes served to narrow the differences in the likelihood of prison after conviction for cases of differing seriousness. In all cases, however, this pattern of increasing punitiveness for less serious cases began before DSL.

The weight of all the evidence considered here regarding DSL effects on the decision to imprison or not

falls decidedly on the side of no perceptible change in prison use as a result of DSL. The increases in prison use in superior courts and associated shifts away from probation and jail sentences evident after DSL implementation are best viewed as continuations of preexisting trends. These trends toward increased prison use are consistent with and probably reflect the effects of some combination of increased punitiveness, general increases in the seriousness of cases handled at all levels of the criminal justice system, shifts of less serious cases from superior to municipal court, and changes in the age structure of the population.

Impact on Length of Terms

Two issues are of central concern in considering the effect of DSL on prison terms: (1) changes in the average severity of prison terms reflected in either increases or decreases in mean or median time served and (2) changes in the variability or disparity in time served for similar cases.

The impact of DSL on average prison terms was difficult to anticipate prior to implementation. As originally enacted, the base terms were chosen to reflect recent past experience of time actually served under Adult Authority releasing policies (Nagin, 1979:81; Lipson and Peterson, 1980:4; Casper et al., 1981:2-10). The good-time provisions, which allowed for a maximum of one-third off the sentence, and the application of separate enhancements, whose impact on time served was presumably already reflected in the designation of base terms for each conviction offense, however, contributed to uncertainty in predictions about changes in average time served under DSL. The subsequent enactment of amendments to increase base terms further complicated these predictions.

There was less ambiguity about the expected impact of DSL on the variation or spread of prison terms. A principal purpose of DSL was to introduce greater uniformity in sentences for offenders convicted of the same offense (Lipson and Peterson, 1980:4; Casper et al., 1981:2-9). This was to be achieved through the narrow range of sentence lengths available in the three base terms for any conviction offense. DSL also provided for routine review of all sentences for disparity (i.e., excessive deviation from the distribution of previous

sentences for that conviction offense) by the Board of Prison Terms. Both these mechanisms were expected to considerably reduce the range of sentences imposed for the same conviction offense.

All the evidence points to a definite decrease in sentence lengths after DSL. Just as with prison use, however, the changes are part of a continuing trend that began before DSL was implemented. There was also a tendency toward greater uniformity in sentences under DSL. Specifically, most measures of sentence variation or dispersion declined, and the differences in the sentences of men and women were essentially eliminated. Despite this decline and the narrow range of sentence length options provided by base terms, the range of sentences imposed for individual convicted offenses remained surprisingly broad.

Length of Prison Terms

Studies comparing the average length of terms under ISL and DSL use both actual sentences imposed under DSL and adjusted DSL terms reflecting credits for jail time already served, good time off the sentence, or both.[24] The average length of terms served under ISL was estimated from the actual time served by offenders recently released under ISL. These comparisons generally found decreases in mean or median time served under DSL, especially when allowing for jail and maximum good-time discounts from the term actually imposed at sentencing.

Based on Department of Corrections data on receptions and releases statewide, Brewer et al. (1980), for example, report that the mean time that would be served for all offenses, without allowance for credits, increased very slightly from ISL to DSL (40.0 to 41.4 months), using the actual sentence imposed under DSL (Table 7-33). Allowing for maximum good-time credits, however, the adjusted DSL mean time served was considerably lower at 28.7 months. Similarly for robbery, the mean time that would be served for actual DSL sentences, without credits, was higher at 51.8 months compared with 44.8 months for ISL releases. The mean DSL time to be served for robbery, however, dropped to 35.7 when adjusted for good time. For burglary, both the mean time served from actual DSL sentences and the mean from adjusted DSL sentences were lower after DSL than the mean time served found for ISL releases. This same pattern was found when statewide

TABLE 7-33 Length and Variability of Prison Terms in California: ISL Versus DSL

Jurisdiction and Period	Prison Terms (months) All Offenses				Robbery				Burglary (2d Degree)			
Statewide (Men Only)[a]	Mean	S.d.	Median	(n)	Mean	S.d.	Median	(n)	Mean	S.d.	Median	(n)
ISL: 1972-1976	40.0	32.8	35	(22,546)	44.8	25.1	41/34[b]	(5,263)	45.4	28.3	37	(3,135)
DSL: 1977-1978												
Actual sentence	41.4	22.9	36	(2,457)	51.8	20.8	48	(643)	26.3	8.7	24	(436)
Adjusted sentence[c]	28.7	15.4	25	(2,452)	35.7	14.0	33	(642)	18.4	5.9	17	(435)
1979: actual sentence[d]	43.1	28.4	36	(10,395)	56.9	28.8	48	(2,216)	27.5	10.5	24	(1,787)

Statewide[e]	Median	Mid-50% Range	Mid-75% Range	Median	Mid-50% Range	Mid-75% Range	Median	Mid-50% Range	Mid-75% Range
ISL: Composite[f] (1966-1974)	28	17-48	9-60	32	22-42	17-53	23	15-29	8-37
DSL: 1977-1978[c] adjusted sentence	22	12-29	7-43	34	25-41	20-49	14	7-22	4-27

Statewide[g]	Median	Mid-80% Range	Range	Median	Mid-80% Range	Range
ISL: 1975	43	29-66	n.a.	33	21-61	n.a.
DSL: 1978-1979						
Actual sentence	48	36-84	16-240	24	16-48	16-112
Adjusted sentence	32	24-56	11-160	16	11-32	11-75

[a]SOURCE: Brewer et al. (1980:Table 7).
[b]The first number is the median for first-degree robbery and the second is the median for second-degree robbery.
[c]Actual sentences imposed are adjusted to exclude maximum good-time credits (one-third off sentence).
[d]Board of Prison Terms (1981:Table III).
[e]Ku (1980:Figure 4.2).
[f]Refers to release experiences in 1975 for cohorts admitted to Department of Corrections in years 1966 through 1974.
[g]Casper et al. (1981:Table 5.2). No data for "all offenses."

medians were compared in Brewer et al. (1980) and Casper et al. (1981).[25]

Brewer et al. (1980) indicates very different post-DSL changes in time served for men and women (Table 7-34). Time served on discounted DSL sentences for men was shorter than ISL time served for every offense category. For women, however, even the discounted DSL terms for person offenses were longer than ISL time served, and they were about the same for property offenses. DSL thus created greater uniformity in time served across sexes. This was accomplished by introducing a greater differential between person and property offenses in women's terms, with terms for person offenses increasing for women and terms of property offenses remaining about

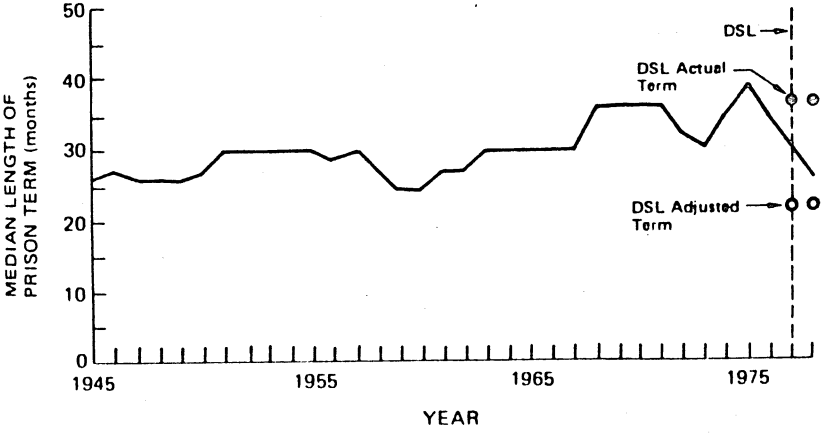
TABLE 7-34 Changes in Length of Prison Terms by Sex Based on Statewide Data

Offense	Mean Prison Term (Months) Men	Women	Women/Men
All Offenses			
ISL: 1972-1976	40.0	23.7	.59
DSL actual: 1977-1978	41.4	35.3	.85
DSL adjusted: 1977-1978	28.7	24.8	.86
2nd Degree Burglary			
ISL: 1972-1976	30.0	19.5	.65
DSL actual: 1977-1978	26.3	22.3	.85
DSL adjusted: 1977-1978	18.4	16.0	.87
Robbery			
ISL: 1972-1976	44.8	26.7	.60
DSL actual: 1977-1978	51.8	42.8	.83
DSL adjusted: 1977-1978	35.7	29.6	.83
Assault with a Deadly Weapon			
ISL: 1972-1976	40.9	22.3	.55
DSL actual: 1977-1978	47.7	49.7	1.04
DSL adjusted: 1977-1978	32.9	34.7	1.05

SOURCE: Derived from Brewer et al. (1980:Tables 7 and 8).

for women and terms of property offenses remaining about the same. As indicated in Table 7-34, while women's terms under ISL were much shorter than those of men, averaging from 55 to 65 percent of men's terms, even when controlling for crime type, under DSL the lengths of women's terms were much closer to those of men; women's terms increased to exceed 80 percent of the length of men's terms.

When the observation period was increased to include multiple observations, Lipson and Peterson (1980) found that the general decline in time served evident after DSL was consistent with a preexisting trend toward shorter terms that began several years before DSL implementation. As evident in Figure 7-9, median ISL prison terms between 1968 and 1976 for all offenses were consistently longer (at about 3 years) than found in the preceding 23 years, when prison terms averaged about 26 months. Beginning in 1975, however, the length of terms began to decline again and reached previous levels in 1978. The shorter DSL terms after discounting for jail and maximum good-time credits were fully consistent with this recent decline in time served. The same trend toward shorter terms is



SOURCE: Lipson and Peterson (1980:Figure 4 and Table 5).

FIGURE 7-9 Median Length of Prison Terms Under ISL and DSL.

evident at all levels of seriousness for robbery, burglary, and assault (Table 7-35).[26]

So far the analysis of changes in time served has considered aggregate statewide data with only limited controls for crime type. Using data on burglary cases before and after DSL, Utz (1981) found differences between counties with time served for burglary cases declining after DSL in Alameda and increasing in Sacramento (Table 7-36). Recognizing that a simple two-point comparison of average prison terms may be

TABLE 7-35 Trends in Lengths of Prison Terms By Crime Type

	Median Prison Terms (months)			
	ISL			DSL
Robbery	1st Degree with Firearm	1st Degree	2nd Degree	All
1975	--	45 (1,001)[a]	38(565)	--
1976	--	39 (818)	30 (417)	--
1977	48 (190)	35 (772)	29 (411)	29-44[b] (756)
1978	45 (220)	34 (664)	27 (380)	29-45 (1,524)
Burglary	1st Degree	2nd Degree		
1975	43 (213)	31 (961)		--
1976	34 (175)	24 (782)		--
1977	31 (243)	22 (1,002)		13-21 (597)
1978	29 (260)	19 (1,249)		13-21 (1,283)
Assault	with Firearm	No Firearm		All Assault with Deadly Weapon
1975	--	41 (455)		--
1976	--	34 (324)		--
1977	40 (35)	33 (367)		21-33 (312)
1978	37 (52)	29 (376)		29-45 (683)

[a]The number of observations is reported in parentheses.
[b]The upper number reflects credit for jail time before prison; the lower number includes both jail time credits and maximum good-time credits.

SOURCE: Lipson and Peterson (1980:Tables 6-8).

TABLE 7-36 Changes in Time Served in Burglary Cases by Jurisdiction

Jurisdiction	Prison Term (months) Mean	Median
Alameda		
ISL: 1976	27.2	24
DSL: 1978 adjusted sentence[a]	24.3	16
Sacramento		
ISL: 1976	23.7	20
DSL: 1978 adjusted sentence[a]	28.6	24

[a]Actual DSL sentences imposed are adjusted to exclude both credit for jail time and maximum good-time credits (one-third off sentence).

SOURCE: Utz (1981:Table 34).

confounded by differences in offense attributes both across jurisdictions and over time, Utz introduced multivariate controls for a variety of indicators of offender and offense seriousness.[27]

With controls for case seriousness, the regression of prison terms on jurisdiction (Sacramento = 1) and time period (DSL = 1) indicates that the effect of DSL was to decrease time served for low-seriousness conviction counts and to increase time served for high-seriousness conviction counts. When controlling for case attributes Sacramento also had more severe prison terms than Alameda; prison terms for "like" cases were 3.5 months longer in Sacramento. The only significant variables among the control variables are all indicators of offense seriousness.[28] No prior record variables were significant for the length of term decision.

Based on these results, the higher prison terms in Alameda under ISL can be attributed to a greater representation of serious cases in Alameda County. The DSL difference between counties of 4.3 months was quite close to the estimated county differential of 3.5 months, suggesting that cases in the two counties were much closer in seriousness in the DSL sample.[29]

The level of control for case differences--including jurisdiction, crime type and other more specific indicators of case seriousness--makes Utz's analysis superior to the other studies considered here. There are, nevertheless, reasons for caution in accepting these results. The main reason for concern is the failure of the regression model to allow for jurisdictional differences in the effects of both DSL and the other control variables.

Certainly, the estimated jurisdictional difference in time served of 3.5 months makes sense in the context of DSL because individual jurisdictions could vary in the severity of sentences imposed. Utz (1981:161), however, is rightly puzzled by the reasons for the same difference between jurisdictions under ISL, when time served was determined by a centralized state agency without explicit regard for sentencing jurisdiction. This result is likely to be an artifact of the way the model was posed, with no allowance for interaction between jurisdiction and time. In this event, jurisdiction necessarily had the same estimated effect in both time periods. This artifact could have been avoided by including an interaction variable for jurisdiction and time period, to allow for the possibility of different jurisdictional differences under ISL and DSL.[30]

Similarly, the model does not address the potential changes in the role of offender and offense variables as the locus of decisions about time served moved from a centralized state agency under ISL to decentralized local courts under DSL. Nor does it allow the effects of the control variables to vary across jurisdictions. As specified the control variables are assumed to have the same effects across jurisdiction and over time. A significant presence of any of these interaction effects would certainly bias the resulting estimates from the homogeneous model posed by Utz.[31] Unfortunately, the data available to Utz, which involve relatively small samples as one focuses only on those cases resulting in prison sentences, do not permit adequate consideration of these issues.

Variability in Prison Terms

Consistent with the emphasis on retribution as a primary purpose of sentencing embodied in DSL, similarly convicted offenses should result in similar sentences. To the extent that this objective is met, one would expect

reductions in the level of variation in prison terms for "like" offenses.

Several of the studies explicitly address reductions in the variation, or dispersion, of prison terms after DSL. Whether measured by the standard deviation around the mean or the breadth of various mid-ranges around the median,[32] various studies report reductions in the spread of prison terms after DSL, when controlling for convicted offense (Table 7-33). These decreases were especially pronounced when discounted DSL terms were used.

Because of the associated declines in the means and medians, however, these decreases in variation must be regarded cautiously in most cases. Any decrease in the mean or median increasingly constrains the possible distribution of prison terms below that "midpoint," thus limiting the range of potential variation. This problem potentially plagues all ISL-DSL comparisons involving discounted DSL terms. The comparisons for men of DSL terms actually imposed with ISL time served in Brewer et al. (1980:Table 7) provide some more reliable indications of a real substantive decrease in prison term variation. Of those crime types with a sufficient number of DSL cases (more than 75), the standard deviation decreased from 20 to 50 percent for five of the seven crime types that experienced increases in means.[33]

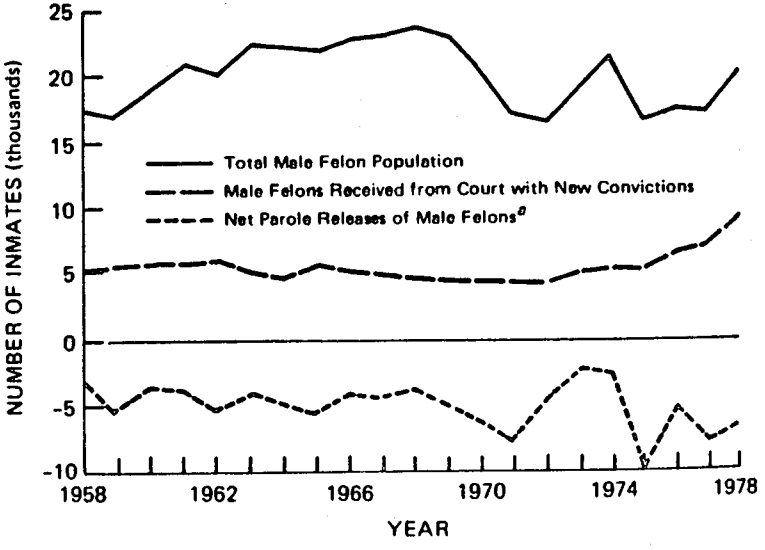
While this greater uniformity within conviction classes was an objective of DSL, the law also provides for various enhancements to the base term that permit finer discrimination for differences in seriousness within a convicted offense class. Consistent with this approach, Casper et al. (1980:5-33 to 5-34) note that the range of DSL sentences actually imposed was quite broad (Table 7-33). Before applying any good-time discounts, DSL sentences for robbery ranged from 1 to 20 years and for burglary from 1 to 9 years. These wide ranges were observed despite the correspondingly narrow range of sentences available across base terms for each convicted offense, with maximum differences of only 5 and 2 years for robbery and burglary, respectively. Thus, the availability of enhancements and consecutive terms on multiple charges introduced the potential for considerable variability in sentences for offenders convicted of the same crime type.

Implications for the Size of the Prison Population

Several studies considered the implications of changes in prison commitments and prison terms for future prison

populations. Both Ku (1980) and Lipson and Peterson (1980) note the important role of the Adult Authority's releasing policies in influencing prison populations in the past. As indicated in Figure 7-10, the large increases in the number of releases from prison in 1970-1971 and again in 1975 were associated with corresponding declines in the size of the prison population. The 1975 increase in releases was particularly important in offsetting the impact of a trend toward increased receptions beginning in 1975.

During the period of relative stability from 1958 to 1968, when annual receptions averaged about 5,250 inmates per year and annual releases averaged about 4,700 inmates per year, the prison population grew at an average of 550 additional inmates per year. Without the discretionary releasing authority of the Adult Authority, a continuation of releases at the stable pre-1968 levels in the face of the increases in receptions experienced during the 1970s would have resulted in unchecked growth in the prison population through the 1970s, reaching over 30,000 inmates by 1978.



[a]Parole releases and discharges minus parole revocations.

SOURCE: Lipson and Peterson (1980:Figure 5).

FIGURE 7-10 Movement of Male Felons in California Prisons 1958-78

In the absence of some form of safety valve releasing authority, both Lipson and Peterson (1980) and Brewer et al. (1980) have anticipated that the continuing increases in prison commitments and only moderate decreases in time served evident under DSL are likely to result in rapid growth in California's prison population. Indeed the California Department of Corrections projected an increase from 18,502 adult felons in 1978 to 27,020 in 1988 (Brewer et al., 1980:20). The potential exists for even greater increases, when viewed in the context of legislative increases in time served.

Conclusions

There was widespread judicial compliance in applying the provisions of DSL to sentenced defendants. Nevertheless, DSL did little to limit considerable prosecutor discretion in screening the cases that reached superior court and in influencing the charge structure of those cases available for sentencing.

Despite the magnitude of the change in sentencing procedures under DSL, we found no compelling evidence of substantial changes in sentence outcomes attributable to DSL. While prison use increased and time served decreased after DSL, both changes represented continuations of trends that began several years before DSL was implemented. Rather than a major factor in changing sentencing, DSL is perhaps best viewed as a manifestation of a more general shift in sentencing practices in California.

Whatever impact DSL had was largely limited to changes in case processing. DSL did not induce sentence bargaining where it did not exist before; it did, however, expand the scope of already existing sentence bargaining to include explicit reference to the length of prison terms in bargained sentence agreements. DSL provisions for enhancements and probation ineligibility functioned as important bargaining chips for the prosecutor in obtaining agreement to a prison term. Furthermore, while aggregate guilty plea rates changed little, there is evidence that early guilty plea rates did increase.

SENTENCING GUIDELINES

Sentencing guidelines have been developed as a means of structuring judicial sentencing discretion by providing

judges with reasonably specific guidance about the appropriate sentence for a particular case. Guidelines have arisen primarily in response to the criticism that current sentencing provisions permit such wide latitude for judicial discretion that very similar cases often receive different sentences (e.g., von Hirsch, 1976; Frankel, 1972). Although guidelines are only one of several responses to unwarranted sentencing variation, the guideline approach has received special impetus from the application of guidelines to parole decisions by the Federal Parole Commission (Gottfredson et al., 1978). The feasibility demonstrated by the parole guidelines makes guidelines particularly attractive as a means of structuring sentencing without usurping the proper exercise of judicial discretion.

Although many types of guidelines have been proposed, they share certain characteristics. First, guidelines classify cases into groups based on attributes relevant to sentencing, such as the seriousness of the current offense and the offender's prior record. Cases within the same group are assumed to be sufficiently similar to each other in terms of the relevant sentencing attributes to warrant similar sentences. Second, the guidelines specify a recommended sentence or range of sentences for each group of offenders. In so doing, guidelines explicitly define sentencing policy by intentionally specifying the desired variation in sentences across different groups and intentionally specifying limits on acceptable variation within each group. Underlying this process is the presumption that the variation in sentences across groups is warranted (i.e., that differences in the sentencing attributes warrant different sentences), that most sentence variation among offenders within the same group is unwarranted, and that the combination of cross-group variation and limited within-group variation establishes equity in sentencing. Third, some official body, usually a sentencing guideline commission authorized by the legislature or the judiciary, is established to construct and promulgate the guidelines. The sentencing commission is responsible for identifying what attributes will be used to classify offenders into groups, thereby indicating the attributes that are most appropriate for the sentencing decision. In this process the criteria that define "like" cases are made explicit. In addition, the commission is responsible for setting sentencing policy by establishing the recommended cross-group and within-group variation in sentences.

Implicit in the notion of guidelines is the expectation that judges will be under some degree of obligation to follow the guideline recommendations. This responsiveness will, of course, vary with the legitimacy of the commission, the reasonableness of the commission's recommendations, and the enforcement powers available when sentences fail to adhere to the guideline recommendation. To the extent that guidelines result in changes in judges' sentencing practices that agree with the guideline recommendations, there is "compliance" with the guidelines. Such compliance is expected to reduce unwarranted variation as sentences conform to the recommended cross-group and within-group variation in sentences.

Several examinations of the construction and impact of sentencing guidelines are available: Rich et al. (1981) assessed the construction and subsequent impact of judicially adopted guidelines in Denver and Philadelphia; Sparks et al. (1982) reviewed the construction of guidelines in Massachusetts in depth and those in other jurisdictions in less detail; Cohen and Helland (1981) examined guidelines in Newark; Knapp (1982) and Minnesota Sentencing Guidelines Commission (1982) report on guideline development and impact in Minnesota. The primary consideration in this review of guideline evaluations is their impact on sentencing outcomes and case processing. Only the sentencing guidelines in Minnesota were found to have demonstrably altered sentencing practices after implementation.

Guideline Types

To date, sentencing guidelines have taken two very different forms. One critical dimension that distinguishes the different types of guidelines is the basis of construction, which refers to the process used in choosing the relevant sentencing attributes, classifying offenders in terms of these attributes and establishing sentence recommendations for each offender group. The basis for constructing guidelines can vary along a continuum from descriptive to prescriptive.

A primarily descriptive approach is discussed in Gottfredson et al. (1978) and Wilkins et al. (1976). Descriptive guidelines are intended to articulate past sentencing practices without substantially altering those practices for the court as a whole. By establishing a

range of sentences that accommodates a substantial portion of current cases (e.g., 80 percent), the guidelines are intended to provide judges with a description of prevailing sentencing practices in their jurisdiction to serve as a standard in their individual sentencing decisions. This explicit description of past practices may also serve as a basis for possible reconsideration of those practices in an iterative process of description, evaluation, and modification of the guidelines. Descriptive guidelines have been implemented in Denver, Philadelphia, and Newark.

At the other end of the continuum are prescriptive guidelines. These guidelines reflect the values and principles of sentencing that emerge in guideline development and need not relate to current practice. Indeed, the guidelines may represent a deliberate departure from past sentencing practices, as exemplified by the guidelines for the state of Minnesota.

In descriptive guidelines the primary intent is to create consistency across judges. The goal is to change the practices of those judges who deviate by sentencing too leniently or too severely relative to the sentencing practices of the court as a whole. Descriptive guidelines are expected to reduce the variation in sentencing among different judges without shifting the standard sentences of the court. In prescriptive guidelines, by contrast, the goal is to shift the sentencing standards of the entire court to the new standards defined by the guideline recommendations. Consequently, prescriptive guidelines may require that all judges, not just the deviant judges, change their sentencing practices.

Success in achieving the intended guideline effects is determined in part by the degree of obligation judges feel toward the guidelines. Like the basis of construction, the degree of obligation can usefully be viewed as a continuum ranging from voluntary to presumptive. With voluntary guidelines, the guideline sentences are viewed merely as advisory, designed to assist judges by providing a set of standard sentences. If an actual sentence deviates from the guidelines, the judge may justify the deviation, but the justification is intended to serve primarily informational purposes in subsequent reconsideration of guidelines (e.g., Wilkins et al., 1976). The guidelines in Denver, Philadelphia, and Newark were voluntary.

With presumptive guidelines, judges are expected to impose the recommended sentence. The Minnesota sentenc-

ing guidelines are an example of presumptive guidelines. Departures from the guidelines are permitted in the presence of substantial and compelling circumstances. In cases of departures, the judge must prepare a written justification for the deviation and the merits of that justification are the basis for appeal by the defense or prosecution.

The impact of guidelines on sentencing practices can be expected to vary with the type of guideline. Descriptive/voluntary guidelines are likely to involve the smallest impact on sentencing. Since descriptive guidelines recommend essentially no departure from current practice for the court as a whole, only those judges who deviate widely from current practice are expected to change their sentences. Because of the voluntary nature of the guidelines, however, very little compliance is expected from these few deviant judges. To the extent that prescriptive guidelines depart from current practices, compliance with the guidelines will require widespread changes in sentencing practices. As implemented in Minnesota, such compliance is likely to be high because of the presumptive authority of those guidelines.

Formal Compliance

Because of the descriptive nature of many sentencing guidelines, it is particularly important to distinguish compliance from agreement with guidelines. Agreement is the extent to which actual sentences are the same as recommended sentences. Compliance, on the other hand, is the increase in the level of agreement in sentencing done with guidelines compared with that done without guidelines. The increase indicates the extent of change in practices in a direction consistent with the guideline recommendations. Simply noting a high level of agreement after guideline implementation may not indicate an effect of guidelines on sentencing practices. This is especially true for descriptive guidelines, which are designed largely to accommodate past sentencing practices.

Voluntary/Descriptive Guidelines

There is little evidence of formal compliance with voluntary/descriptive guidelines in the jurisdictions

studied. Rich et al. (1981) found that, in the aggrega e, judicial decisions to incarcerate were consistent with guidelines in about 70 percent of cases, both before and after guideline implementation in Denver and Philadelphia. Agreement in terms of sentence length was lower, at about 40 percent after guideline implementation in those two cities. Agreement on both decisions occurred in only about half of all cases in Philadelphia and Denver. Similar results were found in Newark (Cohen and Helland, 1981), with about 78 percent agreement with incarceration sentences and 40 percent agreement with sentence length recommendations before and after guideline implementation.

The Denver evaluation (Rich et al., 1981) used data on 632 cases sentenced in the 18 months before guideline implementation in November 1976 and 1,451 cases sentenced in the 30 months after guidelines were implemented.[34] The Philadelphia analysis (Rich et al., 1981) was based on a 10-percent random sample of cases sentenced in the 39 months before guidelines were implemented on March 5, 1979, and a 45-percent random sample of cases sentenced in the first six months after guideline implementation.[35] The Newark evaluation (Cohen and Helland, 1981) used data on 1,446 cases with presentence reports prepared over a total of 15 months before guideline implementation and another 634 cases sentenced in the first six months after guidelines were implemented in July 1977.[36] Except for those in the Denver evaluation, the follow-up periods after guideline implementation were quite short at 6 months, and it was therefore difficult to sort out long-term impact from start-up effects.

The lack of any significant changes in agreement after descriptive guidelines were implemented in these jurisdictions is consistent with the intent of descriptive guidelines. This finding of no compliance for the court as a whole, however, provides no indication of whether guidelines had the intended effect in changing the sentencing behavior of individual deviant judges. A finding of no overall compliance could occur whether or not deviant judges comply with guideline recommendations. Data on the sentences of individual judges are crucial to evaluating the primary impact of descriptive guidelines on individual judges. None of the evaluations reviewed here includes the necessary analyses of individual judge data.

The low levels of agreement found with sentence length recommendations are noteworthy. Despite claims that the

guidelines were descriptive, the recommendations on length were more prescriptive in character: They represented a substantial reduction in the range of sentence lengths from that observed in past practices. There was, however, no evidence of compliance by the court with these narrowed ranges. The degree of obligation to comply with these voluntary guidelines was apparently not sufficient to affect judges' sentencing behavior.

Lawyers and judges interviewed in Philadelphia and Denver indicated that few judges made significant efforts to comply with the guidelines. This indifference to the guidelines was evident in the widespread failure to comply with their procedural requirements. In Denver the guideline worksheets for determining the guideline sentence in each case were available for only a fraction of the cases sentenced after guidelines were implemented. An important feature of descriptive guidelines is the expected role of departures from guideline sentences in a continuing process of guideline evaluation and modification. In Denver, however, the requisite written reasons were provided in only 12 percent of cases involving departures.

Presumptive/Prescriptive Guidelines

Minnesota is the only jurisdiction that has, at the time of this writing, implemented sentencing guidelines that are both presumptive and prescriptive.

The Minnesota Sentencing Guidelines Commission was established by the state legislature in 1978 and charged with developing presumptive sentencing guidelines for the state. These guidelines were accepted by the legislature and were to be used for sentencing all felonies committed after May 1, 1980. The guidelines articulate and embody a number of principles of sentencing. These standards for sentences have served as the basis for appellate review and the emergence of case law governing the choice of appropriate sentences. Two principles in particular have been affirmed in various Minnesota supreme court rulings: (1) that the sentence be based on the conviction offense and not on alleged but unproved offenses and (2) that the severity of the sentence be proportional to the seriousness of the offense when compared with other offenses (Minnesota Sentencing Guidelines Commission, 1982).

The guidelines identify two criteria for sentencing decisions: the seriousness of the offense, reflected in an offense score for different statutory offense types, and the offender's prior criminal history score. Personal attributes of the offender are explicitly excluded from consideration. In developing the guidelines the sentencing commission adopted a prescriptive approach. The recommended sentences represented a deliberate departure from past sentencing practices. Emphasizing retribution as the principal goal of sentencing, the guidelines recommended increased use of prison for violent offenders, including those with low criminal histories, and decreased use of prison for property offenders, regardless of their prior criminal histories.

The Minnesota guidelines are expressed as a grid with offense score on one axis and offender criminal history score on the other. The recommended sentence for a case is found by locating the appropriate cell of the guideline grid. The guidelines distinguish two types of sentences, INs and OUTs. Those cases with an IN recommendation are expected to receive a state prison sentence within the recommended range of terms. Cases with OUT recommendations are not expected to be sentenced to state prison (i.e., the state prison term is stayed); instead OUTs may be sentenced to probation or to terms in local jails.

Internal evaluations of the impact of the Minnesota guidelines found substantial formal compliance by judges in both the decision to incarcerate and the decision about sentence length (Knapp, 1982; Minnesota Sentencing Guidelines Commission, 1982). Table 7-37 shows the percentages of cases in the 1978 baseline sample that would have been sentenced consistently with the presumptive IN and OUT sentences had the guidelines been in effect in 1978 and the percentages of cases sentenced consistently with the presumptive sentences under the guidelines in 1980-1981. For both IN and OUT decisions there were marked shifts in sentences consistent with the guidelines. As Table 7-38 reveals, these shifts in sentencing were often greater when individual cells in the guideline grid are examined than is apparent overall.

The relatively low consistency before guideline implementation in Tables 7-37 and 7-38 illustrates the extent to which the guidelines departed from previous sentencing practices in Minnesota. The increases in agreement in individual cells of the guidelines in Table 7-38 indicate

TABLE 7-37 Percentage of Cases Sentenced Consistently with Presumptive Sentences for Minnesota Sentencing Guidelines

	Presumptive OUTs Who Were Sentenced "Out"	Presumptive INs Who Were Sentenced "In"
1978 baseline cases	86	44
1980-1981 sentences imposed	96	77

NOTE: These figures were estimated from data provided by Knapp (1982). The figures are not precise because some cases that appear among the presumptive OUTs are actually treated as presumptive INs under separate statutory provisions for mandatory sentencing.

the high rates of compliance by judges with the new policy for low-history violent offenders and high-history property offenders.

Before implementation of the Minnesota guidelines, sentence length was determined exclusively by the paroling authority, so a before-and-after comparison for length decisions would not be meaningful. Departure rates after guideline implementation, however, indicate substantial use of the narrow sentence ranges provided in the guidelines. Of 827 cases committed to prison after guideline implementation during 1980-1981, 76.4 percent were within the guideline range, with 7.9 percent receiving longer sentences and 15.7 percent shorter sentences (Knapp, 1982; Minnesota Sentencing Guidelines Commission, 1982).

Furthermore, the monitoring and follow-up by the Minnesota Sentencing Guidelines Commission resulted in strong compliance by judges in submitting the required written justifications for departures from the guideline sentence. The appellate review of sentences in Minnesota has generally upheld the presumptive nature of the guideline sentences, and case law is now emerging on acceptable grounds for departures from the presumptive sentence.

TABLE 7-38 Percentage of Cases Sentenced Consistently with Presumptive Sentences Within Individual Cells of Minnesota Sentencing Guidelines

	Percent Actually Sentenced "Out"	
	1978 Baseline Cases	1980-1981 Sentenced Cases
Offense 5, history 1	60.7	95.0
5 2	21.8	74.2
3 3	45.4	80.3
	Percent Actually Sentenced "In"	
	1978 Baseline Cases	1980-1981 Sentenced Cases
Offense 7, history 0	39.1	71.8
8 0	41.9	85.4
8 1	29.1	75.0

SOURCE: Knapp (1982).

Variability in Sentences

One of the purposes of sentencing guidelines has been to reduce the variation in sentences for otherwise "like" cases. The guidelines make explicit the criteria for identifying "like" cases and recommend a sentence for those cases. The degree to which guidelines reduce variation in sentences depends partly on the range of variation permitted by the guideline recommendation. The narrower that range, the greater the reduction in variation that can be expected.

In an effort to accommodate large portions of past sentencing practices, voluntary/descriptive guidelines have generally preserved wide ranges on recommended sentences. Assessments of these guidelines have generally found little effect on the extent of variation in sentences imposed on like cases (as classified by the guidelines).

Using regression analysis, Rich et al. (1981) found little change in the proportion of total variance in sentence outcomes that was accounted for by the guideline variables. It is also worth noting that the amount of variance explained was always quite small--25 percent or less in both Denver and Philadelphia. As a further test of sentence variability, Rich et al. (1981) examined the neutrality of sentencing with respect to nonguideline variables, such as race and sex of the defendant. Including these variables with the guideline variables in a regression on sentence outcomes, they found little evidence that these variables affected sentence length decisions. When they did influence IN/OUT decisions, with males more likely to be sentenced to prison in both Denver and Philadelphia and blacks more likely to be sent to prison in Philadelphia, introduction of the guidelines did not reduce the observed racial and sexual disparity in sentences.

In Newark, Cohen and Helland (1981) found little detectable change in the proportions of cases sentenced to IN and OUT sentences in different guideline categories, and thus no evidence of a reduction in the variance of these sentences. Despite the general lack of compliance with sentence length recommendations in Newark, there was a trend toward reduced variance in sentence lengths within guideline categories. This suggests that guidelines may have reduced variance by moving extreme sentences in the direction of the guideline range without necessarily moving the sentence into the recommended range. No analysis of the role of personal attributes of offenders is provided for Newark.

In contrast to the voluntary/descriptive guidelines, the Minnesota guidelines make strong recommendations on IN and OUT sentences and pose relatively narrow ranges for the length of state prison terms to be imposed. As was evident in Table 7-38 there has been strong compliance with the explicitly prescribed IN and OUT sentences. As the proportion receiving the recommended sentence increased toward 100 percent, the variance in IN/OUT sentences also decreased. With a maximum possible variance in IN/OUT sentences of .25 the variance decreased 52 percent, from .1041 in the 1978 baseline data to .0499 in 1980-1981 (Knapp, 1982; Minnesota Sentencing Guidelines Commission, 1982). There were only 2.6 percent departures from the narrow range of sentence lengths provided by the guidelines. Since the paroling authority determined the length of prison terms before

the sentencing guidelines were implemented, the only comparison for decisions on length of term is departures from the parole guidelines. In 1979 there were 24 percent mandatory and discretionary departures from the parole guideline term and an addtional 14 percent adjustments under administrative rules. In 1980 combined departures and adjustments represented 46 percent of parole cases.

An important principle articulated in the Minnesota guidelines is that sentences should be neutral with respect to the race, sex, and socioeconomic status of the defendant. One indicator of the success of the guidelines in achieving more uniform sentencing is the rate of departure of sentences from the guidelines for different demographic groups. The data in Table 7-39 indicate that considerable variations in sentences

TABLE 7-39 IN/OUT Departure Rates for Cases Sentenced Under Minnesota Sentencing Guidelines

Demographic Group	Percent Departures over All Cases	Percent Severe Departures Among Total (Presumptive OUTs Who Were Sentenced IN)	Percent Lenient Departures Among Total (Presumptive INs Who Were Sentenced OUT)
Total	6.2	3.1	3.1
Race			
White	5.2	2.6	2.7
Black	9.6	4.9	4.7
Native American	12.4	7.5	4.9
Sex			
Male	6.5	not reported	not reported
Female	3.1	not reported	not reported
Employment			
Employed	3.4	0.2	3.2
Unemployed	8.9	5.0	3.9

SOURCE: Knapp (1982); Minnesota Sentencing Guidelines Commission (1982).

remained after implementation of the guidelines. The number of IN/OUT departures was reduced in the aggregate of all cases from 19.4 percent in 1978 to 6.2 percent in 1980-1981, and similar reductions were found for all demographic groups. Nevertheless, minority, male, and unemployed offenders continued to experience more departures from the presumptive sentences, and these departures tended to be in the direction of more severe sentences (i.e., presumptive OUTS who were in fact sentenced to the state prison).

The distribution of types of cases differed sharply across demographic groups, with cases of whites, females, and employed offenders more likely to be for low-severity offenses and low criminal history scores. Departure rates were also generally lower for these cases; the typical reasons for departures related to the extent of injury to victims--conditions that do not apply in low-severity property offenses. These differences in the representation of cases with low departure rates could affect the comparisons of departure rates across demographic groups. As a minimum control for the potential influence of differences in the distribution of cases, departure rates were estimated separately among presumptive INs and presumptive OUTs. As indicated in Table 7-40, the differences across race and sex remain after minimally controlling for case distribution and the differences between employed and unemployed offenders are increased.

The actual departure rates were compared with an independent assessment by commission staff of justified departures for a sample of cases from eight counties. The commission staff assessment was conservative in the sense that there was a strong presumption in favor of the guideline sentence. The departure rates in the independent assessment reported in Table 7-41 are thus uniformly lower than those observed in actual sentences. Based on the independent assessment, blacks were 73 percent more likely and Native Americans were 3.3 times more likely than whites to merit severe departures. Thus the actual differential between blacks and whites in Table 7-40 is somewhat higher than expected from the independent assessment. Relative to whites, blacks and Native Americans also received lenient departures from presumptive IN sentences more often than expected. The observed difference between men and women is fully consistent with that expected from the differences in case seriousness as reflected in the independent assessment.

TABLE 7-40 Departure Rates Among Presumptive INs and Presumptive OUTs for Cases Sentenced Under Minnesota Sentencing Guidelines

Demographic Group	Percent Sentenced IN Among Presumptive OUTS[a]	Percent Sentenced OUT Among Presumptive INs
Race		
White	3.1	15.4
Black	6.8	10.7
Native American	9.5	17.2
Sex		
Male	4.0	14.2
Female	1.6	25.9
Employment[b]		
Employed	0.2	46.4
Unemployed	6.3	18.8

[a]Severity level VI offenses are excluded from the presumptive OUTs because some of these offenses are in fact presumptive INs under the terms of separate mandatory sentencing.

[b]The departure rates by employment status are estimated from data on departure rates and the distribution of cases for different categories of offenders available from the Minnesota Sentencing Guidelines Commission. The figures reported here are only approximations based on estimates of both the number of departures and the total number of cases in each category. They include severity level VI offenses among presumptive OUTs.

SOURCE: Minnesota Sentencing Guidelines Commission (1982).

No independent assessment is available by employment status. On the basis of this analysis, it is evident that differences in case seriousness account for much of the difference in departures across demographic groups. The greater than expected incidence of severe departures for blacks relative to whites nevertheless remains a matter of some concern.

TABLE 7-41 Expected Departure Rates Among Presumptive INs and Presumptive OUTs Based on Independent Assessment of Case Attributes

Demographic Group	Percent Expected to be Sentenced IN Among Presumptive OUTS[a]	Percent Expected to be Sentenced OUT Among Presumptive INs
Total Cases	2.7	2.0
Race		
White	2.2	2.9
Black	3.8	0.7
Native American	7.2	0.0
Sex		
Male	3.0	1.9
Female	1.1	4.8

NOTE: The independent assessment was made by Minnesota Sentencing Guidelines Commission staff on a sample of 1,728 cases from eight counties in 1980-81.

[a]Severity level VI offenses are excluded from the presumptive OUTs because some of these offenses are in fact presumptive INs under the terms of separate mandatory sentencing.

SOURCE: Minnesota Sentencing Guidelines Commission (1982).

Case Processing

The Rich et al. (1981) evaluation of voluntary/descriptive sentencing guidelines systems attempted to study the effects of the guidelines on plea negotiations. Interview data from Philadelphia, Chicago, and Denver indicate that lawyers did not consider the guidelines to be important and accordingly did not take them into account when negotiating plea agreements. Because Minnesota's presumptive sentencing guidelines have legal force and prescribe narrow ranges from within which prison sentence lengths must be selected, some guideline

critics have suggested that counsel would incorporate the guidelines into their plea negotiations. Since the applicable guideline range is based on conviction offenses, charge bargains would consequently permit counsel to determine the applicable guideline sentence. Some evidence was found of changes in charge reduction patterns for cases in which aggravated robbery was the most serious charge (Knapp, 1982; Minnesota Sentencing Guidelines Commission, 1982). As evidenced in Table 7-42, the proportion of charge reductions increased for cases with low criminal history scores--fewer cases were actually convicted of aggravated robbery. There were apparently adjustments in case processing to avoid imposing the prescribed prison term for marginally serious defendants when prison was not deemed appropriate in every case by court personnel. With high criminal history scores, however, the proportion of charge reductions declined, and more cases ended in convictions for aggravated robbery. This pattern suggests that prosecutors and judges were operating to preserve distinctions among cases on the basis of criminal history despite the explicit guideline policy of uniformly prescribed prison terms for all these cases.

It was also anticipated by some that the guidelines would result in increases in the rate of trial. No such

TABLE 7-42 Changes in Charge Reductions After Implementation of the Minnesota Sentencing Guidelines

Criminal History Score	Percent of Cases Convicted of Aggravated Robbery When Aggravated Robbery was the Most Serious Charge	
	1978 Baseline Cases	Cases Sentenced Under Guidelines, 1980-1981
0	59	49
1	75	60
2	64	66
3	54	70
4	58	70

SOURCE: Knapp (1982); Minnesota Sentencing Guidelines Commission (1982).

increase was observed during the first year after full implementation of the guidelines; the trial rate among felony convictions was 5 percent in 1978 and 4 percent among 5,500 cases disposed under the guidelines (Knapp, 1982). However, in assessing the impact on trial rates it is important to also examine disposition time. If disposition time from arrest to sentence increased, especially for trial cases, increases in trial rates might not be evident during the early guideline implementation period. This remains an issue for further exploration in the continuing evaluation of the impact of the Minnesota guidelines. In addition, although the Minnesota Sentencing Guidelines Commission is now conducting an assessment of the impact on plea negotiations, only preliminary findings on aggravated robbery are available.

Prison Use

The Minnesota guidelines included an explicit policy choice to increase the use of prison for serious offenses against persons by offenders with limited criminal histories while decreasing prison use for property offenders regardless of their prior criminal history. Consistent with the guidelines, the portion of offenders committed to state prisons for person offenses increased from 32 percent to 46 percent. There was no similar shift in offense types among convictions, with cases with presumptive prison sentences representing about 13 percent of convictions before (1978) and after (1980-1981) guideline implementation. Table 7-43 provides further evidence of the effectiveness of the guidelines in shifting prison sentences from property to personal offenses. The portion sentenced to prison of low-history offenders in serious offenses increased sharply, from 45 percent to 77 percent after implementation of the guidelines, while the portion sentenced to prison of high-history offenders in the least serious felonies decreased from 53 percent to 16 percent (Knapp, 1982; Minnesota Sentencing Guidelines Commission, 1982). This change is an instance in which the sentencing reform, through its explicitly prescribed IN and OUT sentences, has effectively increased the difference between cases that were previously treated similarly.

The impact of guidelines on the overall size of the prison population was also an overriding concern of the Minnesota Sentencing Guidelines Commission. The guide-

TABLE 7-43 Shift in Prison Sentences from Property to Persons Offenses under Minnesota Sentencing Guidelines

Offense Severity Level	Criminal History Score	Percent of Cases Sentenced to State Prisons	
		1978 Baseline Cases	Cases Sentenced Under Guidelines, 1980-1981
VII, VIII, IX (High)	0, 1 (Low)	45	77
I, II (Low)	3, 4, 5 (High)	53	16

SOURCE: Knapp (1982); Minnesota Sentencing Guidelines Commission (1982).

lines were explicitly developed with an eye to the existing capacity of state prisons. Through the end of 1981 the average prison population was at the expected level at 96 percent of capacity. In assessing the anticipated effect of guidelines on the prison population, the commission used the baseline distribution of court cases in 1978 with minor adjustments for expected changes in the demographics of the state. The impact assessment did not allow for changes in case mix that might result from changes in crime rates or in arrest and charging practices. To the extent that such changes do occur, the projections of impact on prison population could be seriously in error. For this reason the commission continually monitors the size and composition of the state prison population.

While the prison population has remained relatively stable in size since implementation of the guidelines, the population in local jails has increased. This is partly due to increased use of jail as a condition of stayed prison sentences. In 1980-1981 after the guidelines 46 percent of convicted felons were committed to jails, compared with 35 percent to jail in the baseline year 1978. Of this 11 percentage point increase, about half can be attributed to the reduction of 4 to 5 percent in prison use at sentencing. The

remainder of the increase is part of a continuing trend toward increased use of jails that began in 1974 (Minnesota Sentencing Guidelines Commission, 1982:63).

Conclusion

There is little evidence that voluntary/descriptive guidelines have had any demonstrable impact on sentencing practices for the court as a whole, either in terms of compliance or in reductions in variation in sentences. This is not surprising, however, because the principal intent of these guidelines has been to increase the consistency of sentences across individual judges. Thus far, the crucial data on sentencing by individual judges that are necessary for examining compliance by individual deviant judges has not been examined, and the impact of these guidelines on individual judges remains largely unknown.

In sharp contrast, the case of the Minnesota sentencing guidelines, which were prescriptive and presumptive in authority, have indicated that it is possible to achieve substantial compliance resulting in major policy shifts through the use of guidelines. The key factors in achieving this impact in Minnesota appear to have been: the legal authority of the guidelines manifested in the legislative mandate; the careful implementation of the guidelines involving many facets of the community as well as criminal justice system participants; and the enforcement of the guidelines through monitoring of sentences by the commission staff and affirmation of the guideline sentences in Supreme Court decisions on appeals.

PAROLE REFORMS

Parole Abolition

On May 1, 1976, Maine became the first state in modern times to establish a determinate sentencing system and abolish parole. The climate for this change included emerging sentiment for harsher sentencing, particularly in rural areas; a widespread belief that the public felt the parole board was too lenient; and skepticism about rehabilitative programs among members of the Law Revision Committee. Sentencing became determinate in the sense

that the duration of prison sentences was calculable at the time of sentencing. "Good time" accrued at a rate of 10 days a month, and "gain" time at a rate of two days a month. Assuming maximum credits, defendants could expect to serve 60 percent of the nominal prison sentence.

The National Institute of Justice has supported two evaluations of Maine's innovations. The first, conducted by a group at Pennsylvania State University, assessed the impact of the new regime during its first 12 months and was completed in late 1978 (Kramer et al., 1978). The second, directed by Donald Anspach of the University of Southern Maine, has generated one lengthy "Interim Report" (Anspach, 1981)--it is primarily a content analysis of changes in Maine's substantive criminal law--and is expected to culminate in a comprehensive final report. Neither study has produced credible findings, although the Southern Maine project may yet do so.

There are several general reasons why the Maine experience is not likely to produce credible evaluation results. First, Maine's small and not especially criminous population does not generate enough cases to permit meaningful statistical analyses of year-to-year changes. Second, simultaneous changes in the substantive criminal law and the sentencing system confounded efforts to isolate the effects of either separate set of changes.

Before 1976, Maine's criminal law consisted of a large number of individual statutes that had been enacted over two centuries and were often inconsistent and overlapping. There were, for example, nine different forgery statutes; the new statutory forgery formulation incorporated "over sixteen different but related statutes" (Anspach, 1981:24, 8). There was no compelling logic to the sentences authorized for different offenses. There were more than 24 different maximum prison terms authorized for different offenses and 60 different statutory sentencing provisions (Anspach, 1981:10; Zarr, 1976:118).

The statutory changes that affected sentencing included the separation of all substantive offenses into five offense classes, each authorizing a maximum term of imprisonment and probation and a maximum fine. Other critical changes included the abolition of the parole board, the establishment of appellate sentence review, and the creation of a procedure by which the corrections commissioner can petition the courts for resentencing of prisoners who receive sentences longer than one year.

The abolition of parole, without simultaneous creation of criteria for judicial sentencing, gave rise to a number of hypotheses about likely effects. One might expect greater disparity, following abolition, in the lengths of prison terms actually served, because there is no parole board to even out gross anomalies. Prison sentences might become longer because judges are accustomed to dealing in inflated terms and may not reduce the lengths of sentences imposed fully to account for parole deflation (see von Hirsch and Hanrahan, 1979:88-90). By contrast, one might hypothesize a real reduction in sentence severity, because judges may have been consciously increasing past prison sentences to discount for parole release and no longer need to do so and because, without a parole board, judges may be chastened by the sole responsibility for punishment decisions and impose less severe sentences (see, e.g., Kramer et al., 1978:62-64).

Maine regrettably was the wrong state in which to test such hypotheses. It is thinly populated and there are relatively few prosecutions or convictions. In the six counties from which the Penn State study included the universe of convictions in the first year after implementation, there were 957 convictions, two-thirds of which were for misdemeanor equivalents. There were 441 convictions for Class A, B, or C felonies in the six counties in the first 12 months of the new law, nearly half of which resulted in nonincarcerative sentences (n = 207). The number of persons convicted of any particular offense in any one year was too small to permit meaningful statistical analysis of changes in sentence by offense type. Moreover, most of the definitions of substantive offenses were changed in the new criminal code, making it difficult to compare the handling of particular offenses before and after the statutory change.

The Penn State evaluation concluded that the 1976 sentencing changes caused (1) a decrease in the use of incarcerative sentences, (2) reduced sentence lengths for persons convicted of Class B and C offenses and longer sentences for persons convicted of Class A offenses, and (3) an increase in sentence disparities. Some or all of those things may have happened, but major defects in research design make the report's conclusions less than persuasive. Before discussing those defects it may be helpful to describe the general research strategy.

Data were collected on all convictions in the superior courts of 6 of Maine's 16 counties for the fifth through

second years preceding the changes (May 1970 to April 1974). The sample included five of the six busiest superior courts and encompassed more than 70 percent of Maine's criminal prosecutions. Data were also collected on all convictions in those counties during the first 12 months after implementation. Because prison records were centrally located and easily accessible, data were collected on all persons released from Maine's prisons without regard to county of conviction for the periods May 1971-April 1972, May 1973-April 1974, and May 1976-April 1977. The analysis consisted of a series of comparisons of outcomes of sentences imposed during the 4-year preinnovation period and the 12-month postimplementation period, and comparisons between the durations of sentences served by prisoners released prior to implementation and the sentences to be served by persons convicted during the 12-month postinnovation period, assuming they receive the maximum 12 day credit for good time per month.

There are seven reasons why the Penn State study's findings are not credible. First, changes in substantive offense definitions make the comparability of precode and postcode convictions unclear. The study relied on a "conversion table" to match offenses developed by the Maine Department of Mental Health and Corrections, but there is no way readers of the report can determine how reliable that conversion table is. Any conversion system would require highly substantive judgments, and this one had the added difficulty that "there are pre-code offenses for which there is no corollary in the new code and vice versa" (Kramer et al., 1978:26).

Second, because the percentage of cases involving more than one charge increased from 5.5 percent precode to 21.3 percent postcode, all multiple conviction cases were deleted from the conviction samples. The rationales for that deletion were:

(1) multiple offenders were systematically treated more harshly than single offenders;
(2) the proportions of multiple offenders in the precode and postcode samples of imprisoned offenders were strikingly different (e.g., 12.7 percent of those incarcerated at Maine State Prison precode and 35.6 percent postcode);
(3) coding problems were generated by the impossibility of knowing which offense accounts for what part of the sentence; and

(4) the number of multiple offense cases was too small to permit independent analysis (Kramer et al., 1978:31).

While the problems noted are not inconsiderable, the substantial increases in multiple charge convictions and among Maine State Prison incarcerations[37] may have been important consequences of the law changes, yet they were defined out of the sample. Moreover, the deletion of cases producing 35.6 percent of Maine State Prison commitments creates a systematic and substantial underrepresentation of serious cases in the sample. (This may account for the conclusions that the frequency of incarcerative sentences declined and sentence severity declined for Class B and C offenders postcode).

Third, all Class D and Class E convictions were deleted from the conviction samples, in part for the logistical reason that case records for these misdemeanor-equivalent offenses were located at 34 municipal court sites throughout the state. Moreover, "for purposes of this study, it was felt that these misdemeanor offenses involved sanctions less important from a national perspective than the felony offenses; therefore, we opted for studying sentencing and outcome data for Class A through C offenders only" (Kramer et al., 1978:27). The difficulty here is that changes in charging or bargaining patterns under the new law may have led to the prosecution of cases as Class C offenses postcode that were prosecuted as Class D equivalents precode, or vice versa. Given that almost half of the postcode Class A, B, and C sentences were nonincarcerative, and that prison sentences up to 12 and 6 months may be imposed on Class D and E offenses, that sort of offense drift is not unlikely and it represents one of the changes that an evaluation should try to investigate. Whether offense drift occurred, or in which predominant direction (A,B,C, to D,E, or the reverse) is unclear, but exclusion of all D and E offenses ensured that the study would fail to account or control for those changes.

Fourth, the precode conviction cases were drawn from a four-year period and aggregated into one precode sample against which postcode cases were compared, thereby homogenizing any precode trends into an aggregate. If the study's conclusion that use of incarceration declined is right, it is entirely possible that a trend in that direction had been under way for several years. The

four-year aggregation would mask any such trend and thus risk attributing changes to the new law that predated it.

Fifth, outcome data on prison release dates were not obtained on 45 cases in the precode sample of Maine Correctional Center commitments and on 31 Maine State Prison cases. The aggregate three-year sample of precode release cases for which records were found totals 431. The 76 missing cases would increase the precode release sample by almost 20 percent. "While there is no reason to expect that missing MCC cases are systematically different from those in our sample" (Kramer et al., 1978:28), there is no reason not to make that assumption. Of the missing 31 Maine State Prison cases, some had not been released at the completion of data collection; their absence systematically reduces average sentence severity in the precode sample. Other files that were lost concern prisoners whose sentences had expired. Still others were under life sentence and were excluded from the sample. Perhaps ironically, five of the missing Maine State Prison cases involved prisoners serving prison terms for offenses that have retrospectively been characterized as Class D offenses and therefore were excluded from the study.

Sixth, the analyses aggregated conventional Maine Correctional Center and Maine State Prison incarcerative sentences with short-term local jail sentences and "split" sentences. Doing so would obscure changes in the imposition of long sentences. The use of split sentences (probation on condition that the defendant serve a short term of incarceration) increased markedly under the new law (7.8 percent of persons sentenced precode versus 22.2 percent postcode). The increased use of split sentences is not surprising: the new law expressly authorized split sentences involving not more than 90 (shortly thereafter increased by amendment to 120) days of incarceration.

Seventh, there were apparently few if any interviews conducted with lawyers, judges, and courtroom personnel. Given many of the difficulties of conducting a statistically rigorous evaluation in Maine, a qualitative study of work-group reactions to the new law and perceptions of its operation might have been enlightening.

Taken together, these various tactical decisions make the precode and postcode samples of persons convicted and persons serving prison terms noncomparable and the results of the research unpersuasive.

The Southern Maine Interim Report adds nothing to our knowledge of what happened in Maine when parole was abolished. The Interim Report addresses itself to

"sociologists of deviance" and "students of the sociology of law." The changes in substantive offense definitions in Maine and sentencing reform are "subjects of a critical analysis of value-laden social construction" (Anspach, 1981:82). This content analysis of substantive law changes casts little light on the impacts of the statutory changes. Perhaps the final report from this project will provide more useful insights.

Neither of the available reports of the evaluations on the impact of Maine's abolition of parole provides credible findings. Maine's prison population increased greatly from 1976 to 1980. Whether that increase is partly attributable to law reform efforts, notably the abandoned administrative release powers of the parole board, is worth knowing. Unfortunately, the evaluations cast little light on this issue.

Parole Guidelines

There have been three major recent evaluations of the operations of parole guidelines systems. Arthur D. Little, Inc. (ADL, 1981) examined the U.S. Parole Commission's parole guidelines system and state guideline systems in Washington, Oregon, and Minnesota. Mueller and Sparks (1982) studied the operation of the Oregon parole guidelines. The General Accounting Office released a report in 1982 on the operation of the federal parole guidelines system. Four primary questions have been studied:

(1) Severity--the effect of sentencing guidelines on the overall severity of prison sentences;
(2) Accuracy--the extent to which parole guidelines are correctly applied in prison release decisions;
(3) Variability--the extent to which parole release decisions are consistent with apparently applicable guidelines; and
(4) Disparity reduction--the extent to which parole guidelines serve to reduce disparities in punishment compared with parole release without guidelines and compared with the distribution of sentences imposed by judges.

Severity

Mueller and Sparks (1982:15-20) investigated severity--whether the overall severity of prison sentences served

in Oregon increased between 1974, before guidelines were implemented, and 1978, when guidelines had been in effect for several years. They concluded that there was "an overall increase in severity of terms" (p. 20), but cautioned, as we do with regard to the evaluations of California's Determinate Sentence Law, against concluding that "the guidelines caused the observed changes" (Mueller and Sparks, 1982:1, emphasis in original). The other studies did not assess severity changes.

Accuracy

The Arthur D. Little and General Accounting Office studies investigated accuracy--the consistency with which different decision makers would apply the guidelines to individual cases. This was tested by having researchers or (in the General Accounting Office study) parole hearing examiners calculate guideline sentences on the basis of case files for cases already decided, and compare the researchers' sentences to those actually imposed.

In Minnesota (where the parole guidelines have since been abandoned), Arthur D. Little researchers, working with case files for a sample of prisoners released in 1979, concluded that the parole board "applies parole decision guidelines in a highly consistent manner" (ADL, 1981d:97). By contrast, both the General Accounting Office and the Arthur D. Little studies of the U.S. Parole Commission's guidelines found serious accuracy problems. Arthur D. Little researchers--using a method in which two individuals separately evaluated each file, reconciled their decisions, and compared them with the actual case decisions--were in agreement with the actual Parole Commission offense severity and salient factor calculations in only 61 percent of the cases studied (ADL, 1981b:49). The General Accounting Office (1982) study found great inconsistencies in release date calculations when it had parole examiners calculate guideline sentences for 30 prisoners previously released. The guideline calculations of Arthur D. Little researchers in Oregon were completely consistent with parole board calculations in two-thirds of the cases studied (ADL, 1981a:8). The complete agreement rate in Arthur D. Little's Washington study, by stark contrast, was only 13 percent (ADL, 1981c:2). The evaluators point out that their analyses may, for several reasons,

overstate discordance. Nonetheless, for all but Minnesota's "simple and explicit" system, all of the guidelines systems appear highly subject to calculation errors, owing to various combinations of inherent complexity, poor quality control procedures, insufficiently specific policy rules, and problems of missing and unreliable data.

Variability

Variability concerns the extent to which release dates are consistent with the apparently applicable guideline (that is, the guideline that the examiner determined was applicable, which often, as noted above, was an inaccurate determination). Two important caveats must be noted. First, all parole guideline systems authorize examiners to depart from the guidelines in exceptional cases. Thus a release date not authorized by the guidelines does not necessarily mean that it is not in compliance with the guidelines system, nor is a release date from within the applicable guidelines necessarily compliant. Second, rates of compliance with guidelines are not especially informative without knowledge of the widths of the guideline ranges and the specificity of guideline criteria. A 90 percent compliance rate with 3-to-6 year ranges may be less meaningful than a 50 percent compliance rate with a 56-to-58 month range. The discretionary "departure rates" under the U.S. Parole Guidelines have varied between 10 percent and 20 percent. Under the Minnesota guidelines the overall discretionary departure rate in 1977-1979 was less than 10 percent (ADL, 1981d:40). Compliance with Washington's first set of guidelines occurred in about 30 percent of the cases (ADL, 1981c:8), but those guidelines were later repealed and replaced with guidelines expressed in a different format: Arthur D. Little found that in 1979-1980, release dates were set within the guidelines 74 percent of the time (ADL, 1981f:14).

These guideline systems vary substantially in the widths of guideline ranges (Minnesota's were quite narrow; the U.S. Parole Commission's were quite broad). Yet compliance rates exceeded 75 percent in the jurisdictions studied, except under the original, quickly abandoned Washington guidelines. Thus it would appear that parole boards are capable of achieving considerable accountability in parole release decision making (assuming that "accuracy" problems are surmountable).

Disparity Reduction

All of the studies reviewed that assessed the impact of parole guidelines on disparity found evidence that the guidelines reduced sentencing disparities. Mueller and Sparks (1982:20-21, 36) concluded that controlling for offense severity and using the Oregon Parole Board's offender scoring system, the variability of prison terms was less in 1976 and 1978, under guidelines, than in 1974 before guidelines were implemented. The Arthur D. Little study of the impact of the U.S. parole guidelines on disparity compared actual times served by prisoners convicted of robbery and selected property offense who were released in 1970 (preguidelines) and 1979 (postguidelines) and found "measurably less dispersion in the distribution of actual time served" for the 1979 releases that could not be explained by reduced variability in sentences imposed by judges (ADL, 1981e:3). Finally, for Minnesota, Arthur D. Little found that for persons convicted of aggravated robbery "offenders released in 1979 under the guidelines system tended to serve more nearly the same amount of time . . . when stratified into subgroups based upon prior history" than did aggravated robbery prisoners who were released preguidelines in 1974 (ADL, 1981e:63). Thus it appears that well-managed parole guideline systems can operate to reduce sentence disparity among persons imprisoned.

CONCLUSION

Substantive Findings

Almost all the studies reviewed found, in the most trivial sense, formal compliance with the procedural requirements of reform. Prosecutors refrained from bargaining, judges imposed the mandated sentences on convicted offenders, and parole boards released according to guideline requirements. This behavioral change, however, usually represented compliance more in form than in substance. Participants routinely attempted to circumvent changes by filtering cases out earlier. One result thus dominates the studies of sentencing reform impact: Regardless of the type or locus of the procedural change, no appreciable changes were found in the use of prison; whatever system changes occurred were limited largely to modifications of case-processing procedures.

Procedural Compliance

The mechanisms for achieving compliance were quite different in different contexts. Plea bargaining and parole reforms were successfully achieved through administrative orders, executed by system participants who were usually agents of, and sometimes employees of, an administrative agency and who shared an organizational orientation. When prosecutors wanted to abolish plea bargaining in general or in a particular form and were serious about it, they were able to do so. All three plea bargaining evaluations so attest. In the Michigan county in which charge bargaining was forbidden in drug sale cases, the percentage of convictions resulting from guilty pleas to reduced charges declined from 80 percent in 1973, the year before the ban, to 0 in sample cases disposed in 1974 after the ban. All the evidence in Alaska suggests that the plea bargaining ban was generally followed. In Detroit, the firearm plea bargaining ban also appears to have been followed.

In general, assistant prosecutors working in systems in which plea bargaining had been restricted much preferred the new regime. To some extent, their work loads were reduced (there was much less haggling). To some extent, they had to work harder, but at work that enhanced their self-images by calling on them to try cases and to prepare them for trial or generally to behave more "professionally."

Conversely, defense lawyers tended to dislike the bans. While their objections were often expressed as concern that inflexibility caused injustice, their objections appeared at least in part to be self-serving. The economics of defense practice often place a premium on quick resolution of a high volume of cases. The bans impeded realization of that goal; the only solutions were for defense counsels to work harder on each case or to represent their clients less effectively. No doubt the trade-off between reduced income and reduced effectiveness was resolved differently by different lawyers. However it was resolved, the dilemma was one that made defense counsel uneasy.

Achieving the compliance of judges was another matter entirely. Judges traditionally operate as independent agents whose official actions are bound only by the rule of law. Being elected or appointed to the position, usually for long terms, they are less subject to administratively imposed changes and relatively imper-

vious to organizational controls. In all the studies, judicial compliance with new sentencing provisions was only achieved when mandated by statute, as found in cases of mandatory and determinate sentences, and for the Minnesota Sentencing Guidelines. Administratively imposed changes, not backed by the force of law, as found in most cases of sentencing guidelines, were advisory at best.

Adaptive Responses

In every case of procedural compliance, the studies also found evidence of increased screening or other early disposition of cases, effectively avoiding application of the procedural change in many cases.

In Alaska the portion of felony arrest cases screened out early increased by at least 2.9 percentage points, and perhaps as much as 6.4 percentage points, from a rate of 10 percent. In Boston and Detroit there was evidence of earlier disposition of moderate severity cases to avoid the impact of the mandatory sentence laws.

In Boston district courts, defendants charged only with violation of the illegal firearms carrying statute were more than twice as likely to be acquitted after the law took effect: 16 percent of court dispositions before and 36 percent after. Of those convicted and sentenced in the lower court, the likelihood of appeal to a trial de novo (and hence another opportunity at escaping the prison sentence) increased dramatically: Before the law, 52 percent of defendants were convicted, of whom a quarter--12 percent of all dispositions--appealed; afterward, 39 percent of dispositions were convictions and virtually all of them (38 percent of <u>all</u> dispositions) appealed.

In Detroit the likelihood that "other assault" cases would be dismissed or result in acquittal increased from 36 percent before the mandatory sentencing law took effect to 50 percent afterward; recall that an effective ban of plea bargaining occurred simultaneously, which may make the shift more striking because new ways had to be found to achieve the increased dismissal rate.

In New York, notwithstanding significant declines in drug felony arrests statewide (1972: 19,269; 1975: 15,941), which should have increased the "quality" of arrests, there were steady declines in indictment rates, given arrest, and in conviction rates, given indictment.

In New York City, drug felony arrests declined by one-third (1972: 11,259; 1975: 7,498), yet indictment rates, given arrest, declined and dismissal rates tripled.

In California early guilty pleas increased immediately after the determinate sentencing system took effect, from 32 percent of all guilty pleas in 1976 to 43 percent in 1978. There is also evidence that cases were increasingly disposed in lower courts, with dispositions in superior courts declining from 71 percent in 1968 to only 30 percent by 1979.

One irony about sentencing reforms is that their implied invitation to circumvention meant that while the severity of prison sentences actually imposed sometimes increased, the number of defendants imprisoned often declined. In New York, the likelihood of imprisonment given arrest was approximately 11 percent in both 1972 and in the first half of 1976, but the arrest base was much smaller, meaning that there were fewer prison sentences imposed overall. If, as is widely believed, the deterrent effectiveness of criminal laws depends more on certainty and celerity than on severity, the New York drug law appears to have achieved exactly the opposite balance.

Marginal Cases

One theme running through almost every evaluation considered is that the greater rigidity of a system in which plea bargaining has been controlled or in which sentences have been prescribed, the more people worried about possible undue severity in marginal cases. In California, Casper et al. (1981) noted a widespread belief that DSL would increase the number of marginal offenders receiving prison sentences. Under ISL, a judge who wanted to send an offender to prison for two years would hesitate to do so from apprehension that the Adult Authority might hold the offender much longer. Accordingly, such offenders were often given local jail sentences or probation, even though the sentence was less severe than the judge would have preferred. Under DSL, that problem no longer existed. A 2-year sentence, given good-time, meant 16 months, and one need not worry about the Adult Authority.

In each evaluation in which participants were interviewed, both prosecutors and defense lawyers were quoted as expressing concern that defendants with minor

records or those accused of minor offenses, who in the past received modest, generally nonincarcerative sentences, might become enmeshed in the rigidity of the new scheme.

Virtually every study provides some evidence that those marginal offenders not protected by means of early filtering decisions were subject to harsher sentences. In Alaska there were selected increases in sentence length for drug cases and low-seriousness theft cases. In Detroit offenders charged with "other assaults" experienced increases in both the probability of prison after conviction and the length of prison terms. In California, continuing an existing trend, the portion of persons convicted of burglary found among prison commitments increased steadily relative to robbery.

Methodological Concerns

A number of key methodological issues have emerged as fundamental to adequate impact evaluations of criminal justice reforms generally and of sentencing reforms particularly. To some extent these issues derive from unique features of criminal case processing; when formulated more generally, however, they are likely to characterize any complex flow system in which inputs at one point are transformed into outputs at some other point in the system. Most generally, these concerns relate to the length and scope of observation and to the level of control for differences between individual cases.

The Necessity for Extended Observation Periods

Many of the impact evaluations reviewed here involved simple two-point designs with single observations before and after the reform. These were inadequate for a number of reasons.

As demonstrated by several studies (e.g., Casper et al., 1981; Lipson and Peterson, 1980; Joint Committee, 1977) there is considerable value to having multiple observations of outcomes before implementation of the change under study. These allow one to distinguish discrete changes or impacts associated with a reform from the continuation of existing trends. The presence of such trend evidence is crucial to the conclusion that introduction of determinate sentencing in California resulted in no

substantial changes in sentencing outcomes there. Prison use had been increasing and time served decreasing for several years before DSL.

Ideally the postreform observation period should also extend for multiple observations beyond the reform to permit sufficient time for the full impact of the reform to be realized. Case processing is obviously far from instantaneous in criminal justice systems. It is not uncommon to find mean times to final disposition as long as six months or more. Thus a sentencing reform that is to apply to all cases involving offenses committed after January 1 may not be applied to any substantial number of cases until well into the second year after the reform is implemented. And a reform that itself contributes to increased processing times through the system will only further delay full realization of impact. To the extent that cases disposed early under the reform differ in important ways from cases that take much longer to resolve, evaluations of early impact are likely to be biased, sometimes evidencing opposite effects from later impacts.

The possibility of delayed impact was strongly suggested in the case of the New York drug law: Median disposition times doubled in New York City (1973: 172 days; January to June 1976: 351 days) as defendants increasingly requested trials and postponements (Joint Committee, 1977:103-5). Conviction rates and imprisonment rates for drug felonies fell considerably immediately after the law went into effect and then increased steadily to slightly exceed prelaw rates in the first half of 1976 (Joint Committee, 1977:Tables 24, 27, 29). Based only on early performance, the reform appears to have achieved the exact opposite of its intended effect--sanctions decreased for felony drug defendants. However, following the process for a longer postlaw period, sanction rates increased up to then slightly exceeded prelaw rates. Because of processing delays it may well be that we would not have observed the full impact of the drug law until 1976 or later.

To avoid possible spurious findings of impact arising from delays, evaluations should routinely include measures of case-processing times and changes in work load and backlog. These variables are important not only as direct indicators of impact but also for identifying necessary follow-up periods.

The potentially extended time periods necessary for adequate evaluations of impact have direct implications both for the structure of research funding and program

design and for strategies to implement reforms. If impact evaluations are not to be limited to retrospective analysis of easily accessible summary statistics or automated record systems, field work will be needed throughout the extended follow-up period both to continually search current records and to measure changes in participant reactions over time. This requires long-term commitments to continued funding of research efforts over extended periods of time. One- or two-year funding arrangements with limited options for renewal or continuation do not encourage this type of research. With regard to promulgating innovative and promising reforms, one must weigh the trade-offs between timeliness in obtaining feedback on the impact of new innovations against the benefits, largely in terms of credibility and rigor, of the results derived from a more protracted evaluation that distinguishes between short-term and long-term effects.

The Necessity for Outcome Measures at All Levels of Case Processing

All too frequently evaluations are limited to those aspects of the process most directly affected by a reform and fail to address processing at earlier or later stages. For example, if prison terms are changed, only impacts on the lengths of terms of sentenced defendants and perhaps sentences for convicted offenders might be considered (Kramer et al., 1978). The evaluations of a ban on plea bargaining (Beha, 1977) and of a mandatory sentencing law (Church, 1976) failed to include data on sanctions imposed on convicted offenders. All the evaluations of the California Determinate Sentencing Law considered in this review are limited to cases disposed in superior court; earlier charging and lower court decisions that screen cases out of superior court were not examined.

This narrowness of focus fails to acknowledge the complexity of criminal case processing and the many opportunities for the exercise of discretion that it affords. While in a literal sense criminal sentences are limited to the sanctions imposed by the court on convicted offenders, the character of these sentence outcomes is substantially influenced by factors that determine which cases are actually available for sentencing.

For example, by effectively weeding out those cases least likely to end in a prison sentence if convicted--through some combination of screening of initial charging, prosecutor nolles, case dismissals, or shifting final disposition from upper to lower courts--the cases that reach the upper courts will be increasingly restricted to the more likely prison cases. In this event the resulting increased use of prison among upper court convictions is more apparent than real; it derives from a change in the mix of cases at the upper court and not from a real change in sentencing policy to extend prison use to cases previously sentenced to nonprison outcomes.

The significance of the filtering process was highlighted in the evaluations of the New York drug law (Joint Committee, 1977) and the mandatory sentencing law for firearms violations in Detroit (Heumann and Loftin, 1979). In both jurisdictions prison use among convictions increased dramatically after the reform, rising from 34 percent in 1972 to 55 percent in the first half of 1976 for drug felonies in New York (Table 7-14) and from 57 percent to 83 percent following reform for "other assaults" in Detroit (Table 7-10). At the same time, however, there was virtually no change in prison use for cases entering the system; prison use for those arrested for drug felonies in New York remained stable at approximately 11 percent and went from 37 percent to 43 percent for persons charged with "other assaults" in Detroit.

The considerable opportunities for filtering cases before they reach the sentencing stage cannot be ignored. The studies reviewed here are replete with references to potential confounding effects of unobserved changes in the filtering process. The need to address the impact of filtering changes adequately is one of the most important lessons to be learned from previous impact evaluations.

The Necessity for Adequate Controls for Changes in Case Attributes

General changes in the character of cases--particularly changes in the seriousness of cases--are related to but certainly not limited to the filtering process. Case attributes relevant to sentencing outcomes might also be

affected by general changes in offending patterns involving shifts to more or less serious offending. Demographic changes increasing the representation of "older" offenders (ages 25 to 35) might also alter the extent and nature of prior criminal records for offenders. Failure to control for any resulting changes in case attributes before and after a reform can seriously jeopardize the validity of conclusions about the impact of that reform on case outcomes at various stages, particularly sentencing outcomes.[38] This issue of adequate controls is especially troubling in the impact studies reviewed here, in which there was little control beyond the crime type category.

The Necessity for Qualitative Analysis of System Functioning

Many evaluations are limited entirely to statistical analysis of abstracted case processing data, often available from centralized automated data systems. Such analyses are particularly useful for providing aggregate average characterizations of case processing for large numbers of cases. However, quantitative data alone, while often necessary, are seldom sufficient if we are to understand the impacts of change on what goes on in courts. To gain a fuller appreciation of the complexity of the process, with its interleaved discretions, the analysis should also include more qualitative approaches, including participant observation and systematic interviewing. These qualitative approaches can often illuminate what seem like anomalous results in the statistical analysis. No one approach by itself will suffice. Together, the diverse methods may permit a diversity of perspectives and knowledge from which credible findings can emerge.

NOTES

1. The following illustrates an example in which guilty plea rates for defendants decline from 80 percent to 68 percent, but guilty pleas among "cases" remain stable at a 40 percent rate:

	Single Charges	Multiple Charges	Total	Number Guilty Pleas	Percent Guilty Pleas
Year 1: 80 percent of All Defendants Plead Guilty to a Single Charge					
Defendants	60	40 (@ 3.5 ea.)	100	80	80
Charges	60	140	200	80	40
Year 2: To encourage continued guilty pleas, the prosecutor shifts some multiple charges to a single charge at initial charging stage.					
Defendants	80	20 (@ 4.5 ea.)	100	68	68
Charges	80	90	170	68	40

2. The sample sizes in Juneau were very small, even when the six-month periods were aggregated to form whole-year samples. This increases the likelihood that large variations are due to chance.

3. The ambiguity arose from the attorney general's effort to distinguish charge reductions to induce guilty pleas, which he wanted stopped, from unilateral charge dismissals and reductions resulting from professional judgments about the strength of evidence, problems of proof, and the like.

4. The marginal offender hypothesis is supported by each of the plea bargaining and mandatory sentence evaluations. Jonathan Casper develops the converse hypothesis to support a prediction that more minor offenders would be imprisoned under California's Determinate Sentencing Law. Under the Indeterminate Sentencing Law, a judge who wanted to impose, say, a two-year sentence but no more could not do so. A significant chance existed that the defendant would be held for a longer period. Judges were unwilling to expose such defendants to that risk and instead sentenced them to local sanctions. Under the new law, prison sentences

were determinate and a judge who wanted to impose a short prison sentence could do so (Casper et al., 1981:12).

5. If one conservatively estimates that the "true" number of felony arrests remained stable at 1,776, the adjusted screening rate would be 4 percent plus 2.9 percent of 1,707, which represents 2.4 percent of 1,776, a total of 6.4 percent.

6. This impact of excluded cases was potentially greatest in Juneau. When only those cases finally disposed of were considered, trial cases in Juneau appeared to decrease from 6.3 percent to 2.2 percent of all cases disposed after screening. Juneau, however, also experienced a 26 percent decrease (from 127 to 94) in the number of cases disposed after screening. To the extent that this decrease is associated with cases that were excluded from the sample because they were not disposed by the end of 1977, the excluded cases could substantially increase the postban trial rates in Juneau.

7. Hampton County is a pseudonym used by the researcher to conceal the identity of the research site.

8. The charges examined because of their frequent association with gun use include firstand second-degree murder, armed robbery, felonious assault, and other major assaults.

9. The following discussion of data in Table 7-10 is based on the assumption that the cases in the before and after samples are comparable; in fact, we have reason to doubt that (see discussion above).

10. Because the dependent variable is truncated at zero, maximum likelihood TOBIT estimators were used. In addition to dummy variables reflecting gun use and the observation period (before and after implementation of the gun law), the model includes an interaction variable of gun use and period.

This interaction variable is taken to indicate the changes in sentences unique to the gun law. As the authors note, to the extent that factors other than the gun law affected the postlaw gun cases selectively, these other effects would be confounded in the above estimates. The authors note in particular a "crash program" to decrease court backlog beginning about the same time as the

implementation of the gun law. The authors' conclusion to the contrary notwithstanding, such a program might very well selectively affect sanctions in gun cases if other cases were more likely to be dismissed in clearing the backlog.

11. This could be verified by comparing the processing times of trial cases with those of other disposition types. To ensure greater comparability between the two samples, the preperiod sample could be restricted only to those cases initiated and disposed in the six-month period July 1, 1976, to December 31, 1976.

12. These expectations are discussed at length in Messinger and Johnson (1978), Cassou and Taugher (1978), Nagin (1979), Brewer et al. (1980), Lipson and Peterson (1980), and Casper et al. (1981).

13. The same pattern is reported for 1977-1978 by Lipson and Peterson (1980) using Judicial Council data on sentences imposed in court between July 1, 1977, and September 30, 1978; 60 percent of all sentenced cases received the middle term (Lipson and Peterson, 1980:Table 10). The court sentencing data, however, show slightly higher use of the upper base term than was indicated by the corrections statistics, perhaps reflecting a greater likelihood that defendants receiving the aggravated upper base term will appeal conviction and thus delay their reception in prison.

14. The crime types directly affected by SB709 were first-degree burglary, robbery, voluntary manslaughter, rape, crimes against children, and oral copulation. Both the middle and upper terms were increased for all these offenses except robbery, for which only the upper term was increased.

15. The 1977-1978 data are available in Brewer et al. (1980:Tables 7 and 8); comparable data for 1979 are found in Board of Prison Terms (1981:Table III).

16. Because of the way the model is specified with no interaction between jurisdiction and law period, we cannot sort out whether the jurisdiction differences vary for the different periods of law.

17. Lipson and Peterson (1980:21-22) report that for the state as a whole there was definite evidence of less

serious felonies shifting to municipal court between 1971 and 1976. During this period, while the number of defendants sentenced to prison or to both probation and jail remained relatively constant, these cases constituted an increasing proportion of superior court sentences as fewer felony arrests reached superior court. The above conclusion rests on the assumption that the less serious felony cases shifting to municipal court were also more likely to plead guilty early.

18. Utz (1978) describes this cooperative process of "settling the facts" as a principal means for achieving "substantive justice."

19. The influence of this legislative change on case mix in superior court is noted in Lipson and Peterson (1980:21) to account for increases in use of prison among superior court convictions through the early 1970s.

20. Data on lower court prosecutions were not available after 1973.

21. An ordinal variable was used to represent the dependent sentence type variable where "prison" = 4, "California Youth Authority" = 3, "jail" = 2 and "no jail" = 1. The estimated model is

$$S = aJ + cT + bX + \epsilon$$

where S is sentence type, J is jurisdiction (Sacramento = 1, Alameda = 0) and T is the time period (post-DSL = 1, pre-DSL = 0). X includes a number of case attribute variables, reflecting whether the offense was a residential burglary or not, weapon use, physical harm to victim, presence of a vulnerable victim, sophistication in committing the offense, prior record of offender, weight of conviction charges, and race and sex of offender. Only race and weight of conviction charges were not statistically significant; all other variables, except sex (female = 1) were found to have a positive contribution toward a prison outcome.

In this model "a" represents the pre-DSL difference between jurisdictions, and a + c is the post-DSL difference between jurisdictions with c being the ISL to DSL change in sentence outcomes, regardless of jurisdiction. In the estimate of the model both a and c are positive and significant.

As formulated the model does not permit separately identifying different effects of DSL in the two jurisdictions; instead, both jurisdictions are assumed to experience the same change in sentence type outcomes after DSL, namely, c. Inclusion of a simple interaction variable combining jurisdiction with time period (J x T = 1 for post-DSL period in Sacramento, and 0 otherwise) would have permitted isolating separate DSL effects in each jurisdiction. For d the coefficient of J x T, the ISL to DSL change is c in Alameda and d + c in Sacramento. While a number of different models containing various interaction terms were estimated, none of them included an interaction of jurisdiction with time period.

22. In the eight years from 1962 to 1970, the FBI's reported index crime rate rose 97.3 percent: from 2,019.8 to 3,984.5 per 100,000 population. From 1970 to 1978 this rate rose only 28.2 percent: from 3,984.5 to 5,109.3 per 100,000 population (U.S. Bureau of Criminal Statistics, 1981).

23. The issue of changes in time served is discussed in detail in the next section.

24. Since most of the studies were undertaken in the first few years after implementation of DSL, the number of individuals sentenced and subsequently released under DSL was quite small. Information from the Department of Corrections indicates that in the early years of DSL, with the admittedly limited experience of implementation of the early-release, good-time provisions, most prisoners were released with maximum good time off their sentences (Lipson and Peterson, 1980:25; Brewer et al., 1980:14-15; Utz, 1981:150).

25. The results from Ku (1980) were consistent for all offenses and for burglary; robbery, by contrast, increased slightly from ISL to DSL. Ku's estimates of the medians were consistently lower than comparable medians reported in Brewer et al. (1980) and Casper et al. (1981). The difference between these estimates lies in Ku's use of the population remaining in prison on December 31, 1975, while the other estimates were based on time served by persons released during 1975.

For Ku, the proportion of inmates with time served of at least one to two years was derived from the admissions during 1974 who are still in prison on December 31,

1975. When releases during 1975 were used (Brewer et al., 1980, and Casper et al., 1981), time served of at least one to two years derives from admissions on or before January 1973 to January 1974 for January 1975 releases, and so on, to admissions on or before December 1973 to December 1974 for December 1975 releases.

Thus, there is greater representation of earlier admission cohorts in the estimates based on releases. To the extent that time served has been decreasing for more recent cohorts as suggested in Figure 7-9, the estimates of time served based on more recent cohorts from data on remaining populations will be lower.

26. In comparing ISL to DSL, Lipson and Peterson (1980:Table V) concluded that there were substantial reductions in time served under DSL for burglary, but only slight reductions for the persons offenses of robbery and assault. This imputed difference between crime types was then the basis for the authors to conclude that the overall decrease in prison terms was largely the result of a greater representation of minor convictions previously sentenced to jail but now appearing among prison commitments with shorter terms on average.

This seems an excessively strong conclusion to draw from these data. Allowing for maximum credit for good time, as they do for burglary, the combined 1977 and 1978 reductions for robbery (from 35 to 29 months) and assault (from 31 to 26 months) are comparable to those for burglary (from 21 to 13 months).

27. The control variables include whether the offense was a residential burglary or not, weapon use, physical harm to victim, presence of a vulnerable victim, sophistication in committing the offense, several indicators of prior record of the offender, weight of the conviction charges, and race and sex of the offender.

28. Only three control variables were significant: physical harm to victim, an interaction variable of weight of conviction counts and time period, and number of conviction counts. Neither race nor sex was significant.

29. These results are consistent with the independent assessment of differences in case seriousness in the two counties (Utz, 1981:22-27).

30. If T = a + b Jurisdiction + c (Jurisdiction x Time) + dX + ε then the total effect of jurisdiction is given by (b + c Time) x Jurisdiction. When Time = 0 (ISL) the jurisdictional difference is only b; for Time = 1 (DSL) this difference is b + c.

31. For example, as specified, the model includes an interaction between time period and the weight of the conviction charges. To the extent that conviction charges and jurisdiction were negatively correlated, with the Sacramento sample, tending to have offenses of lower seriousness, the differential effect of DSL found for different levels of seriousness might be reflecting a difference in DSL effects in the two counties, with prison terms decreasing more under DSL in Sacramento than they do in Alameda.

32. The 80 percent mid-range, for example, is the range of prison terms that includes 40 percent of cases below the median and 40 percent above the median.

33. The seven crime types include second-degree murder, robbery, assault with a deadly weapon, first-degree burglary, receiving stolen property, forgery and checks, and rape. The standard deviation decreased for all but assault with a deadly weapon and rape.

34. The Denver data file included all cases for which charges were filed in district court between May 1, 1975, and October 31, 1978, and sentences were imposed by April 30, 1979. These included 1,208 cases sentenced before guideline implementation and 2,397 cases sentenced after guideline implementation. However, many of these cases could not be used because of missing data, and there is little basis for assessing the representativeness of those cases that were used.

35. There is no indication of the extent of missing data in Philadelphia. The cases actually used in the impact analysis number 920 before and 429 after guideline implementation.

36. The preguideline data include randomly selected presentence reports prepared in calendar year 1975 and all presentence reports during January, February, and March 1977. Of a total of 1,704 preguideline cases, 258 were deleted because of missing data. The postguideline

data include 702 cases in which guidelines were used from July 1977 through January 1978; 68 cases were excluded because of missing data. Guidelines were not used in all cases sentenced after July 1977, and there is no information available on the basis for selecting cases for guideline use.

37. Maine State Prison is the long-term prison; prisoners sent to the Maine Correctional Center are under sentences of three years or less.

38. This issue is discussed at length in the context of discrimination in sentencing in the paper by Klepper et al. (in this volume).

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COURT OF COMMON PLEAS
JUDGE'S CHAMBERS

CURTIS C. CARSON, JR.
JUDGE

June 5, 1984

Hon. John Conyers, Jr.
U.S. House of Representatives
Committee on the Judiciary
Washington, D.C. 20515

My dear Rep. Conyers:

I regret that I have been unable to arrange my trial schedule to appear before your committee, particularly in view of my extreme reservations concerning guidelines as a viable sentencing mechanism.

I must admit that unbridled sentencing discretion in major felonies need to be addressed. It is rather easy to document unwarranted disparity and other sentencing excesses in cases where the Court's discretion range from probation to imprisonment for twenty years. Unfortunately, these problems are only marginally addressed, as our committee blindly followed legislative directions which were concerned more with punitive justice rather than equal or fair justice.

I seriously question whether our guidelines have had a significant impact upon reduction of racial disparity. I know the computer print-outs supplied at my request most assuredly do not provide a basis for these opinions. In the first instance, sentence lengths were measured by determining the average of all prison sentences given to white persons charged with a given offense and comparing that with a similar determination made of sentences received by blacks for the identical offense.

The fallacies in the above process are all too readily apparent.

This data does not include those whites who received probationary sentences upon conviction of the offense as compared to blacks convicted of the same offense. It might be that of the fifteen whites convicted of the offense, only three received imprisonment sentences, while out of fifteen blacks convicted, twelve received total confinement.

Further, those three whites may have each received one year sentences each, yet six of the blacks may have received six months each, and six, two years each, making the statistical differences between the two groups of only three months.

Additionally, the guideline information submitted to our commission does not provide the racial identity of victims. Now, I ask you, how can you evaluate racial disparity in sentencing where these facts are shielded? The most flagrant examples of racial differences occur where the victim is white and the offender is black and vice versa. Hopefully, this situation will be corrected, as the Commission tacitly approved my resolution that this information be included in our reporting forms.

Well defined aggravating and mitigating factors are another way of reducing judicial excesses in sentencing, provided socio-economic considerations are deleted from the criteria. This Commission was unwilling to adopt this feature, and as a consequence, we are finding that the same judge in one case may treat a guilty plea as a mitigating factor or for departing from the guideline in one case, and completely ignore the plea as a factor in another case. This is a special evil where we have incorporated in the matrix three separate ranges of sentences, i.e., standard, mitigated and aggravating. In some instances, these sentences at the same level would suggest a difference of four years. May I suggest you consider the offenses of Voluntary Manslaughter with a (3) prior record score - it not only exceeds the maximum that can be imposed, but the range is four years difference.

The most insidious feature of these guidelines is the effect on newly enrobed judges who come to the bench with zero trial experience in criminal cases. They consider these guidelines as fashioned from on high instead of political decisions fashioned at the express direction of the legislature to formulate severe sentencing models.

I assure you that after the Pennsylvania Legislature rejected our first model with the admonition they were not tough enough, fairness and justice vanished from consideration, replaced by what will be acceptable to a Legislature ready to enact mandatory sentencing.

The foregoing does not, by any means, exhaust all my reservations concerning those guidelines, but it should give you some idea as to why I could never approve their adoption. It would seem that sentencing could be better controlled by placing a cap on those offenses where such a wide discretion is given trial judges. For instance, burglary, which carries a twenty-year maximum sentence could be capped to two years for a first time offender. Departure from this limitation would be subject to appellate review spelling out specific reasons for departure by the sentencing judge, i.e., offender member of a gang of professional burglars, etc.

Most importantly, it should be required that all new judges are to attend a judicial college shortly upon being enrobed, and compulsory attendance for the three successive years at advanced courses wherein they are sensitized to the poor, minorities and handicapped. There cannot be any substitute for a trained judiciary.

Sincerely yours,

CURTIS C. CARSON, JR.

CCC/ss

RUTGERS
THE STATE UNIVERSITY
OF NEW JERSEY

SCHOOL OF CRIMINAL JUSTICE • 15 WASHINGTON STREET • NEWARK • NEW JERSEY 07102 • 201/648-5870

March 1, 1984

Hon. Peter W. Rodino, Jr.
Committee on the Judiciary
U.S. House of Representatives
H2-362 House Annex No.2
Washington, D.C. 20515

Dear Hon. Rodino:

Thank you for your letter of January 16, 1984 requesting comment on H.R. 4554 and related bills. I, too, believe the sentencing is in need of reform, and would offer these reactions to the proposals, as organized in your summary document:

I. Purposes of sentencing

The experience of most states has shown that it is difficult, if not virtually impossible, to completely extricate utilitarian concerns such as incapacitation or deterrence from sentencing systems. The predominate trend has been to bury these concerns under a rhubric of "desert," and forcing them into a place of reduced visibility, to allow the utility-oriented decision maker to use these beliefs to manipulate sentencing decisions while justifying the manipulations on legislated "desert" rationales. The result is a clear potential for dishonest and disparate sentencing practice.

The key is not to merely specify a "purpose," but to structure how the sometimes conflicting purposes are allowed to relate to one another in determining the sanction. With the extensive pressure for crime control, particularly through selective incapacitation, it will be even more necessary to make explicit exactly how utility values influence the sentence. My advice is not to ignore these values, but to put them in their proper, limited perspective. (See Sherman and Hawkins, Imprisonment in America and Clear and O'Leary Controlling the offender in the Community).

II. Pre-sentence Reports

No comment.

III. Guidelines

An extensive research literature has recently been developed with regard to sentencing guidelines. While it is a bit of an overgeneralization to summarize this literature quickly, I think the lessons about guidelines can be broadly stated:

1. Discretionary guidelines seem to have little or no effect on sentencing decisions of judges; mandatory guidelines (to the degree this phrase is not self-contradictory) are more effective in altering policy, but not uniformly so.

2. A key to guidelines' impact lies in the relationship (and patterns of work) among prosecutors, defenders and judges. Since these vary among courts in the same jurisdiction, it is unlikely that guidelines for large jurisdictions (such as the federal trial courts) will have uniform impact across all sites.

3. The design of the guidelines model is a chore involving both policy authority and technical skills. Without a careful (and adequately funded) design effort that includes both these areas, the guidelines are likely to have serious flaws.

4. Independent sentencing policy boards are crucial to keep the judicial decisions removed as much as possible from the realm of politics. This suggests the use of rotating-membership commissions.

5. "Past-practice" type guidelines lack a clear conceptual or mathematical rationale. Policy based guidelines are more satisfactory on both counts.

IV. Parole

The problem with discretionary parole, to my mind, has been with the width of lattitude given the boards moreso than the very idea of parole. With minor exceptions, states that have abolished parole have retained a discretionary, early-release function of some sort, with a limited range of authority. The name of the function is unimportant, but the need for it is administratively

and programmatically clear. It is not easy to exercise foresight on this, but I think the HR 4554 model has enough discretion to make it sufficient for both needs.

Supervision is another matter. The key concerns with supervision are twofold: techniques and conditions. Our technical knowhow in supervising offenders has improved markedly in the last decade. Those who have enjoyed the demise of rehabilitative ideals either don't know or don't care, but supervision has become potentially an increasingly effective correctional method. I would put effort into upgrading the technical base of probation-parole officers in the federal system, as they have not kept pace with state-of-the art in some areas.

The problems of supervision conditions can be substantially improved by implementing a few changes. First, the number of conditions must be reduced to a bare minimum. Second, the rampant use of community service and restitution orders must be brought under control--these conditions, while publicly popular, are appropriate only to some offenses and offenders. Third, "risk-control" conditions (such as drug treatment, etc.) must be strictly limited and strictly enforced. Because we've treated conditions as though they were partygoers--the more the merrier--they have become legally unenforceable and conceptually incredible. (See NIC's series of papers on conditions of supervision, supervision methods).

V. Good time

The abolition of good time is indefensible from any standpoint, but particularly from the point of view overburdened institutional resources.

VI. Sentence Appeal

No comment

VII. Sentencing alternatives

The mere existence of an alternative does not, of course, ensure that it will be used. Too many so-called sentencing alternatives have served to increase the overall punitiveness rather than decrease it. The "least restrictive alternative" is an admirable concept in a democratic society, but this aim is difficult to achieve without carefully linking the alternatives to specific offender populations. Thus, when community service is limited to certain offenders who would ordinarily serve terms of incarceration, it becomes an alternative. Otherwise, it is simply an add-on to a probation sentence.

It is possible to create the structure for better (more effective) use of alternatives legally and programmatically. To do so, the law must be clear about the purpose of the alternative; the program procedures must reflect that purpose. Otherwise, alternatives become lost promises.

The "career criminal" concept is extremely loose. I have little trouble with the operationalization of the concept as stated in HR 4554, but I doubt that many of those covered will be truly "career" offenders in any defensible sense.

(See materials of the Prison Overcrowding Project, Center for Effective Public Policy, Philadelphia, PA.)

VIII. Sentence length

In most sentencing reforms of the last decade, the issue of sentence length has been a real sleeper. Normally, reforms were enacted with the idea that agggregate sentence lengths would not be substantially altered under the new proposals. Experience too often proved otherwise, with the result of an exacerbated problem of institutional crowding.

I would prefer, as Sherman and Hawkins have argued in their book cited earlier, that we face more forthrightly the concept of sentence length. No reasonable or empirically sound rationale exists for the lengthy punishments routinely given out to incarcerated offenders. Moreover, the gap in credibility between community-based punishments (such as probation) and imprisonment need not be accepted as inevitable. It is my conviction that we need to reduce aggregate sentence lengths for most offenses, while upgrading the capabilities of non-incarcerative sanctions.

In any event, reforms that rearrange sentence discretion, such as HR 4554, are highly vulnerable to subtle shifts in power relations among justice system actors such that actual time served is significantly affected. I would suggest a detailed simulation-impact study, something similar to what was done for Minnesota as a part of their Sentencing Guidelines Commission's work.

IX. Corporate crime

There is a need to expand punishment options for these offenders, as HR 4554 appears to do.

Generally, I think the provisions of HR 4554 are well-considered and can serve as a basis for an improved sentencing structure at the federal level. However, I am left

with two serious concerns. First, it will not be possible to eradicate discretion--nor is it desirable could it be done. Therefore, attempts to restructure discretion often inadvertently relegate it to more informal processes--particularly the negotiation process. I wonder if prosecutors and defenders view H.R. 4554 as having this potential impact.

More important, I am extremely concerned about correctional resources and correctional programming as vulnerable to reform efforts. The bill seems not to take these issues into consideration whatsoever. In my view, this is a serious shortcoming, because the overloading of corrections leads to the use of emergency measures (as provided for in the bill) which have the ultimate effect of violating the very credibility of the justice system that was the aim of the reform in the first place. Without "truth in punishment", if you will, the idea of "truth in sentencing" lacks meaning. I fear that H.R. 4554--and the others--have not been sufficiently tailored to this concern.

I have enclosed a paper which gives my views on this last point in greater detail.

Sincerely yours,

Todd R. Clear
Associate Professor

TRC/p
Enclosure

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
219 FEDERAL BUILDING AND U.S. COURTHOUSE
DETROIT, MICHIGAN 48226

CHAMBERS OF
AVERN COHN
DISTRICT JUDGE

March 20, 1984

Honorable John Conyers, Jr.
United States Congressman
Chairman
Subcommittee on Criminal Justice
U. S. House of Representatives
Commmittee on the Judiciary
Washington, D. C. 20515

Dear Congressman Conyers:

Thank you for the opportunity to comment on H.R. 4827.

My views on sentencing reform are reflected in my contribution to the Open Forum issue of the Detroit College of Law Review winter issue. I enclose a copy of my article.

My views on S. 668 are reflected in the minority views of Senator Mathias. I enclose a copy of his views.

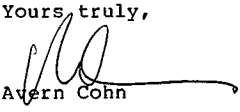
Professor Malcolm F. Feeley in a letter to the New York Times on March 9, 1984 fairly describes the faults of a fix sentencing system. I enclose a copy of his letter.

In my experience the two factors most frequently at work in considering the appropriate sentence are deterrence and just desserts. These factors frequently lead to a custody sentence. Most often the public's perception of the seriousness of an offense suggests the need of a custodial sentence. The difficulty comes in determining the length of such a sentence. Information to assure proportionality and more importantly unwarranted disparity is not easily obtained even within a single district. A well operated probation department and the use of sentencing councils is the best approach to resolving these problems I know of. Voluntary guidelines as recommended by the Judicial Conference's proposal would help. I do object to its recommendation on the right of appeal, however.

The procedures contemplated by Section 3525 of H.R. 4827 are excessive and more likely to create mischief than assure greater fairness in arriving at a first sentence. Additionally, the extent to which the manner in which a judge conducts a sentencing hearing is restricted should be by rule rather than statute.

I trust these comments may be of some help.

Yours truly,



Avern Cohn

Enclosures

AC:nt

UNIVERSITY OF VIRGINIA
CHARLOTTESVILLE-VIRGINIA-22901
SCHOOL OF LAW

March 14, 1984

The Honorable Peter W. Rodino, Jr.
The Honorable John Conyers, Jr.
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Rodino and Mr. Conyers:

I received a letter from each of you on the same day this week asking me for reactions to your criminal sentencing bills (H.R. 4554 and H.R. 4827). Unaccustomed as I am to having my opinion solicited by two such esteemed Members of Congress, I will reward your thoughtfuless by being brief.

First, I would strongly reinforce the provision in both bills for the generation of empirical knowledge regarding sentencing practices (Sec. 3793 of H.R. 4554 and Sec. 3901 of H.R. 4827). Only in this way will we have the information in future years to know whether the ultimately adopted bill truly re-formed sentencing in the federal system.

Second, on the crucial issue that distinguishes your two bills--the advisability of sentencing "guidelines--I side firmly with Mr. Rodino's bill.

I share your dual concerns, Mr. Conyers, that "political pressure could result in an escalation of sentences" under a guideline approach, and that restricting the discretion of the judge "may merely place that discretion in the hands of the prosecutor." These clearly are the two pitfalls into which some state sentencing guidelines have fallen.

Mr. Rodino's bill addresses the first issue--sentence escalation-- by (a) insulating the Sentencing Guidelines Commission from direct political (i.e., legislative) pressure by placing it within the Judicial Conference of the United States (Sec. 3793) and (b) providing a "safety-valve" sentence reduction procedure whenever prison capacity is overtaxed (Sec. 3791(d)). This latter point is essential. If the Commission can only allocate existing prison resources among offenders, then every increase in the sentence of one offender means a corresponding reduction of another offender's sentence. This should militate against across the board escalation.

The second concern with guidelines--that they shift discretion to prosecutors--is troublesome. At one level, the question reduces to: who do you think will exercise discretion more responsibly, judges or prosecutors? Your bill, Mr. Conyers, answers "judges." But I don't trust anyone's unfettered discretion, including (indeed, particularly) my own. Mr. Rodino's bill adopts what I believe to be a sensible position of "checking" and "balancing" the discretion of judges against the discretion of prosecutors.

The prosecutor, according to Mr. Rodino's bill, can determine the sentence range by negotiating a plea with an eye to the guidelines. But the judge is then free to select a sentence within that range, or to go outside the range if he or she believes warranted (Sec. 3522(c)). I am more comfortable with pitting the discretion of two parties--judges and prosecutors--against one another than with choosing between them.

My views on structuring criminal penalties are spelled out at greater length in an article in the International Journal of Law and Psychiatry, which I enclose.

Again, thank you both for asking my opinion. I hope it's helpful.

Sincerely,

John Monahan
Professor of Law

JM:jwm

Enclosure

International Journal of Law and Psychiatry, Vol. 5, pp. 103-113, 1982
Printed in the U.S.A.

0160-2527/82/010103-11$03.00/0

The Case for Prediction in the Modified Desert Model of Criminal Sentencing

John Monahan*

This paper will argue the notion that what offenders are expected to do when they get out of prison is a legitimate concern in deciding how long to keep them in it. In terms popularized by von Hirsch and Hanrahan (1979), the Modified Desert Model of sentencing, which allows some role to such crime control devices as predictions of recidivism, will be argued to be superior to the unadulterated Desert Model, which does not. The arguments will be of both a negative and a positive sort. There will first be an attempt to demonstrate that the Desert Model, in its current state of development, fails to provide a self-sufficient scheme for assigning punishment to the individual offender. It will then be argued that crime reduction is not as irrelevant to the sentencing process as current liberal fashion would have it, but rather is an acceptable, albeit limited, determinant of the allocation of punishment. Finally, a preliminary decision-rule will be offered for determining which factors believed to be associated with recidivism should be taken into account in setting individual sentences, and to what degree.

I would like to make clear at the outset that I am *not* in *any* sense advocating a return to unfettered discretion in setting sentence length, to indeterminate sentences, or to the primacy of predictive restraint. I pledge allegiance to the principle of commensurate deserts and to the sentencing reforms for which it stands. I feel sufficiently secure in my own credentials as a card-carrying just-deserter (Monahan & Monahan, 1977; Monahan, 1981; American Psychological Association, 1978), however, to suggest that it is not by desert alone that justice lives.

Just Deserts: Pure and Less Pure

Both the Desert and the Modified Desert Model of sentencing are predicated upon the "principle of commensurate deserts," namely, that "the severity of the punishment be commensurate with the seriousness of the offender's criminal conduct (von Hirsch & Hanrahan, 1979, p. 4). In the Desert Model, this principle is "rigorously observed" (p. 16), whereas the Modified Desert Model allows "limited deviations from the constraints of commensurateness" and "gives

*Professor of Law, University of Virginia School of Law, Charlottesville, Virginia 22901. I would like to thank Richard Sparks, Sheldon Messinger and Andrew von Hirsch for extremely valuable comments on an earlier draft of this manuscript.

somewhat greater scope for future-oriented considerations in deciding how much to punish" (p. 18). These future-oriented considerations would include the ability of the punishment to incapacitate, rehabilitate, or deter. This may involve predictions of the likelihood of recidivism (p. 21).

Both the Desert and the Modified Desert Models give primacy to the principle of commensurate deserts in setting sentences. In the Desert Model, the primacy is absolute: desert is the *only* thing one considers in sentencing individuals. In the Modified Desert Model, the primacy is relative: desert takes precedence, but other considerations – crime control considerations – can play a secondary role. How large a role? "It will not be easy to draw a principled demarcation" (von Hirsch & Hanrahan, 1979, p. 19). Words like "limited" and "modest" are used to describe the desired scope of non-desert considerations. Much as Norval Morris (1974) had earlier proposed, in the Modified Desert Model, "desert would determine the range of penalties applicable to conduct of a given degree of seriousness; but, within the range, other factors could be considered in fixing the specific penalty" (von Hirsch and Hanrahan, 1979, p. 18).

The position taken here differs from that of von Hirsch and Hanrahan in that they appear to see the inclusion of crime control objectives in sentencing as a reluctant concession to the *realpolitik* of criminal justice reform. It is a compromise of principles – a bone thrown to the political yahoos of the law and order right – and inferior on the merits to the more pristine pursuit of justice and justice alone. What is argued here, on the contrary, is that modifying the Desert Model by including crime control objectives is *preferable* to the single-minded pursuit of commensurate deserts. It is preferable *by default* in that the principle of commensurate deserts can provide no more than rough upper and lower bounds on punishment in any event (Morris, 1974), and some principle other than desert must be invoked to choose within the range. And it is *affirmatively* preferable, in that, justice to the offender being equal (within our large measurement error), a scheme which promotes justice to potential victims is superior to one that does not.

On the Impossibility of Precisely Assessing Crime "Seriousness"

Under the principle of commensurate deserts, the severity of punishment is proportional to the seriousness of the offender's criminal conduct. Seriousness, in turn consists of two components: the *harm* committed and the degree of the offender's *culpability* in committing it.

For seriousness to be an operational guide to sentencing decisions, therefore, requires both harm and culpability to be reliably assessed in the individual case. According to the strict Desert Model, seriousness must be reliably assessed, not just in a ballpark manner, but in a manner that yields a *precise* score that can be readily translated into a specific degree of punishment. This is so since there is no other factor in the model to reduce uncertainty in arriving at sentence length.

How does one arrive at a precise specification of the "seriousness" of criminal conduct, to which the severity of the punishment is to be proportionate? According to von Hirsch (1976, pp. 90–94), one first scales various types of criminal conduct *relative to one another* in terms of their seriousness, and then

sets the magnitude of the resulting scale in terms of beliefs about *absolute* crime seriousness.

von Hirsch (1976) acknowledges that, regarding the absolute magnitude of the seriousness scale, the principle of commensurate deserts can supply only "fuzzy" outside limits (p. 91), ones that are "imprecise" (p. 93). It is necessary, therefore to invoke the utilitarian principle of *deterrence* to assist when the scale of crime seriousness is transformed into the scale of punishment severity. He believes that *relative* seriousness can be reliably measured.

There is, however, reason to doubt that anything like a consensus exists on the seriousness of criminal conduct. While there may be some agreement on relative levels of harm, there appears to be great variation in perceptions of the absolute magnitude of harm represented by various criminal acts, and in either the relative or absolute level of culpability represented by various criminal actors.

Let us briefly examine both the empirical and the conceptual literature on this point.

Surveys such as that of Wolfgang and Sellin (1964) which report a high degree of reliability in public perceptions of crime seriousness are viewed as providing a basis (although not an exclusive one) for assessing the seriousness of offenses (von Hirsch, 1976; von Hirsch & Hanrahan, 1979). von Hirsch (1978) is careful to note that popular judgments of seriousness "may be untenable either because they contain factual misjudgments or because they involve moral judgments that do not withstand scrutiny . . . One should, in other words, *consider* the popular judgments, not necessarily abide by them" (p. 623).

Yet, as Gibbs (1978) notes, the Sellin-Wolfgang "seriousness scale" is a measure of the "extent of social (public) disapproval of the crime." It is, in other words, a measure of perceived *harm,* with little relationship to culpability, the other half of what is meant by "seriousness." Indeed the notion that "seriousness" consists of the separate components of harm and culpability "is not even investigated, much less vindicated, by Sellin and Wolfgang" (Bedau, 1977). As well, the high reliabilities of the Sellin-Wolfgang scale are for *relative* judgments. All of us agree that murder is more "harmful" than pocket-picking. In terms of agreement on the *absolute* level of the harm represented by given crimes, however, social consensus breaks down, and "the inevitability of subjectivity" (Gibbs, 1978), takes center stage.

Yet the difficulty in gaining agreement on the absolute social harm caused by given offenses is mild compared to the difficulty in gaining agreement on the culpability of given offenders. As Messinger and Johnson (1978) noted in their history of the recent determinate sentence law in California, "There is little sign that the various interested parties agree what 'deserts' are 'just' for different offenses, or, above all, different offenders." A number of empirical studies have demonstrated that attributions of culpability or blame are highly influenced by factors having little relevance to notions of desert. For example, De Jong et al. (1976) studied sentences recommended in two cases of a store hold-up each involving two offenders. In one condition, subjects were told that one of the two offenders had escaped successfully. In another condition, they were told the

escape attempt was unsuccessful: the offender was captured. The results of the study showed that the degree of culpability imputed to, and the number of years in prison recommended for, the offender whose accomplice had escaped was considerably less than for the offender whose accomplice was captured. This makes no sense whatever from a commensurate deserts point of view:[1] they both robbed the store, and the fact that one had an accomplice who escaped should hardly result in his or her being held less culpable. Unless, that is, culpability is "an essentially metaphysical notion" (Gibbs, 1978) which by its very nature defies reliable quantification in any but gross categories.

To further examine the manner in which people form judgments about an offender's culpability, Monahan & Fuggiero (1980) conducted a study pitting predictions of recidivism — the *bête noire* of retributivists — against prior offenses as the determinants of criminal sentencing. To isolate further the factors that influence perceptions of culpability and investigate how they, in turn, affect beliefs about sentence length, they asked their respondents to record separately the sentence they would recommend taking only *moral desert* into account, taking only *societal protection* (i.e., predictive restraint) into account, and finally taking into account whatever they believed should be taken into account in imposing an *actual sentence.* The reasoning here was straightforward: to the extent that judgments of moral culpability are themselves *dependent upon* beliefs regarding risk of recidivism, moral culpability becomes less tenable as a self-sufficient alternative to predictive restraint in justifying criminal sentences.

Results showed that desert appeared to function as a *limiting* principle: beliefs about desert served to reduce the sentence subjects would have given on utilitarian grounds alone. Actual sentences recommended were an *average* or compromise between beliefs about moral desert and beliefs about public protection.

Most interestingly, however, predictions of recidivism affected not only those sentences recommended on utilitarian grounds, as would be expected. They also had a significant and profound effect on sentences in which the sole justification was to be moral culpability. Indeed, regardless of whether an offender had committed prior offenses, subjects perceived the offender with a 20% chance of recidivism as morally "deserving" a sentence slightly in excess of 1 to 2 years, while perceiving an offender with an 80% chance of recidivism as "deserving" a sentence of almost 5 to 6 years.

Finally, Riedel (1975) found that people tend not to take into account factors such as victim provocation in judging the seriousness of crimes. They tend to

[1]The study could be viewed as confirming a common-sense view of "fairness" in that if one offender, through no virtue of his or her own, is "lucky" enough to escape sanction completely, then it would be "unfair" to his or her accomplice not to escape sanction at least partially, i.e., by receiving a sentence lower than would otherwise be given. Such a view of "fairness," however would appear conceptually relevant to the concept of commensurate deserts only if the determination as to who got caught and who escaped was a matter of conscious policy (i.e., discriminatory law enforcement) rather than chance. Otherwise, one could argue that, since most offenses are never cleared by an arrest, we should never punish those who are caught, out of fear of being "unfair" to them vis-a-vis their unapprehended partners in crime.

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assess crime seriousness "in ways that make unimportant inferences of whether the offender intended the act" (p. 208).

What we have, then, are empirical findings that people do *not* take into account what the commensurate desert principle says they *should* take into account in assessing seriousness (e.g., intent), and that they *do* take into account both factors that are irrelevant from a commensurate desert's point of view (e.g., escaped accomplices), as well as those that are explicitly *prohibited* (e.g., prediction). These findings do not bode well for those who would have punishment meted out on desert-relevant grounds alone. As Gibbs (1978, p. 295) has stated:

> A doctrine is not a complete basis for a punitive penal policy unless it at least *implies* an answer to this question: For the type of crime under consideration, what is the appropriate punishment? Unless one is willing to accept whatever is a just desert, the retributive doctrine implies no answer.

Likewise Bedau, while not wishing to disparage the principle of commensurate deserts "as though this principle were fraudulent or erroneous or trivial," believes:

> No one disputes the claim that a slap on the wrist for murder is too lenient and that a month in prison for overparking is too severe. It is common sense judgments like these that inspire the search for a principle such as the principle of commensurate deserts. What I have been arguing is that the retributivists' principle of commensurate deserts is not at present an objective, reliable way of going beyond such common sense judgments, so that sentencing authorities may rely on the principle and be secure in the belief that with it they can achieve retributively just sentences in practice (Bedau, 1977, p. 65).

To these empirical findings a proponent of the strict Desert Model might retort that "the public" is no doubt confused about many central concepts in the criminal law (e.g., *mens rea*) and yet this does not impede the use of these concepts in the day-to-day operations of the system. Perhaps all the findings do is cast doubt upon the wisdom of relying upon survey data to quantify deserved punishment. Is it possible that more "principled" arguments can be put forth that would yield agreement among knowledgeable persons as to the precise delineation of culpability and hence seriousness? This, too, does not appear to be the case, at least at the current stage of development of the Desert Model.

Gardner (1976), for example, noted the undeveloped status of the concept of culpability in the Desert Model. The emphasis on "free choice" in the determination of culpability, he stated, leaves unclear whether criminal negligence or "strict liability" crimes could be punished at all under desert principles, since "free choice," as commonly understood, is not present. Indeed, "[T]he most significant weakness in *Doing Justice* theory is its failure to take seriously the concept of culpability" (Gardner, 1976, p. 806). Gardner, in this regard, would take the "whole character of the offender," including his or her "motives, powers, and temptations" (p. 804) into account in assessing culpability. "One who violates the law because of worthy motives, through less than average

powers of self control, or in the face of special temptation is either not culpable at all, or less culpable than other offenders. The uniquely debilitating influences of social and economic deprivation are relevant in attending to the matters of motives, powers, and temptations" (p. 805). Greenberg and Humphries (in press) also attack the Desert Model because of its "neglect [of] the social situation of the criminal actor" in assessing seriousness and its effect of dismissing such topics as "the dynamics of the capitalist economy, the manner in which it allocates benefits and injuries among classes, races and sexes – and in so doing generates the structural conditions to which members of the society respond when they violate the law."

While some argue for considering the social situation of the offender in deciding his or her degree of culpability, others argue with equal fervor that justice demands a consideration of the effects of the sanction upon *future victims,* who do not "deserve" to be disadvantaged by recidivistic offenders.

> Retributivists, whether of the old or of the new variety, are totally uninterested in binding up the wounds of the victims. The only fairness retributivists are interested in is the fairness of deserts to be visited upon the offender; as for the victim, retributivists seem quite willing to let him fend for himself. This is a strange as well as an incomplete theory of justice in the full context of crime in society . . . It is too rarely noticed that retributivists in principle are fundamentally indifferent between the state of the world in which there is no crime, and the state of the world in which there is a wide variety of horrible crimes each of which is punished fully and exactly as retribution requires. Depressing the crime rate is no concern of the retributivist; neither is avoiding recidivism; he willingly leaves these concerns to the utilitarian, thereby revealing just how narrow are his interests in the overall social problem of crime and punishment. If justice or other moral principles dictate a concern about innocent victims and the innocent public, it is not thanks to the views held by retributivists (Bedau, 1977, pp. 68–69).

While the Desert Model acknowledges that crime control is an acceptable rationale for the existence of criminal sanctions in general and may play a role in setting the absolute level of criminal penalties, it denies crime control considerations a role in setting penalties in the individual case. The model does make exception for "a small class of especially fearsome cases" (von Hirsch, 1976, p. 126). The justification for this abrupt deviation from the previously inviolable principle of commensurate deserts is given in political rather than theoretical terms. "These cases will be so highly visible and evocative of public anxiety that arguably the pressure for isolating such persons would be impossible to resist in any event; and unless express authority to invoke predictive restraint is granted here, the entire structure of 'deserved' sentences could be distorted upward" (von Hirsch, 1976, p. 126). Predictive restraint for a few Charles Manson-types, in other words, is necessary "only for the purposes of safeguarding the general rule that the sentence should be deserved" (p. 131).

Public anxiety about crime, however, is not limited to crime committed by a few highly visible persons. It is a pervasive fear of victimization, regardless of

the identity of the offender. For those, like Bedau, who view this public concern as legitimate, desert dictates that at least some concern be given to crime control in allocating individual punishments.

The principal impediment to arriving at social consensus — or even the presumably more informed consensus of criminal justice elites — on the culpability of individual offenders, therefore, is disagreement whether "justice" in the largest sense of that term requires a consideration of (a) the contribution of society to the production of the offender's past behavior, or (b) the effect of the offender's likely future behavior upon other members of society. Some emphasize the former consideration and argue that "justice" in the case of a socially deprived offender should lead to his or her being confined for a shorter period, for the same instant offense, than a non-deprived offender. Others emphasize the latter consideration and argue that "justice" in the case of an offender with a high probability of victimizing innocent persons again should lead to his or her being confined for a longer period, for the same instant offense, than an offender with a low probability of so doing. And still others, like the majority of the Committee for the Study of Incarceration, while expressing sympathy both for disadvantaged offenders and the victims upon whom they will visit disadvantage, argue that "justice" in the largest sense is beyond the reach of the criminal justice system. That system would do best to ignore both the offender's claim to reduced confinement and the potential victim's plea for increased protection.

Just Deserts as Social Norms

The conclusion I would draw from both the empirical evidence and the conceptual arguments regarding culpability and hence crime seriousness and the sentencing severity is that decisions regarding the "just" sentence in any given case are by and large normative ones.[2] Some will take into account very different things than others (such as social environment or future victims). There is no more principled way to determine who is the more "correct" in the assessment of justice than there would be in the assessment of beauty. In a given culture at a given time, norms will develop concerning the range of sentences that the majority feel are just for given criminal conduct. These ranges will be different in different cultures, and will change over time within the same culture. Thus the majority of people in the United States, unlike those in some other cultures, believe that cutting off the hand of a thief is an unjustly severe punishment, and have recently come to believe that lengthy prison terms for marijuana possession are unjust.

The crucial question of how broad or narrow a range of sentences justice allows thus transforms into an empirical question concerning the breadth or

[2] I do not wish to disparage those who seek to identify universal and invariant stages of moral reasoning (e.g., Kohlberg). Indeed, I believe in an intuitive way that such absolute and non-normative principles *must* exist. The Inquisition or the Holocaust were not "just" despite the fact that a majority of responsible decision-makers at the time found them to be within the range of their ethical tolerance. But the state of research and theory on moral reasoning is so undeveloped and controversial that it can provide little, if any, guidance to the task of criminal sentencing.

narrowness of the existing social norms. The upper limit of deserved punishment thus may be said to be reached just before a majority of the responsible decision-makers (e.g., members of a Sentencing Commission) say "too high;" the lower limit just before they say "too low." The width of the resulting range may vary with the type of crime. For some crimes the distance in severity between the upper and lower limits of social acceptance may be quite narrow, for others it might be broader.

To stipulate that the *majority* of decision-makers set the upper and lower limits would seem to assure that these limits, however broad, would place a significant constraint on the allocation of punishment. The problem with a procedure such as the Model Penal Code was that it set the lower limit at that point where virtually *everyone* would agree that any lower was "unjust," and the upper limit at that point at which virtually everyone would agree that any higher was "unjust." Taking a simple majority vote would necessarily result in a narrower range than expanding the upper and lower limits to include minority views.

Assume, for example, a Sentencing Commission of twelve persons representing an attempt at a cross-section of various interest groups. The group is asked: "For a second conviction of rape (in which no additional physical harm is done to the victim) what is the *least* severe sentence you could impose without violating your beliefs about justice?" Four persons say 1 year, 5 persons say 2 years, and 3 persons say 3 years. The lower limit of the deserved sentence is thus set at 2 years: to go lower than 2 years would violate the sense of justice of 8 of the 12 members. The group is then asked: "For the same case, what is the *most* severe sentence you could impose without violating your beliefs about justice? Two persons say 6 years, 3 persons say 5 years, 3 persons say 4 years, and 4 persons say 3 years. The upper limit of the deserved sentence is thus set at 4 years: to go higher would violate the sense of justice of 7 of the 12 members. With the range thus set by desert at 2–4 years, other factors could come into play to choose within this range.

My own position in regard to choosing within this normative rage of deserved sentences is to agree with von Hirsch that the sentencing phase of the criminal justice system seems hardly the place to mount major programs of social restructuring, or even to evaluate the effects of an existing social structure on an offender's "whole character." But it does not offend *my* sense of justice to consider in this limited way what effect a given offender's sentence likely will have on others after his or her release. Nor, according to the Monahan and Ruggiero (1980) study, does it offend most other people's sense of justice. Given that (a) by definition, the majority of responsible decision-makers (e.g., members of the Sentencing Commission) believe that just deserts will not be flaunted by any sentence imposed within the range, and (b) that there would be an empirically demonstrable reduction in the suffering of those who are, by all accounts, "innocent" victims if offenders with a high probability of serious recidivism were sentenced at a higher level of the range than those with a low probability of recidivism. I see no reason why we should not opt for a sentencing scheme which maximizes utilitarian benefit at the same time it satisfies the dictates of desert, as far as we can determine what those dictates are.

For those who agree with these sentiments, the questions become which fac-

tors associated with criminal recidivism should be used to select a sentence from within the prescribed range, and how much they should affect the sentence imposed.

I would offer as a preliminary guide the principle that the only factors that can be used in sentencing are those whose existence and relationship to recidivism have been demonstrated to an acceptable standard of proof in a legal proceeding. This principle would insure that the factors relied upon to influence a sentence in the name of predictive restraint are actually present in the case at bar, and actually do relate to predictive restraint. It would exclude sentencing on the basis of hearsay, and would force the state (in the case of increasing a sentence otherwise given) or the defendant (in the case of decreasing a sentence otherwise given) to present empirical evidence that the factors relied upon are actuarially associated with recidivism. The standard of proof is left open since that is currently under debate in some areas (e.g., the U.S. Supreme Court has recently decided that the standard of proof in civil commitment need only be "clear and convincing evidence," *Addington* v. *Texas,* 1979). Likewise, the nature of the legal proceeding is unspecified, since a juvenile court, in the case of juvenile crime, or a trial-like prison hearing, in the case of crime while in prison, could suffice if the procedureal protections were sufficient.

This principle would exclude the use of adult or juvenile arrests that do not result in an adjudication of guilt, and any information from the mental health system or elsewhere that was not tested in a legal proceeding. For example, "emergency" civil commitment for violent behavior (typically a three-day commitment) does not require judicial involvement in most states, and thus would be excluded, whereas longer term commitment for "dangerousness" does require a hearing or trial and so evidence of it would be permissible to introduce. In order for a history of commitment on the basis of dangerousness to influence a sentence, the state, under this principle, would have to prove (a) that the defendant in fact had such a history; and (b) that such a history, in fact, increases the probability of recidivism (and therefore the need for predictive restraint).

How Much to Rely on Prediction

How large a role should be given to prediction in this modified desert model? As von Hirsch and Hanrahan (1979, p. 19) noted, it will not be easy to draw a principled demarcation between the point at which commensurate desert ends and predictive restraint begins. If one accepts that, despite the vaguaries alluded to above, it is possible to arrive at upper and lower bounds for sentence length by recourse to the principle of commensurate deserts, then those bounds provide the first constraint on the degree to which prediction can influence sentencing: regardless of how "dangerous" an offender was predicted to be when released from prison, he or she could be kept no longer than the upper bound set by commensurate deserts, and regardless of how safe, released no sooner than the lower bound.

But more specificity is required. In particular, the expected accuracy of the prediction (e.g., the false positive rate) must influence the degree to which it is taken into account. One cannot jump an offender from the lower to the upper

bound specified by commensurate deserts if he or she merely has *some* higher-than-normal probability of recidivism. Perhaps the notion of proportionality, so influential in the development of commensurate deserts, could prove useful in the area of prediction as well. It would lead to the following principle: *Within the range set by the seriousness of the crime committed, the severity of an offender's sentence shall be proportional to the degree he or she reliably and validly can be predicted to offend again.* This would necessitate developing an equation to *transform* the degree of predictive accuracy into the degree to which the sentence would be augmented. For example, a 40% probability of recidivism could equal moving 25% between the lower and upper bounds set by commensurate deserts. The principle would also necessitate setting a common definition of "recidivism" (e.g., a 100% probability of jay-walking should be irrelevant; perhaps "felony conviction" would be an acceptable common denominator).

Take the example previously given, of a person convicted of second offense rape. On the basis of the normative test of desert proposed, presume most responsible decision-makers would agree the offender deserves at least 2, but no more than 4 years in confinement. This would set the upper and lower limits on punishment. On the basis of past behavior demonstrated to an accepted legal standard of proof, it can be actuarially concluded that the offender has a 50% chance of being reconvicted for a felony (any felony) within 3 years after his or her release. Assume a simple transformation rule such that the probability of recidivism is directly proportional to the degree to which the sentence shall vary between the bounds set by commensurate deserts. The sentence the offender would receive would then be 3 years — 2 to 4 years because of commensurate deserts and half the difference between the two due to the prediction of recidivism.

I have no doubt that much further development will be necessary before a workable framework for prediction in sentencing can be achieved. But "the assessment of predictive selection must take into account the nature of the plausible alternatives to predictive selection" (Underwood, 1979, p. 1418), and the principle of commensurate deserts, in its current state of development, is simply incapable of carrying the entire weight of criminal sentencing. von Hirsch (1978, p. 623) acknowledges that "a satisfactory theory of scaling seriousness has not yet been devised." The reason he gives is that *"nobody has yet seriously tried to construct such a theory.* Until philosophers and penologists give this task the requisite effort, it is hard to judge the prospects of success" (pp. 623–24, italics in original). It is hard indeed. Yet without such a theory, "commensurate deserts" is little more than a banner under which those who would reform the more egregious abuses of discretion in sentencing can rally.

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United States District Court
For the Eastern District of Michigan
Detroit, Michigan 48226

April 11, 1984

Honorable John Conyers, Jr.
Chairman
Subcommittee on Criminal Justice
U.S. House of Representatives
Washington, D.C. 20515

Re: H.R. 4827
Sentencing Revision
Act of 1984

Dear Congressman:

This is in response to your invitation to comment on the above bill. I appreciate the opportunity and I hope my comments will be helpful.

Rather than commenting on specific provisions and language contained in the bill, with your indulgence I engage in describing my perceptions of sentencing problems, some of which are addressed by your proposal, others of which are not.

By way of preface, I have had the onerous burden of sentencing for 21 years -- 7-1/2 years as a Michigan Circuit Judge and the balance as a Federal Judge. I find each sentence more difficult than the preceding one. This, I think, is due to what my experience has taught me, to the lack of a consensus as to the purpose of sentencing and to the conflict between philosophical principles and pragmatic realities. By way of example, most penologists and now, most other persons concerned with the problem, agree that rehabilitation through incarceration is not an achievable goal. I concur that you cannot coerce rehabilitation. On the other hand, one should not thwart rehabilitative efforts as, unfortunately, may be a result of custodial sentences, especially long ones. There are ways in which society can assist, even in prison, in a person's own rehabilitative efforts. I take it that is the rationale behind § 3521(5), that a purpose of sentencing is to provide education, vocational training, medical care, etc. I would suggest that while such admirable provisions should be integral parts of a treatment program, they should not be included as one of the purposes of sentencing. I fear that the provisions could be interpreted in a way that would increase disparity and, in effect, be seen as coerced rehabilitation in other words.

I suppose, too, that at some point recognitition must be given to a basic, underlying conception -- particularly one accepted by the public but rarely articulated. That is, that a purpose of sentencing is punishment. Until we come to grips with that issue and meld it into any sentencing reform I have serious doubts that the problems of sentencing can be resolved. I do not suggest this is an easy task.

Recognition must also be given to the two-level approach to sentencing that we have utilized for some time. One can, in fact, argue that there are three levels, i.e., Rule 11 plea bargaining, court sentences and parole commission guidelines and parole authority. You will note that the judge is in the middle and I interject that purposely. I must elaborate on that theme because I find it the most frustrating.

Assuming that a custodial sentence is appropriate and that a Community Treatment Center is ill-advised (in that vein, you will recall the fruitless efforts of this bench to have a metropolitan correctional institution constructed here), a judge's first step is to determine how long the parole commission is going to decide the defendant is going to be incarcerated. Consider this hypothetical: the judge (and in this District the Sentencing Council) determines that the defendant should spend 18 months in custody but have a relatively long parole term, for drug after-care for example. A sentence of four years would seem appropriate. However, parole guidelines require that the defendant be kept in custody for 32 months. The considered sentence must then be manipulated -- that is, since 18 months custody is the premise, the sentence must be below the parole guidelines with the result that the desired parole period is shortened. Bear in mind that the parole commission follows its guidelines in over 90% of the cases regardless of judicial recommendations and regardless of whether the sentence is under § 4205(b) (discretion left to parole commission).

Thus, when we speak of disparity with regard to custodial sentences, I am not certain whether we are speaking of sentencing disparity or incarceration disparity. Certainly we must determine first which of the two we are addressing. There is an important dichotomy here. Judges are inclined to tailor sentences -- there is, for example, an intuitive (hopefully not an idiosyncratic) element. There is, in fact, an attempt by judges to determine severity in proportion to culpability and harm. On the other hand, the parole guidelines call for a mechanical analysis, i.e., profile "points" and a judgment, however made, on the severity of the crime, without apparent regard for the degree of culpability or other factors. I would suggest this wilderness needs to be explored.

Finally, I must suggest another conundrum. I find it difficult to separate sentencing reform from prison reform. My experience with prisons is a major influence in my determination of a sentence. The sentencing burden would be greatly lightened and more importantly, sentencing could be fairer were we to know in advance what a "correctional institution" is and what are its purposes. While not completely analogous to the subject, your staff may be interested in my opinion in the case of Johnson v. Bell, 487 F.Supp. 977, regarding the Youth Corrections Act.

My apologies for the length of my comments. I hope, nevertheless, they may be of some assistance.

Sincerely,

Philip Pratt
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March 27, 1984

Honorable Peter W. Rodino, Jr.
Chairman, Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Congressman Rodino:

Re: H.R.4554

Thank you for inviting me to comment on H.R.4554, the proposed "Sentencing Act of 1983." As a supporter of the effort to reduce unwarranted disparities in sentencing, I welcome the general thrust of this legislation. In three areas, however, the bill poses major problems that your Committee should address. The problems concern sentence severity, plea bargaining, and the independence of the proposed Sentencing Guidelines Commission.

A. Sentencing severity.

In its present form H.R.4554 could lead to the promulgation of unduly severe sentencing guidelines. The problem is not only that excessively harsh sentencing policy is undesirable in itself. Severe guidelines will increase pressures for plea bargaining. They will also tempt judges and juries to render illogical acquittals on particular counts in order to evade the thrust of guidelines that would otherwise be applicable. These developments will not only undercut the effort to achieve more stringent levels of punishment but will create many low-visibility disparities and thus will tend to defeat the uniformity which is the principal goal of this legislation.

An increase in overall severity levels will pose another serious difficulty. In the absence of significant charge-reduction incentives to plead guilty, defendants facing very severe sentencing guidelines will be much more likely than at present to insist on their right to jury trial. A sharp increase in jury trial demands will not only impose substantial administrative costs on the system, but will in all likelihood increase the delays between arrest and trial. Pennsylvania has experienced precisely these problems under new sentencing

guidelines that have raised expected levels of punishment in most cases.

Increased delay pending trial is of course a serious problem in its own right, and it brings additional problems in its wake. Delay may mean loss of witnesses and resulting acquittals at trial, and it may mean that even where clear proof of guilt exists, cases must be dismissed for failure to comply with speedy trial rules. For defendants entitled to release pending trial, delay extends the opportunity to commit further crimes endangering the community. For defendants detained pending trial, delay means additional incarceration for some individuals who eventually will be acquitted; defendants in that situation suffer the most egregious form of "sentencing" disparity.

Under these circumstances Congress must clearly express its intention that sentencing guidelines not produce any significant increase in the overall severity of the federal sentencing system. This could be done in several ways. For example, your Committee should strengthen the language of §3791(d), which now requires only that guidelines "minimize the likelihood" that prison population will exceed capacity. The guidelines should "assure that the available capacities ... will not be exceeded." Both S.1437, 95th Cong., 1st Sess., and S.1722 96th Cong., 1st Sess., used this language (§994(g) in both bills). In addition, a new provision should be added to require that the Sentencing Guidelines Commission be guided by average terms actually served at present, and that the Commission depart from current averages only if it finds them clearly inappropriate. For a similar approach, see S.1722, 96th Cong., 1st Sess., §994(l); S.Rep.96-553, 96th Cong., 2d Sess., p.1245.

B. Plea bargaining.

In the proposed bill, sentences would be based upon the offense for which the defendant is convicted, §3792(a)(2), and the guidelines would therefore encourage uniform sentencing for cases in which the offense of conviction is determined by trial. But for the 80-90% of federal cases in which conviction is obtained by guilty plea, the offense of conviction will be determined by unstructured negotiation between the parties. Under Rule 11 of the Rules of Criminal Procedure, federal judges currently have discretion to accept or reject a plea agreement, but this discretion is also unguided and unstructured. Indeed, some recent decisions have held that a trial judge may not announce a uniform policy with respect to plea agreements but rather must exercise his Rule 11 discretion on a case-by-case basis! E.g., United States v. Miller, 34 Crim.L.Rptr. 2310 (9th Cir., Dec.28, 1983). Under these circumstances sentencing

guidelines based on the offense of conviction cannot reduce unwarranted disparities in sentencing, and they may actually increase those disparities by shifting discretion to prosecutors whose power to determine sentences will be even less visible and less subject to control than judicial sentencing power is today.

H.R.4554 recognizes this problem by requiring the Sentencing Guidelines Commission to recommend standards for judges to use in determining whether to accept a plea agreement. §3793(a)(4). To insure the effectiveness of this measure, however, two additional provisions are necessary:

1. Rule 11(e)(1) must be amended to make clear that the Rule applies not only to agreements to dismiss charges already filed, but also to agreements to withhold charges in exchange for a plea of guilty. Previous bills recognized the need to plug this potential loophole. See, e.g., S.Rep.96-553, 96th Cong., 2d Sess., pp.1199, 1236-37; H.R.Rep.96-1396, 96th Cong., 2d Sess., p.501 n.2.

2. Section 3791 of the bill must be amended to require that the Judicial Conference prescribe and submit to Congress the proposed plea-agreement standards.

As the bill now stands, the Sentencing Guidelines Commission must recommend plea-agreement standards to the Judicial Conference, but the Conference is not required to take any action to implement the Commission's recommendations. In contrast, in its provisions relating to sentencing guidelines, the bill requires the Commission to make recommendations, §3793(a)(2), and then specifies that the Conference "shall prescribe and submit" those guidelines. In its present form, therefore, the bill could be read to imply that sentencing guidelines are the first priority and that standards to guide judicial discretion over plea agreements are a secondary matter that may or may not prove appropriate to address at a subsequent stage. Nothing could be further from the truth.

In order to prevent sentencing guidelines from actually aggravating unwarranted disparities, standards relating to plea agreements must be coordinated with the sentencing guidelines and implemented at the same time. Although the Judicial Conference may recognize this point and choose to prescribe plea agreement standards on its own initiative, there is great danger that time constraints and political pressures will lead the Conference to postpone action in the sensitive area of plea agreements, unless it receives a stronger mandate from Congress.

Under these circumstances, it is imperative that the bill be amended to make clear that plea agreement standards are not a secondary priority and that Congress expects the Judicial Conference to prescribe those standards along with the sentencing guidelines.

C. Independence of the Sentencing Guidelines Commission.

H.R.4554 wisely places responsibility for the guidelines within the Judicial Conference and requires that a majority of Commission members be judges. These provisions are important for maximizing voluntary judicial compliance and avoiding inappropriately severe sentences. The independence of the Commission could be compromised, however, by the fact that all of its judicial members will be serving part-time while remaining responsible for other judicial duties. In addition, the Commission, lacking its own staff, will be dependent on other federal agencies for technical support and, ultimately, for guidance in reaching its decisions. Your Committee should consider whether the chairperson of the Commission (presumably a judge) should serve full-time in that capacity, with a temporary leave of absence from active judicial status. In addition, it is imperative that substantial staff support be made available under the direct supervision and control of the Commission's Chairperson -- if not as part of a separate agency, then within the Administrative Office of U.S. Courts, as part of a separate unit created specially for this purpose.

* * *

Once again, thank you for giving me the opportunity to comment on this important legislation.

Sincerely,

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SJS/me

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As from:
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Representative Peter W. Rodino, Jr., Chairman
Committee on the Judiciary
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February 6, 1984

Dear Congressman Rodino:

Last week I received a copy of H.R.4554 from you, along with various explanatory materials, and an invitation to comment on the bill. I believe this bill's sentencing provisions have many promising features, but that the core proposal--for sentencing guidelines promulgated by the Judicial Conference--is unsound.

Here are some of the features of H.R.4554 that I strongly endorse: the purposes provision, the plea acceptance guideline provision, the provision limiting sentence appeals to the defendant, the emergency crowding provision, and the admonition that the guideline draftsmen try to minimize the impact of their guidelines on prison population.

The bill's fundamental weakness is in the provisions for guideline promulgation. It is ironic that a reform proposal designed to structure the discretions of judges, prosecutors, and parole board members provides unconstrained discretion to the guideline-setting agency. Section 3793 requires only that the sentencing commission "recommend sentencing guidelines to the Judicial Conference of the United States."

In my view, the delegation to a commission of so much authority, with so few standards for its decision-making, is unsound. Guideline draftsmen could, for example, adopt guidelines with wide ranges and broad offense categories and thereby nullify the plea bargaining and appellate sentence review provisions.

The problem of the absence of standards is exacerbated in H.R.4554 by having the sentencing commission develop guidelines that it must then propose to the Judicial Conference, which in turn must submit to the Congress. It is unlikely that a judge-dominated process will produce guidelines with teeth. An independent, presidentially appointed, sentencing commission

authorized to report directly to the Congress is much likelier to develop credible guidelines that significantly constrain judicial behavior than is a commission whose decisions must be endorsed by the Judicial Conference.

By coupling wide discretion to the guideline developers and a judge-dominated process, H.R.4554 joins two provisions that together are worse than either would be alone. Either an independent commission subject to few standards, or a Judicial Conference-dominated commission subject to precise standards, would offer more prospect of meaningful sentencing change than does H.R.4554.

The other and related question that troubles me is H.R.4554's handling of parole. Given the problems discussed in the preceding paragraphs, I believe that H.R.4554's treatment of parole is wise. The prison capacity language should conduce to the development of minimum guideline sentences that do not greatly exceed current practices and the availability of parole release review for sentences above the minimum should provide a mechanism for keeping a handle on prison population. The parole provisions also provide a method for attacking problems of disparity if the commission/Judicial Conference guidelines are broad, ambiguous, or otherwise insubstantial.

Thus, in the context of H.R.4555's fundamental weaknesses concerning guideline development, the parole provisions are a needed safety valve. With a different sort of bill, I would favor abolition of parole release. The existing parole system diminishes judicial accountability in fundamental ways: if judges know that the sentences they impose provide few constraints to parole-release decisions, they need not face up to the decisions they are making and can impose lengthy "symbolic" sentences. H.R.4554 does nothing to require the mass of federal district judges to take sentencing more seriously. Those who wish to impose symbolic sentences could, under H.R.4554, continue to do so, with the knowledge that only minimum sentences constrain parole release decisions, and that the buck can still be passed to the parole commission.

If the long-range goal of federal sentencing reform is to achieve a system in which judges impose sentences in accordance with articulated, principled standards of general application, H.R.4554 is a small step in that direction. However, a much larger step toward that goal could result from the combination of the Senate's sentencing commission/parole abolition provisions with the many enlightened provisions of H.R.4554.

I know it is late in the day to be raising fundamental critiques. Nonetheless, it seems to me that, however enlightened some of H.R.4554's other provisions, it is fatally flawed by its carte blanche delegation to the Judicial Conference of the authority to promulgate sentencing guidelines.

Best regards.

Yours sincerely,

Michael H. Tonry

jde

cc Peter B. Hoffman

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January 23, 1984

Honorable Peter W. Rodino, Chair
U. S. House of Representatives
Sub-Committee on Criminal Justice
H 2-362 House Annex Number 2
Washington, DC 20515

Dear Mr. Rodino:

In response to your letter of January 16, 1984, I have read and reviewed H.R. 4554. You are to be commended for the comprehensiveness of this proposed legislation. It is a model of sentencing reform that incorporates the best aspects of what we know about the results of recent sentencing changes in the states.

I am certain that you have already received the thoughts and comments of many persons knowledgeable in this area; and I will, therefore, make my remarks brief. I can easily support H.R. 4554 in its entirety. There are, to me, however, two particularly important provisions.

My experiences working for the Oregon State Board of Parole as well as the results of my own research, indicate that H.R. 4554 tackles two of the most difficult areas of sentencing reform. I am especially impressed with Sections 3791(d) and 4201(f)(1), which attend to prison overcrowding and provide for the traditional "safety valve" function of parole authorities. I am also pleased to note that this legislation attends to the vagaries (and, often, disparities) in supervised release by speaking to the nature and type of release conditions in Sections 4205 and 3583.

I have enclosed two papers I have written relevant to conditions of supervision for your information. I fully support your efforts to restructure federal sentencing to serve the interests of justice. If I can be of assistance to you or the Committee in this effort, please do not hesitate to contact me.

Sincerely,

Lawrence F. Travis III

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LFT/kjr

Parole: Structuring Discretion

Ira Blalock and Lawrence R. Travis, III

Parole has been evolving for the past 100 years. This developmental process has been slow until recently, when reforms in the parole process have occurred at a very rapid pace. The majority of recent efforts to modify traditional parole practices have focused on the release decision; parole revocation has been left largely unchanged.

Perhaps as a result of the Supreme Court decision in Morrissey v. Brewer[1], changes in the exercise of release authority by parole boards have taken precedence over reforms in parole supervision and revocation procedures. The due process safeguards protect the parolee's interest in continued liberty during revocation procedures. Decision makers, in adjusting to the minimum standards in Morrissey, tended to ignore further change.

The effect, therefore, of the Court's action in Morrissey has been to stifle experimentation, the development of alternatives and expanded policies to insure equitable and rational treatment of those accused of violating the conditions of their paroles. In other words, through the promulgation of minimum requirements of fairness, the Court decision may have unintentionally defined a "ceiling" on due process protections for parolees facing revocation.

In both parole release and revocation, the center of criticism has been the discretionary power of the Parole Board. Within specified

limits, normally very broad, most parole authorities have the power to grant release, and after release, to revoke that grant and cause the parolee to be incarcerated. The revocation process, while not undergoing the extensive changes characteristic of parole release, has not escaped critical attention.

The criticisms of the revocation process revolve around three issues: the nature of parole violations; the procedures for revocation; and the establishment of penalities for those found in violation of their paroles. The Supreme Court addressed the procedural question. Other Courts, in isolated cases, have considered specific conditions of parole or probation, but these decisions have not established a uniform policy on the nature of parole violations or appropriate sanctions. Finally, the legislature in California, the paroling authorities in a few jurisdictions, (The Oregon Parole Board and the United States Parole Commission) have attempted to assign appropriate penalities for parole violation.

Recently, David Stanley, in Prisoners Among Us, examined the process of parole supervision and identified deficiencies and problems.[2] Stanley acknowledged the improvement in the quality of justice to be found in parole revocation procedures after Morrissey. However, Stanley states that revocation is, ". . . a process that invites inconsistency and arbitrariness in administration and decision-making".[3] One of the most troublesome inadequacies in parole supervision is the routine imposition of numerous conditions. The breach of any condition is theoretically a valid basis for revocation, even if the violation is not a crime.

A serious criticism of parole supervision and revocation was delivered by von Hirsch and Hanrahan in The Question of Parole.[4] Their basic objection is that parole revocation includes the potential imposition of very severe sanctions for acts which are themselves not criminal offenses.

A parolee who fails to maintain employment could be returned to prison, perhaps for the remainder of a lengthy prison term. This sanction is in addition to a sanction already suffered for the original offense. It is imposed without the stricter procedural safeguards of a trial.[5] They write that "a revoked parolee faces imprisonment, at the Board's discretion for up to his full unexpired sentence—and that may be several years hence".[6] They suggest: a scaling down of penalities for parole violation; an analysis of the effect of supervision on reducing criminality; and restricting the use of parole revocation as a penalty for new crimes.[7] Others have also criticized parole supervision. These criticisms center on the effectiveness and fairness of community supervision. The effectiveness of supervision, like that of correctional treatment in general, has not been established. To date, research has failed to demonstrate that community supervision is effective in crime control.

This paper is not concerned with the effectiveness of parole supervision. Specifically, it reports an attempt by the Oregon State Board of Parole to rationalize the parole revocation process, especially revocation decision-making and the imposition of sanctions for violations of parole conditions. It outlines the efforts of the Oregon State Board of Parole to develop guidelines and structure the revocation process. These guidelines impact on all aspects of the retaking process through: defining what behaviors constitute a parole violation which justifies reincarceration, establishing "presumptive" penalities for parole violations, and providing reporting and detaining guidance for field officers. The explicit definitions and presumptive penalities enhance equity and expand upon due process provided in the revocation decision beyond the minimal requirements of the Morrissey decision. To provide a basis for understanding the development

of Oregon's guidelines for revocation and the imposition of sanction, a brief review of parole decision-making follows.

STRUCTURED PAROLE DISCRETION

The Oregon State Board of Parole now uses a matrix system similar to the U.S. Parole Commission to establish prison terms (setting parole release dates). The matrix works like a mileage chart from the maps service stations used to give away. Instead of looking for two cities and the intersection that shows miles to travel, the matrix shows offense severity down the left-hand margin and criminal history across the top. By finding the intersection between criminal history and crime severity, a range of months (E.G. 36-48) appears. The real time, for example 39 months, is selected from the range. The Board can vary above or below the range upon explicit written findings of aggravation or mitigation.

The Board, within six months of a prisoner's admission to the institution, establishes a prison term (presumptive release date). If the prisoner does not engage in any serious institutional misconduct and is not suffering from severe emotional disturbance, he is released to parole at the time established by the Board. An administrative appeal procedure exists, and of course, the prisoner may seek an appeal of a final parole decision through the Courts.

The Oregon Parole Board initiated its guideline matrix in 1976, and the Oregon Legislature made guideline usage a legal requirement in 1977.[8] Data on admissions to Oregon penal institutions in 1977 reveal that approximately 75 percent of prison terms established by the Board for those cases fall within the suggested matrix ranges. The early time set, and the fairly

strict adherence to the guidelines have done much to respond to current criticism of parole.[9]

Oregon Revised Statute 144.780 requires the Board to be guided by "just desert" principles. The statute requires the Board to adopt "ranges of duration of imprisonment...prior to release on parole...the range shall be designed to achieve the following objectives: 2(A) punishment, which is commensurate with the seriousness of the prisoner's criminal conduct..." Further, the statute authorizes the Board to consider deterrence and protection of the public, but only to the extent that such considerations are not inconsistent with the commensurate provision quoted above. This commitment to "just deserts" has also found expression in other policy areas, one of the most important being the assignment of penalties for parole failure. This decision deserves careful structuring and clear rules to guide decision-makers and inform parolees of the criteria used to make it. Recently, the Board has developed a matrix (see figure 1) that displays the presumed penalities for parole failure.

FIGURE 1: GUIDELINES FOR PAROLE REVOCATION

VIOLATIONS	7 - 5	4 - 2	0 - 2
Documented Technicals	Record	Reprimand	Reprimand or 0 - 4 months
Documented Major Technicals/Misdemeanor	Reprimand or 0 - 4 months	4 - 6 months	6 - 8 months
New Felony Finding	6 - 10 months	8 - 12 months	10 - 14 months
New Felony Conviction	Recalculate Matrix Range		

* Reprimand may include program change, e.g., more intensive surveillance or halfway house placement. Numbers refer to incarcerative term in months.

Through its authority to create administrative rules, which have "the force of law", the Board of Parole had moved to constrain its discretion in penalizing parole violators. In cases where probable cause to believe a new crime was committed is found at the Morrissey hearing, the applicable range is eight to twelve months. These ranges include credit for time served awaiting the outcome of the Morrissey hearing. If the parolee is returned with a new court sentence, he is given a prison term hearing as if he were a new admission.

PAROLE REVOCATION GUIDELINES

The Matrix in Figure 1 serves to structure the exercise of parole revocation power. The decision to revoke parole and, therefore, to impose an incarcerative penalty is dependent upon both the seriousness of the parole violation and the parolee's history under supervision. Each of these concerns has been scaled.

Violation severity is categorized into four ranks. The lowest severity is a minor violation of technical conditions. These conditions relate to behaviors which are not themselves criminal; for example, a prohibition against the use of intoxicants, or a directive to secure employment. Free citizens would not be liable to incarceration for either drinking or unemployment. As the matrix clearly shows, it is generally not the Oregon Parole Board's practice to incarcerate parolees found in violation of "minor technicals".

Major technical conditions are defined as those which are: crime-related, such as the prohibition against the use of intoxicants for an alcoholic check writer, crimes in themselves, such as prohibition against the use of controlled drugs, or multiple (four or more) violations

of otherwise "minor" technical conditions. The Board is more likely to revoke parole for violations of this nature than for minor technical violations; in these cases a sanction up to 8 months is imposed.

Findings of new felony behavior are more serious than major technical violations; in these cases a sanction up to 8 months is imposed.

Findings of new felony behavior are more serious than major technical violations. These are still "technical" violations in that the parolee has not been convicted of a new offense; the evidence produced at the Morrissey hearing supports a conclusion that the parolee has committed a new felony. Violations of this sort are punished by no more than 14 months incarceration. The rules restrict the sanction under such circumstances to 12 months in normal cases. The additional two months reflect allowable variations for aggravation.

Finally, new felony convictions are the most severe violations. This is because the offense has been proved beyond a reasonable doubt. The parolee has been provided the full range of procedural protections afforded by trial. The sanction for a new felony conviction is determined by the calculation of the parolee's criminal history and offense severity according to the parole release decision matrix. In these cases, no additional penalty for parole violation is normally imposed, as the criminal history score reflects the parole failure and is sanctioned by the new prison term.

Parole performance, the parolee's history under supervision, is the second dimension of the revocation matrix. Figure 2 presents the "scoring sheet" used to determine a parolee's performance under supervision. Parole performance scores are categorized into three ranks on the matrix: highest (score 7 - 5); middle (score 4 - 3); and lowest (score 0 - 1).

FIGURE 2: PAROLE PERFORMANCE SCORING SHEET

A. Original Crime:

Category 1, 2, 3 & 4	Score 1 point
Category 5, 6 or 7	Score 0 points

_____

B. Time on Parole/Without Reprimand:

Over 18 months	Score 2 points
9 to 18 months	Score 1 point
Less than 9 months	Score 0 points

_____

C. Prior Difficulty:

Not Within 12 months	Score 2 points
Not Within 6 months	Score 1 point
Within 6 months	Score 0 points

(Score 0 points if on parole 6 months or less)

_____

D. Program Adequacy:

Strong program in place	Score 2 points
Tenable program in place or proposed	Score 1 point
Inadequate program	Score 0 points

_____

NOTE: Give credit for time served toward these guidelines whenever he or she deserves it.

TOTAL _____

The parole performance score is comprised of four components. "Original crime" the conviction of which the offender is now on parole is calculated in the scoring. Those who have been convicted of more serious crimes such as homicide, forcible rape, home burglaries, armed robbery,

and the like (category 5, 6, or 7 offenses) are held to a stricter standard of performance than those convicted of simple thefts, forgery, and other less serious crimes. (category 1 - 4 offenses)

The next two components, "Time on Parole Without Reprimand" and "Prior Difficulty" are designed to distinguish between a parolee who has committed one breach of his conditions in an otherwise good adjustment to parole, and the parolee who repeatedly violates conditions of parole or is convicted of a misdemeanor.

The final component, "Program Adequacy" requires the field officer to exercise professional judgment. The Board recognizes four components of a strong parole program. These are: adequate housing, adequate employment, a network of supporting friends and family, the availability of treatment programs such as drug or alcohol therapy, as needed. A tenable program will include at least two of these factors.

SOME CONCERNS

The use of "New Felony Findings", as a violation rank, and "Commitment Offense" as an item in the parole performance score raises concern. Such items have been criticized as unethical or suspect procedurally.

The assignment of a relatively high severity rating to a finding of new felony behavior which has not been proved in court has been characterized as unjust; it may be. In the real world, however, it is a fairly commonplace occurrence and a substantive issue which must be addressed in the revocation process.

When a parolee has been found to be in violation of his parole by virtue of committing a new felony, the Board of Parole must take action.

It would not be fair to the public to continue the parole of a person who has committed a new offense but, for some reason escaped prosecution. Making this practice explicit enhances at least the quality of notice provided to those going on parole.

The Oregon Parole Board generally does not revoke parole "in lieu of prosecution". Normal procedure is to continue parole awaiting disposition of charges and, if acquitted, the parolee is continued on parole. Occasionally a parolee, for example, is returned because he absconded and new crimes are alleged. If, after revoking parole, the prosecutor declines to try the case, that decision is out of the hands of the Parole Board. In such cases, it should be noted that the sanction imposed for "new felony finding" is less than the sanction for a new conviction. While the Board is aware of, and concerned about the possibility of unjustly sanctioning a parolee, the reality of the situation is that a Morrissey hearing may be more procedurally fair, and just, than a Court conviction. Parolees in Oregon can be represented at revocation hearings by counsel, can present evidence, face their accusers, have written notice of the "charge" and of the decision and its reasons, and can appeal the decision to the Courts. Most of these protections are minimized in the "conviction-by-guilty-plea" process which is characterstic of criminal courts today.

A concern for the seriousness of the commitment offense is also a "loaded" issue. If the assumption is that the parolee has already "paid" for that crime before being granted parole, it seems unfair to consider it in deciding upon the question of revocation. Pragmatically, the Board must be concerned with the commitment offense, for few things

are as damaging to a Board's public credibility than headlines like, "Paroled Prisoner Kills Again".

Beyond a pragmatic interest, however, a deserts argument can be made for concern with commitment offense. That is, those who commit more serious offenses deserve to do "harder" parole time. They deserve to be more strictly controlled and supervised than those who have committed crimes of lower severity.

Perhaps these arguments are simply rationalizations for unjust policies. We do not believe so. However, by making these policies public, the door is open to scholarly challenge and appellate court review. Had the policies and practices not been explicitly stated, these questions might never be resolved.

A STRUCTURE FOR CONTROL

Probation and Parole Officers in Oregon are employees of the Corrections Division or of the counties under Oregon's Community Corrections Act.[10] There is no direct line-staff authority of the Parole Board over the parole officers. Parolee's, however, are under the jurisdiction of the Board of Parole, and it is the Board which determines the length and conditions of parole supervision. At least in a pragmatic sense then, Parole Board policy guides the supervision efforts of parole officers.

The pattern of revocation decisions can, over time, define those circumstances under which the Board will revoke parole. A similar situation exists between law enforcement officers and the prosecutor's office. If the prosecutor fails to take any cases of a particular type, say marijuana possession, to trial, the number of arrests for that offense will decline

over time. Similarly, if the Board fails to revoke parole for violation of a single technical condition, the number of revocation recommendations based on violation of one technical condition should decline.

The difficulty, inherent in both these situations, is that the policy is implicit. As such, it is unreviewable and possibly, unknown to the policy makers. Further, it is subject to change without notice or awareness. Finally, and perhaps more troublesome, such an operational reality can have negative consequences in that dispositions of parole violations or criminal offenses which should be matters for the Board of Parole or prosecutors to decide become the realm of individual parole or police officer discretion. Board decisions can be perceived as a lack of action. Resentment of the law enforcement or parole officers towards the Board as a policy-making body can grow.

By making its judgments of severity explicit and thereby opening its policies to public scrutiny, the Parole Board can reduce this feeling of resentment. Explicit policies and non-incarcerative sanctions serve to inform the parole officer that the board is not unconcerned with "minor technical" infractions. In order to guide field officers in deciding when to detain and what to report, another brief chart has been developed. (see figure 3)

FIGURE 3: FIELD OFFICER DETENTION AND REPORTING GUIDANCE

DETENTION:

(1) If alleged new crime is 5, 6, or 7: Detain and submit revocation report.

(2) Otherwise: Detain if Board policy calls for incarceration or parolee is absconder, likely to abscond or commit new crime.

REPORTING:

(1) Submit violation report any time a parolee has been detained or if Board policy requires incarcerative sanction.

(2) Submit special report (report to Parole Board) with recommendation:

A. For any documented technical violation where reprimand or additional condition(s) is requested. Request reprimand even if misconduct has been sanctioned by jurisdiction other than Parole Board.

B. One month prior to tentative discharge date, to recommend early discharge or extension of tentative discharge date.

C. At discretion of supervising officer.

(3) - More intensive supervision, surveillance or misconduct not subject to Board Reprimand should be recorded in parolee's file and/or noted in special report.

CONCLUSION

The development of guidelines for the parole suspension or revocation decision is innovative. Building on the basic premise underlying the matrix used by the Oregon Parole Board, it was not very difficult to devise a model. That premise which grew out of the writing of the Federal Parole Guidelines project, is that parole boards operate within an existing, albeit unarticulated policy. If that existing practice can be described, it is possible to structure discretion by making the underlying policy explicit.[11] In addition to dealing with retaking issues, i.e., the nature of the violations, procedures for revocation and establishing penalties, the process of articulating the Oregon Parole Board's policy regarding parole suspension and revocation has at least five significant implications.

First, as elaborated earlier, the existence of an articulated policy can serve as a guide to supervising parole officers in deciding when and how to report parole violations. It makes the Board's actions more understandable and should reduce friction between field officers and the Board of Parole. Further, by guiding parole officers in their assess-

ment of cases, it will help to structure the important, but relatively unknown process of the exercise of supervision discretion.

Second, the articulation of policy in the revocation process demonstrates that it is not an area too complex to be subjected to the structure of administrative rules. Rather, it points to the possibility that rules and guidelines can be developed to structure the exercise of almost all parole discretion. It is important to recall, though, that this structure does not eliminate discretion; for it is still possible to vary from the suggested decision if justice, conscience, or common sense indicates the suggested decision is inappropriate.

Third, it seems axiomatic that if the release term-setting and revocation practices of the Oregon Board of Parole can be rationalized and governed by written policy, those same practices of other parole authorities can also be controlled. The specific factors and even the general models employed in Oregon might be inappropriate in some other jurisdictions, but the underlying goal of structuring parole discretion could be attained anywhere.

Fourth, the process of studying the revocation decision-making practices of the Parole Board has been a stimulant. It has led to a questioning of the procedure for, and the rationale behind the imposition of parole conditions. Of course, parole conditions are a very complex issue; they involve the policy of the Board, the requirements of statute and the policy and practices of field officers. However, it is, despite complexity, possible to rationalize parole conditions.

Fifth, by making its practices explicit, the Board has made the underlying assumptions upon which retaking decisions are based more accessable to criticism. For example, should the commitment offense (category 5,