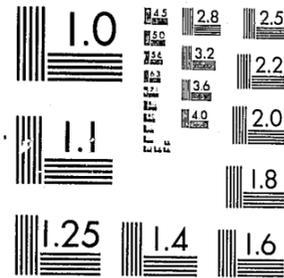


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~~Criminal Sexual Conduct in Michigan: The Law Reform Solution~~

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As a strategy for social change, the effectiveness of law reform has not been proven. The gains expected from legal revisions are not often measured. Although little is known about the nature of changes that can be expected from law reform or the factors which influence the potential for law to alter behavior, legal reform is increasingly used as a means for pursuing public policy goals. The purpose of this study is to examine the impact of Michigan's Criminal Sexual Conduct (CSC) statute, a legal reform addressing the problem of sexual assault. It is the intent of the study to determine the law's effectiveness and to begin to identify factors which enhanced or inhibited its implementation.

Michigan's Criminal Sexual Conduct law took effect in April 1975 and was motivated by a growing concern with substantial increases in reported rapes that seldom resulted in successful prosecution. At the time of the law reform, as at the present, forcible rape was the most rapidly increasing crime of violence in the United States. While other violent crimes were decreasing between 1969 and 1975, forcible rape increased in Michigan by 56%. In the United States between 1967 and 1977, reports of forcible rape more than doubled from 27,620 to 63,020.

The injustices surrounding the processing of rape cases by law enforcement and criminal justice systems are well known. Victims are often discouraged from reporting and prosecuting cases because of humiliating and degrading treatment by hospital staff, police officers, prosecutors, defense attorneys and judges. Many victims suffer great physical and psychological trauma from the rape, and many can expect to be retraumatized by the criminal justice system. Often they must prove to police or a court that they did

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not consent by demonstrating resistance "to the utmost". Or they may have to describe their entire sexual history, including whether they have ever engaged in nontraditional sexual activity.

To address the problem, crisis centers have been established to counsel victims and educate the public. Rape evidence kits have been distributed to law enforcement agencies to insure that evidence in sexual assault cases is secured properly. Prosecutors have streamlined case processing by creating special units. Demonstrations, educational campaigns, speak-outs and court cases have brought the risks and realities of rape into the public domain. But legislative reform has emerged as the social change strategy of choice. From the earliest articulation of the problem, it was argued that antiquated statutes provide little protection for the victim and hinder effective prosecution. Michigan's Criminal Sexual Conduct statute held the promise of change that would be both instrumental and symbolic in impact: properly implemented it could bring about improvements in the criminal justice system, the conviction rate and the treatment of victims, and at the same time could confront and change cultural norms.

Michigan's Criminal Sexual Conduct Law

The law reform in Michigan consists of the following innovations:

- 1) restriction on the use of sexual history evidence; 2) a degree structure;
- 3) an elimination of the resistance and consent standards; and 4) an extension of protection to previously unprotected groups.

1) Perhaps the most important innovation of this law was the prohibition on the use of evidence related to the victim's sexual history. Under the old law, the victim's past sexual conduct was considered relevant to two issues, consent and credibility. Based on the widely criticized premise that previous sexual activity implies consent, the defense could cross-examine the victim about her sexual history and provide witnesses to support the probability that she consented. Similarly evidence of past sexual conduct could be introduced to impeach the victim's credibility. In all other crimes the veracity of the victim is the only proper subject of inquiry for impeachment of character. The new statute prohibits evidence of prior sexual conduct with persons other than the accused on the basis of its irrelevance and its highly prejudicial and inflammatory nature.

The introduction of such evidence is considered a principal factor inhibiting the willingness of victims to report and prosecute their assailants. The expected effect of this provision was 1) to increase victim willingness to make and pursue complaints and generally to improve her or his experience in the criminal justice system, and 2) to increase prosecutors' chances for conviction.

2) Under Michigan's old law, a defendant could be convicted of rape only if the prosecution proved the use of force by the assailant and the unwillingness of the victim. Michigan courts interpreted this requirements to mean the victim had to resist "to the utmost" from the "inception to the close" of the attack. This demonstration of resistance was established, of course, to provide an objective test of the victim's unwillingness or lack of consent. This provision has been criticized on several grounds. First, rape has been the only violent crime requiring proof of any resistance by the victim. Second, resistance is inconsistent with the advice of many police, who suggest apparent compliance or efforts to distract the assailant may be more effective strategies for avoiding the attack or reducing personal injury. Finally, since the use of force implies nonconsent, it should be presumed in forcible sexual assault.

Under the new law, resistance by the victim is no longer an element of the prosecutor's proofs. Instead, the new law regards evidence of coercion used by the actor, not the victim's willingness, as tantamount to non-consent. Thus, consent still may be raised as a defense. This modification makes the prosecution of rape cases comparable to other crimes and does not require victims to risk death in order to have a case against their assailant. This essential shift in the burden of proof was also expected to improve chances of conviction.

3) The degree structure in Michigan's law is an explicit description of criminally assaultive sexual acts articulated in four degrees assessed by the seriousness of the offense, the amount of coercion used, the infliction of personal injuries and the age and incapacitation of the victim. There are several advantages to the degree structure. It defines and codifies a range of assaultive acts and provides comprehensive definitions of assaultive

behaviors which eliminate the overlap and omission problematic under multiple statutes. It removes the disparity between acts of penetration and molestation and describes these acts as a sequence of violent, coercive behaviors.

4) The codification of offenses and clarification of the language are crucial because they reduce the amount of discretion which law enforcement officials exercise. Under the new law police may investigate cases they would not have taken previously, those "marginal" cases in which the victim was not injured, did not strenuously resist, knew the offender, or was a prostitute. Prosecutors have more guidance with respect to the appropriate charge and can advocate more charges in each case. Subsequent to the law reform, training workshops were held at which police investigation techniques and charging procedures were revised. As a consequence of the degree structure, it was expected that a great number and variety of sexual assault cases would be pursued by the criminal justice system with a concomitant increase in warrants for arrest.

5) A major innovation of this law was the extension of protection to two victim groups who were effectively denied it previously. First, since the law is gender neutral, males assaulted in some manner other than sodomy, which is covered under a separate statute, can prosecute under the CSC law. Legally separated spouses can now also prosecute assaults by their former mates. By explicitly extending coverage to these groups, the law was expected to draw more and a larger variety of cases into the criminal justice system.

Research Design

While the potential effects -- both direct and indirect -- of a comprehensive law such as this one are numerous and varied, most observers agreed that the law would at least contribute to (1) an increase in reports, arrests and convictions, and (2) a reduction of the trauma victims experience in the criminal justice system. The study was designed to examine these specific effects of the law.

We used objective publicly available, archival data to document changes, and then used interview data to ascertain that the law had, in practice, been implemented, and to give breadth to our understanding of the nature of changes that occurred. In particular, we examined crime statistics for the period

forty-five months before and thirty-nine months after the law reform to detect any changes concurrent with the law's passage. We interviewed individuals who had had experience handling sexual assault crimes both before and after the reform to determine their perception of changes (a) in prosecutors' ability to achieve convictions, (b) in the victims' experience, and (c) in the kinds of cases which now come to the attention of the court. We further used interview data to explore whether these perceived changes were actually attributable to the law reform.

The primary research staff conducted interviews with 170 criminal justice personnel (police, prosecutors, defense attorneys and judges) and rape crisis center staff from six counties in Michigan. The counties were selected for their heterogeneity. While all six were among the thirteen counties in the state with the highest crime rate, they included a small rural county (the only county without a sexual assault crisis center) and one with a large university campus. This sampling strategy allowed us to determine whether the law has comparable effects in diverse types of jurisdictions.

The implementation and effectiveness of the Criminal Sexual Conduct were examined in light of its intent. While no single legal reform can be expected to accomplish sweeping social change, Michigan's statute has at least met the expectations of those who drafted it and lobbied for its passage. Trends in the report, arrest, and conviction rates for forcible rape¹ in Michigan before and after the law reform provide the primary evidence of the law's impact.

Reports. Figure 1 shows the monthly pattern of reports and arrests for forcible rape from 1972 through 1978, three years before and three years after the law took effect. While the reports of rape are clearly increasing over time, inspection of Figure 1 does not indicate significant discontinuity in reports of forcible rape related to the legal revision. The interrupted time series analysis of reports of forcible rape yielded no significant change in the trend after the Criminal Sexual Conduct law reform ($t = .70, n.s.$)²

Insert Figure 1 about here

Consistent with these analyses, our respondents did not attribute reporting increases to the statute. Instead, when asked to identify what they considered to be the main reasons for the increase in reports, they emphasized social change and gave less weight to law reform or absolute increases in violent crimes. Most (about 75%) cited "a change in public attitudes toward rape" as one of the most important influences on reporting trends.

Arrests. Given the consistent increase in forcible rape reports over time, arrests could be expected to increase at a commensurate rate. And indeed, the monthly pattern shown in Figure 2 indicates that arrests increased, but at a sharper rate than reports. The time series analysis supports the visual evidence showing a positive trend in arrests associated with the law reform ($t = 1.43, P < .10$).

Insert Figure 2 about here

Interviews with police and prosecutors supported the data available from the Michigan State Police. They described more arrests resulting from sexual assault reports than from cases involving equally serious crimes. But, paradoxically, they had more concerns about victim credibility in sexual assault cases and felt reports were more likely to be fabricated. The apparent conflict these data reveal may be resolved by more closely examining the investigative practices criminal justice system officials described. Their mistrust of victims seems to lead to more thorough investigations, resulting in stronger warrant requests, fewer denials and thus to higher arrest rates in CSC cases. And indeed, police and prosecutors estimated that polygraphs are used more frequently in sexual assault crimes than in crimes of equal seriousness, a practice which may strengthen cases but weaken a victim's determination to prosecute.

Convictions. Analysis of the monthly pattern of convictions as charged for forcible rape from 1972 to 1978 indicates that an increase in the conviction rate is related to the new law. Visual inspection reveals both a steeper slope and increased variability of the series after the law reform. Convictions for lesser offenses -- when the original charge (e.g., CSC 1) is reduced to a lower final charge (e.g., CSC 3) -- show a decline. One would expect that as more convictions are achieved for the original charge there would be a reduction in convictions for lesser offenses. Inspection of the data (displayed in Figures 3 and 4) indicates this is, in fact, the

case. After the law reform there is a significant increase in convictions as charged ($t = 1.51, p < .10$) and a significant reduction in convictions for lesser offenses ($t = 1.404, p < .10$). Overall, the crime data suggest the conviction rate for original charges of rape in Michigan increased after the law reform.³

Insert Figures 3 and 4 about here

When the law was implemented, there was some speculation that the degree structure was too broad in its specification of criminal behaviors. Reformers and activists were concerned that the degrees of sexual assault that did not include violence and were too radical a departure from conventional definitions of the crime, and would not be taken seriously by members of the criminal justice system. Some conjectured that convictions would be achieved more easily for CSC 1 and CSC 2, cases which involved the use of force or other aggravating circumstances, and conform more closely to crimes formerly known as "forcible rape". CSC 3 and CSC 4, which represent "expanded" definitions of sexual assault, might be expected to end more readily in dismissal. To examine this possibility, we obtained data on 1139 cases handled by the Detroit Police Department's Sex Crime Unit for the period January 1975 to May 1979. Contrary to the impressions of some respondents, the data indicate that approximately 70% of all cases for which a warrant was issued, regardless of the initial charge resulted in a conviction plea or verdict. Thus, the probability of conviction does not seem

to be influenced by the degree of sexual assault originally charged. It should be noted, however, that many more CSC 1 crimes were charged than CSC 4 crimes.

To check the validity of the evidence provided by the time series analyses, we asked our respondents to comment on the relative ease with which convictions have been achieved since the law reform. Consistent with evidence of an increasing conviction rate provided by the crime statistics, 82% of our respondents suggested that prosecutors' chances of winning had increased. Respondents cited specific characteristics of the law itself as responsible for this change: 50% credited the prohibitions on sexual history evidence; 33% the degree structure; 31% the increased clarity and specificity of the law; and 22% attributed the change to the fact that prosecutors no longer need to prove resistance and non-consent. The figures indicating improvement in the probability of conviction are also supported by prosecutors' reports that they are now able to win cases in which complainants have prejudicial sexual histories (for example, when the victim is a prostitute). Prosecutors also reported that they can now win cases in which the victim may not have used "good" judgment, for instance, when the victim had been hitchhiking.

Victim experience. We were also interested in our respondents' perceptions of two other potential effects of the law reform. First was the probability and expectation that a reform law would influence and improve the victim's experience in the criminal justice system.

Our respondents overwhelmingly agreed (82%) that, due primarily to the prohibitions on sexual history evidence, victims' experience with criminal justice processing is less traumatic than it was prior to the law reform. A shift in public attitudes toward the crime of sexual assault as well as crisis center support for victims were seen as contributing -- along with the law reform -- to the improved experience of the victim.

It should be noted that, for judges and prosecutors, the improvement in victims' experience was not perceived to occur at the risk of defendants' rights. Further, the constitutionality of Michigan's law has been challenged in the courts several times, and so far, no important provision of the law has been deemed unconstitutional.

Expanded coverage. The second expectation was that the law, both because of its language and its specific provisions, would bring more and a wider variety of cases into the system. While the reformers were generally concerned with improving the victim's experience in the criminal justice system, they also used the law as a means to extend legal protection to groups not covered under the old law. Specifically they designed the law to protect males, incest victims, victims who were raped by spouses from whom they were legally separated, victims involved in "marginal" cases (those lacking prompt report, corroborating evidence) and victims assaulted by anyone with whom they had a prior relationship, whether casual or intimate.

According to respondents, the law is having the desired effect: they not only perceived an overall increase in reports of sexual assault, but noted an increase in particular types of cases as well. Twenty-two percent

of the respondents described a general increase in sexual assault cases, which could be independent of the law. But 28% describe an increase in incest cases and approximately 25% cite an increase in statutory rape.⁴ Twenty-one percent of the respondents mention handling cases involving separated spouses, 19% report cases involving male victims. Their reports of the types of cases that are increasingly handled by the criminal justice system provide valuable evidence of the law's capacity to bring a wider range of cases to the attention of the system.

Summary of Findings

Most respondents acknowledge that social norms surrounding sexual assault were changing even before the law's passage; the law seemed to ratify a value shift that had already occurred. As evidence of changing community attitudes, respondents referenced increased public consternation about the crime and more willingness among women to report assaults and pursue convictions. The effectiveness of Michigan's Criminal Sexual Conduct law above and beyond these changes can be documented directly in terms of the tangible goals that have been achieved.

To summarize briefly, arrests and convictions for Criminal Sexual Conduct in the first degree have increased substantially as a function of the reform law. The time series analysis reveals that these increases are not a consequence of an upsurge in reports of the crime. The law's passage may not have affected public perceptions of the criminal justice system's handling of rape cases and empathy for victims, thereby creating

more willingness to report. Rather, the law appeared to have an impact within that system such that reports and arrest warrants are more often successfully pursued and prosecuted. Consistent with this finding, respondents reported that prosecutors now have a better chance to win convictions in a wider variety of cases, suggesting that the law is protecting more groups of people.

Respondents cited specific provisions of the law as responsible for these changes. They believed that improvements in prosecutors' chances of achieving convictions derive from shifts in the burden of proof resulting from prohibitions on the use of sexual history evidence and the elimination of the need to prove resistance and non-consent. Respondents also credited the way in which the law structures the offense into degrees with punishment commensurate with the seriousness of the crime. (This feature of the law allows prosecutors to plea-bargain down to a sex offense reflective of the nature of the crime.) Respondents believed that the sex neutral language of the law, the provisions related to juvenile victims and its capacity to protect those with prejudicial sexual histories also increase the likelihood of successful prosecution. Respondents felt that the victim's experience in the criminal justice system, while difficult, is less onerous than it once was, primarily due to the law's limitation on sexual history evidence. These observations were consistent across all six counties in the sample, suggesting that the law's influence and effects are independent of demography or differing law enforcement, prosecutorial or judicial policies.

Thus, based on analysis of archival data and from the perspective of those charged with implementing the law reform, there is considerable evidence that the law has achieved its goals: exerting control on decision-makers in the criminal justice system; bringing the legal standards for cases more in line with those used for other violent crimes; and reducing the trauma the victims have traditionally suffered while prosecuting their assailants.

Determinants of the Law's Effectiveness

Crime statistics and interview data allowed us to assess the law's impact, while anecdotal, archival and other qualitative information enabled us to ascertain at least four factors which contributed to its implementation and thus its effectiveness.

First, those responsible for applying the law were, in general, very familiar with it. The law's passage in the legislature generated controversy and publicity. The complexity of the statute, originally thought to be a liability, forced criminal justice system officials to focus their attention on it. The sweeping revisions in the law created a need for training workshops for most officials, and our interviews with them revealed substantial knowledge of the law and its provisions. Many law reforms have failed merely because they were not communicated to those responsible for their implementation. The Michigan evidence clearly underscores the value of effective communication to those charged with implementing legal change.

Second, the law reduced the discretion exercised by members of the criminal justice system, eliminating many opportunities for subjective

decision-making especially prone to bias in sexual assault cases. The comprehensive degree structure and clarity of the language, particularly regarding sexual history evidence, contributed most to this reduction of personal discretion which respondents thought was especially important for judges.

Third, the law's implementation was enhanced to the extent that those responsible for it perceived it as a source of immediate and obvious gain. Simply put, most of those who worked with it found that the CSC statute made their jobs easier. The new law lends itself to political gains which can be achieved either by demonstrating a sensitivity to the rape issue or a tough law and order stance. And a number of respondents were relieved when the CSC law took effect, feeling it more accurately reflected their own values. Those charged with implementing a legal revision must feel that the benefits outweigh the costs. Given a new and vocal anti-rape constituency, Michigan CSC statute offered personal, political and professional gains with few costs.

Finally, monitoring of, and political pressure on, the criminal justice system furthered the law's implementation by making failure to do so highly visible. Crisis centers and activist groups who engage in court watching and advocacy, as well as sustained interest by the media, created additional incentives for criminal justice system officials to follow the law.

The Criminal Sexual Conduct Statute has substantially addressed the goals of the law reformers. But like all legal reforms, the implementation of this law is imperfect and its impact limited. The law

stands at the frontier of social change. A risk exists in the passage of a law as timely and effective as Michigan's Criminal Sexual Conduct Statute. There is a risk that the passage of the law will be viewed as a solution, will dull social sensibilities to unresolved problems, and will slow the impetus for further reform.

Notes

1. Data were collected for forcible rape prior to the law reform and Criminal Sexual Conduct in the first degree (the comparable charge) after the law reform from the Michigan State Police.
2. The procedure used to perform the analysis are based on the work of Box and Tiao as interpreted by Dr. Harry Roberis of the University of Chicago, Graduate School of Business. It should be emphasized that the analysis is designed to detect a shift in the level of the series before and after the law reform, i.e., to answer the question, "Did the sexual assault law have a measurable impact on forcible rape crime statistics?"
3. When the Michigan State Police data are aggregated for each year, arrest and conviction rates are as follows:

Arrest and Conviction Rates for
Criminal Sexual Conduct 1972-1978

	<u>1972</u>	<u>1973</u>	<u>1974</u>	<u>1975</u>	<u>1976</u>	<u>1977</u>	<u>1978</u>
Arrests/reports	.47	.43	.40	.43	.51	.48	.41
Convictions as charged/reports	.04	.04	.05	.05	.08	.12	.07
Convictions for lesser charged reports	.02	.01	.02	.01	.01	.01	.01

Comparable statistics based on case records obtained from criminal justice systems in Seattle and Kansas City (Chappell, et al., Forcible Rape, Law Enforcement Assistance Administration, March 1978) are arrests/reports = 7%, convictions as charged/reports = 2% and convictions for lesser charge/reports = 2%. These rates are lower than the pre-reform rates in Michigan.

4. The law specifies two situations in which the age of the victim can serve as an aggravating factor: (1) when the victim is under 13 years of age; and (2) when the actor either lives with, is related to, or is in a position of authority over a person between 13 and 16 years of age. Clearly, the statute has contributed to the increased frequency with which sexual assault of children by relatives or by strangers are receiving the attention of the courts.

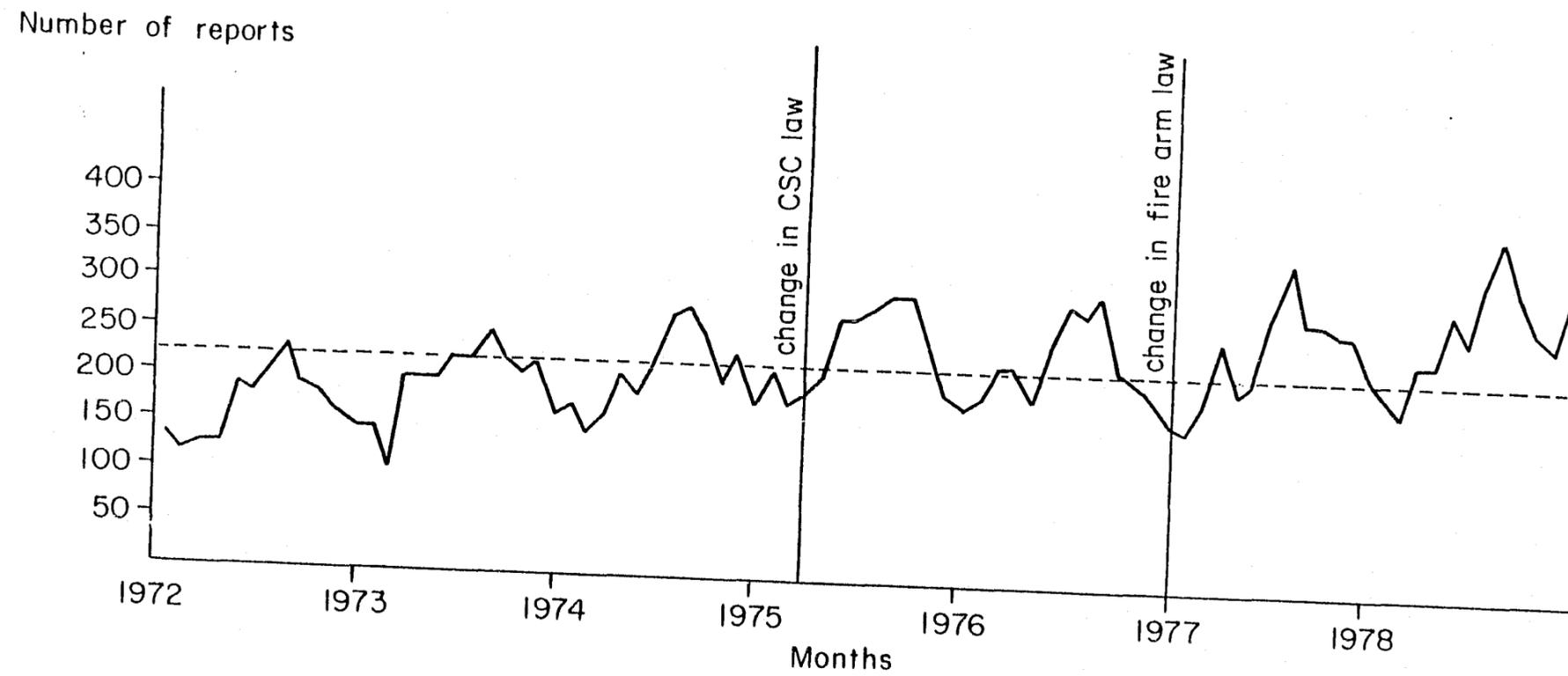


Figure 1. Total monthly criminal sexual conduct reports in Michigan

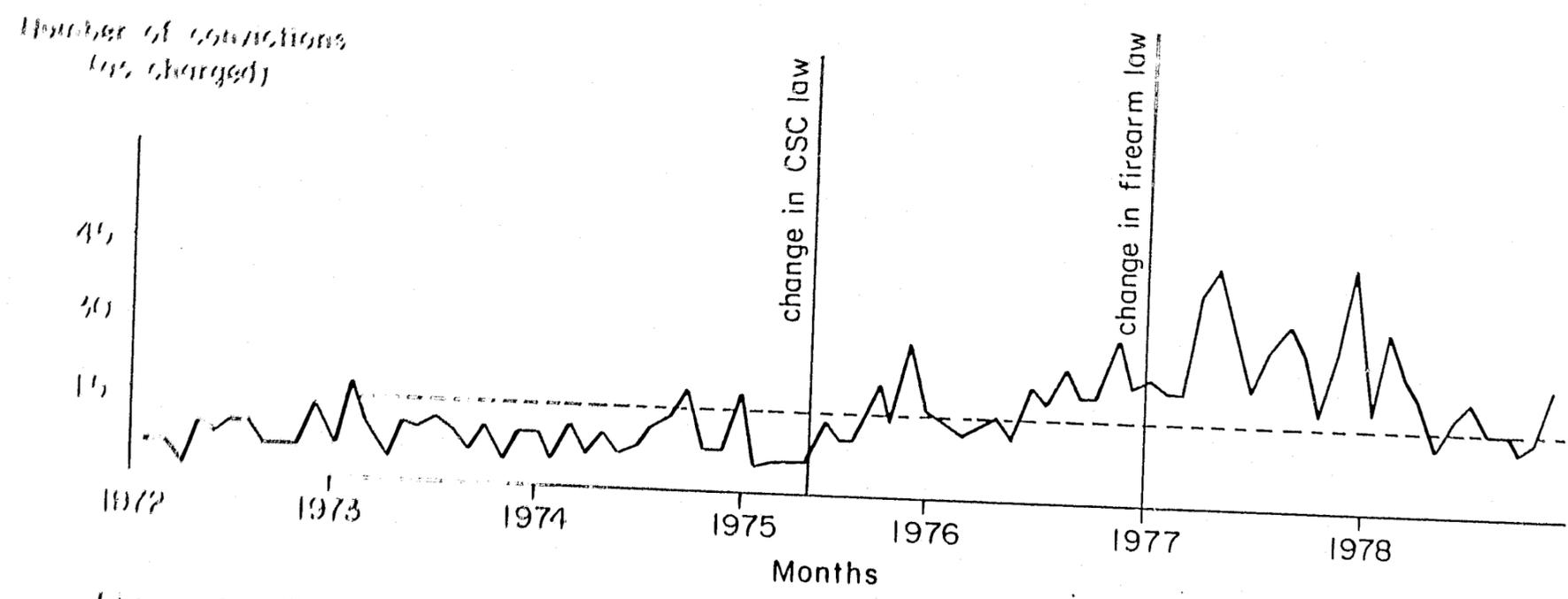


Figure 3. Total monthly criminal sexual conduct convictions (as charged) in Michigan

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